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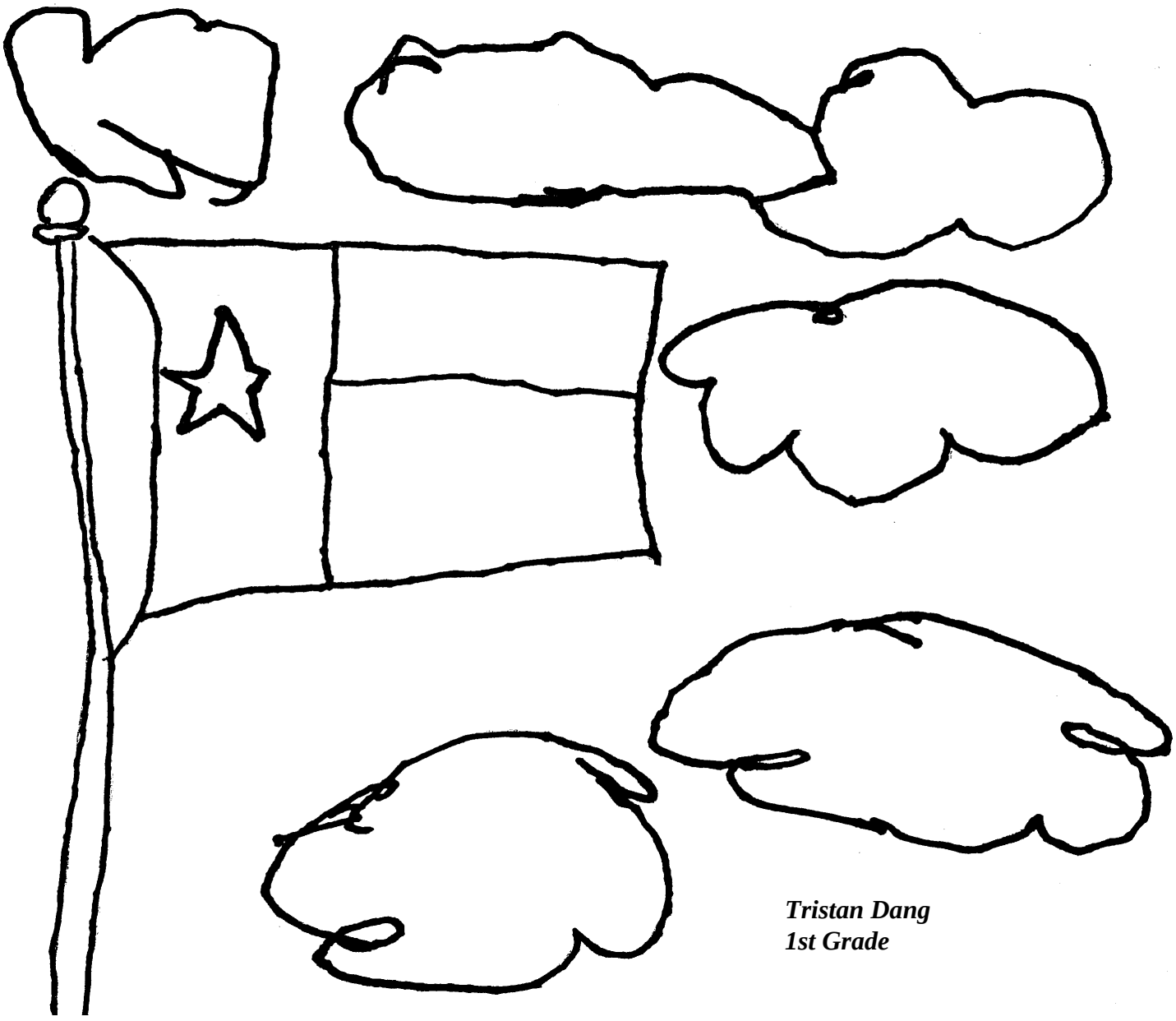

Tristan Dang
1st Grade

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. 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.

The artwork featured on the front cover is chosen at random. Inside each issue, 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*.

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GOVERNOR

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REGULATION OF LOBBYISTS

TEXAS BUILDING AND PROCUREMENT COMMISSION

EXECUTIVE ADMINISTRATION DIVISION

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IN ADDITION

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

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 August 23, 2002

Appointed to the Texas Commission on Law Enforcement Officer Standards and Education for terms to expire on August 30, 2007, Steven M. Byrd of Dallas (replacing Onzelo Markum of League City whose term expired), Daniel J. Smith of Belton (Sheriff Smith is being reappointed), Joe A. Stivers of Huntsville (Mr. Stivers is being reappointed).

Appointed to the Texas Online Authority for a term to expire on February 1, 2005, Charles Bacarisse of Houston (replacing Judge Lee Jackson of Dallas who resigned).

Appointed to the Texas State Technical College System Board of Regents for a term to expire on August 31, 2003, Barbara N. Rusling of China Springs (replacing Amy Tschirhart of New Braunfels who resigned).

Rick Perry, Governor

TRD-200205635

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PROPOSED RULES

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

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

TITLE 1. ADMINISTRATION

PART 2. TEXAS ETHICS COMMISSION

CHAPTER 34. REGULATION OF LOBBYISTS

SUBCHAPTER A. GENERAL PROVISIONS

1 TAC §34.23

The Texas Ethics Commission proposes new 1 T.A.C. Chapter 34, Subchapter A, §34.23, concerning the conflict of interest statement filed with the Ethics Commission by lobbyists. The proposed rule implements the conflict of interest law that requires a lobbyist to file a statement with the Ethics Commission indicating that there is an actual or potential conflict and that the lobbyist has notified each affected or potentially affected client as required by law. The proposed rule would require lobbyists to provide the names and addresses of notified clients on the statement filed with the Ethics Commission.

Karen Lundquist, General Counsel, has determined that for each year of the first five years the rule is in effect there will be no fiscal implication for the state and no fiscal implication for local government as a result of enforcing or administering the new rule as proposed.

Ms. Lundquist also has determined that for each year of the first five years the rule is in effect, the anticipated public benefit will be clear notice to lobbyists concerning the information required to be filed with the Texas Ethics Commission on the conflict of interest statement. It will also aid the Ethics Commission in its enforcement of the lobbyist conflict of interest law by providing a means of confirming the identity of a lobbyist's clients to whom a conflict of interest disclosure has been given in order to determine, in an enforcement proceeding, whether the lobbyist has complied with Government Code, §305.028.

Ms. Lundquist has also determined there will be no adverse economic effect on small businesses or micro-businesses.

Ms. Lundquist has further determined that the economic costs to persons required to comply with the rule is negligible and includes the costs associated with preparing and mailing the form.

The Texas Ethics Commission invites comments on the proposed rule from any member of the public. A written statement should be mailed or delivered to Karen Lundquist, Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, or by facsimile (FAX) to (512) 463-5777. A person who wants to offer spoken comments to the Ethics Commission concerning the proposed rule may do so at any Ethics Commission meeting during the agenda item "Communication to the Commission from the Public" and during the public comment period at a Commission meeting when the Commission considers final adoption of the proposed rule. Information concerning the date, time, and location of Ethics Commission meetings is available by telephoning (512) 463-5800 or, toll free, (800) 325-8506. Information concerning Ethics Commission meetings is also available at www.ethics.state.tx.us on the Internet.

The new rule is proposed under Government Code, Chapter 571, §571.062, which provides authorization for the Texas Ethics Commission to adopt rules concerning the laws administered and enforced by the Commission.

The proposed new rule, §34.23, affects Chapter 305, Registration of Lobbyists, Subchapter B, Prohibited Activities, §305.028, Prohibited Conflicts of Interest, Government Code.

§34.23. Conflict of Interest Statement Filed with Commission.

The statement required to be filed with the commission by a registrant under Section 305.028(c)(3), Government Code, must state that the registrant has become aware of an actual or potential conflict described by Section 305.028, Government Code, and that the registrant has notified each affected or potentially affected client as required by Section 305.028(c)(2), Government Code. The statement must include the name and address of each affected or potentially affected client to whom the notice has been given.

This 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 19, 2002.

TRD-200205438
Tom Harrison
Executive Director
Texas Ethics Commission
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 463-5777

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PART 5. TEXAS BUILDING AND PROCUREMENT COMMISSION

CHAPTER 111. EXECUTIVE ADMINISTRATION DIVISION

SUBCHAPTER B. HISTORICALLY UNDERUTILIZED BUSINESS PROGRAM

1 TAC §§111.11, 111.12, 111.17, 111.19, 111.20, 111.23, 111.25

The Texas Building and Procurement Commission proposes amendments to Title 1, T.A.C., Chapter 111, Subchapter B, §§111.11 (relating to Policy and Purpose), 111.12 (relating

to Definitions), 111.17 (relating to the Certification Process), 111.19 (relating to Recertification), 111.20 (relating to Revocation), 111.23 (relating to Graduation Procedures), and 111.25 (relating to the Memorandum of Understanding between the Texas Department of Economic Development and the General Services Commission).

Amendments are proposed to further ensure compliance in the certification of historically underutilized businesses, as well as increase the certification period for historically underutilized businesses. Amended language updates the current definition of "Subcontractor" to comply with Texas Government Code 2251.001 and updates obsolete language and references to the former General Services Commission. In addition, amended language provides for the revocation of a historically underutilized business' certification if that business is barred from participating in state contracts.

Cindy Reed, Deputy Executive Director, determines that for the first five-year period the rules are in effect, there will be no fiscal implication for the state or local governments as a result of enforcing or administering these proposed rules.

Cindy Reed further determines that for each year of the first five-year period the amendments are in effect, the public benefit anticipated as a result of enforcing these rules will be compliance with Texas Government Code, Chapter 2161, relating to the Historically Underutilized Business Program. There will be no effect on large, small, or micro- businesses. There is no anticipated economic cost to persons who are required to comply with these rules and there is no impact on local employment.

Comments on the proposals may be submitted to Juliet U. King, Legal Counsel, Texas Building and Procurement Commission, P.O. Box 13047, Austin, TX 78711-3047. Comments must be received no later than thirty days from the date of publication of the proposal in the *Texas Register*.

The amendments are proposed under the authority of the Texas Government Code, Title 10, Subtitle D, §§2152.003, 2161.002, and 2161.253, which provide the Texas Building and Procurement Commission with the authority to promulgate rules necessary to implement the sections.

The following code is affected by these rules: Government Code, Title 10, Subtitle D, Chapter 2161.

§111.11. Policy and Purpose.

It is the policy of the commission to encourage the use of historically underutilized businesses (HUBs) by state agencies and to assist agencies in the implementation of this policy through race, ethnic, and gender-neutral means. The purpose of this program is to promote full and equal business opportunities for all businesses in state contracting in accordance with the goals specified in the State of Texas Disparity Study. Sections 111.11 through 111.28 [~~111.27~~] of this title (relating to the Historically Underutilized Business Program) describe the minimum steps and requirements to be undertaken by the commission and state agencies to fulfill the state's HUB policy.

§111.12. Definitions.

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

(1) Applicant--A corporation, sole-proprietorship, partnership, joint venture, limited liability company, or supplier that applies to the commission as a [~~an~~] historically underutilized business.

(2) Application--A written request for certification as a [~~an~~] historically underutilized business in the required format submitted to the commission.

(3) Commodities--Materials, supplies, or equipment.

(4) Comptroller--Comptroller of Public Accounts.

(5) Contractor/Vendor --A supplier of commodities or services to a state agency under a purchase order contract or other contract.

(6) Directory--The Texas Certified Historically Underutilized Business Directory.

(7) Disparity Study--The State of Texas Disparity Study, performed by the National Economic Research Associates, Inc. (NERA).

(8) Economically Disadvantaged Person--An eligible HUB applicant whose business has not exceeded the graduation size standards according to the commission's graduation procedures in §111.23 of this title (relating to Graduation Procedures).

(9) Forum--A collaborative effort between agencies and potential contractors/vendors to provide information and training regarding an agency's procurement opportunities.

(10) Graduation--When a business exceeds the commission's size standard for certification.

(11) Historically Underutilized Business--A business outlined in subparagraphs (C)-(H) with its principal place of business in Texas (as defined in paragraph (19) of this section) in which the owner(s):

(A) have a proportionate interest and demonstrate active participation in the control, operation,and management of the entities' affairs; and

(B) are economically disadvantaged because of their identification as members of the following groups:

(i) Black Americans--which includes persons having origins in any of the Black racial groups of Africa;

(ii) Hispanic Americans--which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(iii) American Women--which includes all women of any ethnicity except those specified in clauses (i), (ii), (iv), and (v) of this subparagraph;

(iv) Asian Pacific Americans--which includes persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the U.S. Trust Territories of the Pacific, the Northern Marianas, and Subcontinent Asian Americans which includes persons whose origins are from India, Pakistan, Bangladesh, Sri Lanka, Bhutan or Nepal; and

(v) Native Americans--which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians; and

(C) a corporation formed for the purpose of making a profit in which at least 51% of all classes of the shares of stock or other equitable securities are owned by one or more persons described by subparagraphs (A) and (B); or

(D) a sole proprietorship created for the purpose of making a profit that is 100% owned, operated, and controlled by a person described by subparagraphs (A) and (B) of this section; or

(E) a partnership formed for the purpose of making a profit in which 51% of the assets and interest in the partnership is owned

by one or more persons who are described by subparagraphs (A) and (B) of this section; or

(F) a joint venture in which each entity in the joint venture is a [~~an~~] historically underutilized business under this subdivision; or

(G) a supplier contract between a historically underutilized business under this subdivision and a prime contractor/vendor under which the historically underutilized business is directly involved in the manufacture or distribution of the supplies or materials or otherwise warehouses and ships the supplies;

(H) a business other than described in subparagraphs (D), (F), and (G) of this section, which is formed for the purpose of making a profit and is otherwise a legally recognized business organization under the laws of the State of Texas, provided that at least 51% of the assets and 51% of any classes of stock and equitable securities are owned by one or more persons described by subparagraphs (A) and (B) of this section.

(12) Historically Underutilized Business (HUB) Coordinator-- An agency employee who holds a position equivalent to the procurement director or is the procurement director. The employee reports to the agency's executive director on HUB activities including, but [~~are~~] not limited to, the agency's good faith effort criteria, HUB reporting, contract administration, and marketing and outreach efforts for HUB participation.

(13) HUB Report--A fiscal year semi-annual and annual report of the state's total expenditures, contract awards and payments made to certified HUBs.

(14) Mentor Protege Program--A program designed by the commission to assist agencies in identifying prime contractors/vendors and HUBs for potential long-term contractual relationships.

(15) NERA--National Economic Research Associates, Inc.

(16) Non-Treasury Funds--Funds paid by a state agency that are not treasury funds.

(17) Other services--All services other than construction and professional services, including consulting services subject to Texas Government Code, Chapter 2254, Subchapter B.

(18) Person--U.S. citizen, born or naturalized.

(19) Principal place of business--A permanent business office located in Texas where the majority HUB owner(s) makes the decisions, controls the daily operations of the organization, and participates in the business. The qualifying owners must be residents of the State of Texas.

(20) Professional services--Services of accountants, architects, engineers, land surveyors, and physicians that must be purchased by state agencies under Texas Government Code, Chapter 2254, Subchapter A.

(21) Subcontractor--A person who contracts with a vendor to work or contribute toward completing work for a governmental entity as defined in Texas Government Code, § 2251.001. [~~A supplier of commodities or services to a contractor/vendor.~~]

(22) Subcontractor Funds--Payments made to certified historically underutilized businesses by a contractor/vendor or supplier under contract with the state.

(23) Size Standards--Graduation thresholds established by the HUB program consistent with the commission's rules which are extracted from the U.S. Small Business Administration's size standards, and based on the North American Industry Classification System codes. [~~gross receipts and gross number of employees according to the Standard Industrial Classification codes~~]

(24) Term Contract--A contract establishing a source or sources of supply for a specified period of time as defined in §113.2 of this title (relating to Definitions).

(25) Treasury Funds--Funds maintained in the state treasury and paid through the comptroller's office for each state agency.

(26) USAS--Uniform Statewide Accounting System for the State of Texas.

(27) Vendor Identification Number (VID)--A 13-digit identification number used in state government to identify the bidder or business for payment or award of contracts, certification as a HUB, and registration on the bidders list.

(28) HUB Subcontracting Plan-Written documentation regarding the use of HUB subcontractors, which is required by a state agency in procurements with an expected value of $100,000 or more which a potential contractor/vendor must prepare and return with their bid, proposal, offer, or other applicable expression of interest. The HUB subcontracting plan subsequently becomes a provision of the contract awarded as a result of the procurement process.

§111.17. Certification Process.

(a) A business seeking certification as a [~~an~~] historically underutilized business must submit an application to the commission in [~~on~~] a form prescribed by the commission, affirming under penalty of perjury that the business qualifies as a [~~an~~] historically underutilized business.

(b) If requested by the commission, the applicant must provide any and all materials and information necessary to demonstrate active participation in the control, operation, and management of the historically underutilized business.

(c) Texas Government Code, §2161.231, provides that a person commits a felony of the third degree if the person intentionally applies as an historically underutilized business for an award of a purchasing contract or public works contract and the person knowingly does not meet the definition of a [~~an~~] historically underutilized business.

(d) The commission shall certify the applicant as a [~~an~~] historically underutilized business or provide the applicant with written justification of its denial of certification within 90[~~60~~] days after the date the commission receives a satisfactorily completed application from the applicant.

(e) The commission reviews and evaluates applications, and may reject an application based on one or more of the following:

(1) the application is not satisfactorily completed;

(2) the applicant does not meet the requirements of the definition of historically underutilized business;

(3) the application contains false information;

(4) the applicant does not provide required information in connection with the certification review conducted by the commission; or

(5) the applicant's record of performance on [~~of~~] any prior contracts with the state.

(f) The commission[~~Commission~~] may approve the existing certification program [~~Certification Program~~] of one or more local governments or nonprofit organizations in this state that certify historically underutilized businesses, minority business enterprises,

women's business enterprises, disadvantaged business enterprises that substantially fall under the same definition, to the extent applicable for historically underutilized businesses [~~Historically Underutilized Business~~] found in §2161.001, Texas Government Code, and maintain them on the [~~Commission's~~] commission's Historically Underutilized Businesses List[~~list~~], if

(1) the local government or nonprofit organization meets or exceeds the standards established by the commission [~~Commission~~] as set out in Chapter 111, Subchapter B of this title (relating to the Historically Underutilized Business Program); and

(2) agrees to the terms and conditions as required by statute relative to the agreement between the local government and/or nonprofits for the purpose of certification of historically underutilized businesses [~~Historically Underutilized Businesses~~].

(g) The agreement in subsection (f) of this section must take effect immediately and contain conditions as follows:

(1) allow for automatic certification of businesses certified by the local government or nonprofit organization [~~(Program)~~] as prescribed by the commission;

(2) provide for the efficient updating of the commission database containing information about historically underutilized businesses and potential historically underutilized businesses as prescribed by the commission;

(3) provide for a method by which the commission may efficiently communicate with businesses certified by the local government or nonprofit organization;

(4) provide those businesses with information about the state's Historically Underutilized Business Program; and

(5) require that a local government or nonprofit organization that enters into an agreement under subsection (f) of this section, complete the certification of an applicant with written justification of its certification denial within the period established by the commission in its rules for certification.

(h) The commission will not accept the certification of a local government or nonprofit organization that charges for the certification of businesses to be listed on the Historically Underutilized Business List[~~list~~] maintained by the commission.

(i) The commission may terminate an agreement made under this section if a local government or nonprofit organization fails to meet the standards established by the commission for certifying historically underutilized businesses [~~Historically Underutilized Businesses~~]. In the event of the termination of an agreement, those HUB's that were certified as a result of the agreement will maintain their HUB status during the fiscal year in which the agreement was in effect. Those HUB's who are removed from the HUB list as a result of the termination of an agreement with a local government or nonprofit organization may apply directly to the commission for certification as a historically underutilized business [~~Historically Underutilized Business~~].

(j) The commission will send all certified HUBs an orientation packet including a certificate, description of certification value/significance, list of agency purchasers, and information regarding electronic commerce, the Texas Marketplace, and the state procurement process.

§111.19. Recertification.

(a) The certification is valid for a four-year [~~two- year~~] period beginning on the date the commission certified the applicant as a [~~an~~] historically underutilized business.

(b) Upon expiration of the four-year [~~two-year~~] period, a [~~an~~] historically underutilized business that desires recertification must:

(1) return a completed recertification form as provided by the commission; and

(2) comply with the requirements specified in §111.17 of this title (relating to the Certification Process) which apply to the recertification process.

§111.20. Revocation.

(a) The commission shall revoke the certification of a [~~an~~] historically underutilized business if the commission determines that a business does not meet the definition of historically underutilized business or that the business fails to provide requested information in connection with a certification review conducted by the commission. The commission shall provide the business with written notice of the proposed revocation. Applicants have 30 days from receipt of the written notice to provide written documentation stating the basis for disputing the grounds for revocation. The applicant shall also submit documentation to address the deficiencies identified in the notice. The commission shall evaluate the documentation to confirm the applicant's eligibility. The commission shall provide the applicant with written notification of their certification status. If an applicant's certification is revoked, the applicant may appeal to the commissioners within 14 days of receipt of written notice of the revocation. Upon receipt of the applicant's request for appeal, the commissioners will vote on the proposed revocation at the next available open meeting. The action of the commissioners is final.

(b) If a historically underutilized business is barred from participating in state contracts in accordance with Texas Government Code, section 2155.077, the commission shall revoke the certification of that business for a period commensurate with the debarment period.

§111.23. Graduation Procedures.

(a) A HUB shall be graduated from being used to fulfill HUB procurement utilization goals when it has maintained gross receipts or total employment levels for four consecutive years which exceed the U.S. Small Business Administration's size standards identified by the North American Industry Classification System Codes as stated in 13 Code of Federal Regulations 121.201 for the following categories:

(1) heavy construction other than building construction;

(2) building construction, including general contractors and operative builders;

(3) special trade construction;

(4) medical, financial and accounting services;

(5) architectural/engineering and surveying services;

(6) other services including legal services;

(7) commodities wholesalers;

(8) commodities manufacturers.

(b) Firms which have achieved the size standards identified in subsection (a) of this section will be assumed to have reached a competitive status in overcoming the effects of discrimination. The commission shall review as part of the certification, compliance or recertification process the financial revenue or relevant data of firms to determine whether the size standards identified in subsection (a) of this section have been met.

(c) The graduation of HUBs will be tracked and included in the HUB Report by the applicant's Vendor Identification Number and by Social Security Number to the extent allowed by federal law.

(d) The commission will monitor the progress of graduated HUBs and report their participation in the state's procurements to the

Legislature [~~, General Services commission,~~] and [~~other~~] state agencies.

(e) Businesses that have graduated from the HUB program in accordance with this section or have been decertified in accordance with §§111.17-111.22 of this title (relating to Executive Administration Division) may not be included in meeting agency goals.

§111.25. Memorandum of Understanding between the Texas Department of Economic Development and the Texas Building and Procurement Commission [~~General Services Commission~~].

(a) Pursuant to the Texas Government Code, §481.028 [~~(Vernon 1998)~~] the Texas Building and Procurement Commission[~~General Services Commission~~] adopts the following memorandum of understanding (MOU) with the Texas Department of Economic Development, under which they agree to cooperate in program planning and budgeting relating to procurement information, and certification and technical assistance to small and historically underutilized businesses.

(b) The Texas Building and Procurement Commission[~~General Services Commission~~] and the Texas Department of Economic Development mutually agree to the following in order to serve the citizens of Texas in an efficient and fiscally responsible way:

(1) to cooperate on regional economic planning with Texas;

(2) to cooperate in providing procurement information, certification and technical assistance to small and historically underutilized businesses;

(3) to share information of mutual interest;

(4) to develop the agreements necessary to accomplish the activities set forth in the MOU; and

(5) to cooperate to encourage economic development within Texas.

(c) The MOU becomes effective upon execution by authorized representatives of each agency [~~,~~] and shall remain in effect until terminated by either party. [~~terminate on August 31, 2001, unless extended by the mutual agreement of the parties.~~]

This 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 23, 2002.

TRD-200205581
Juliet U. King
Legal Counsel
Texas Building and Procurement Commission
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 463-3583

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TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 22. NURSERY PRODUCTS AND FLORAL ITEMS

4 TAC §22.3

The Texas Department of Agriculture (the department) proposes an amendment to §22.3 related to event permits for Class 1, 2, 3, 4 and M certificate holders. Currently, thirty event permits are available at no additional cost under a Class M registration. Once the thirty event permits have been used, registrant must apply for a new Class M registration if additional event permits are needed in a given year. In the proposed amendment, Class M registrants will have the option of purchasing event permits in blocks of ten permits at cost of $50 per block, after the allocated thirty event permits under the Class M registration are exhausted. In doing this, Class M registrants will not have to apply for a new registration once event permits under a registration are exhausted. There will be no limit on the number of permit blocks that can be purchased. The proposed amendment also makes changes for availability of event permits for Class 1, 2, 3, and 4 certificate holders. Currently, Class 1, 2, 3, and 4 certificate holders may obtain an event permit to sell, lease, or distribute nursery products and/or floral items at trade shows, garden shows, or other horticultural exhibits, sponsored in whole or in part by an Internal Revenue Service-designated nonprofit organization at no additional cost. The proposed amendment will provide for ten event permits under Class 1, 2, 3 and 4 registration at no additional charge for use at trades shows, garden shows or horticultural exhibits, and with an option to purchase additional event permits in blocks of ten permits at a cost of $50 per block. There will be no limit on the number of permit blocks that can be purchased. In addition, the proposed amendment no longer restricts the use of event permits for Class 1, 2, 3, and 4 registrants to trade shows, garden shows, or other horticultural exhibits sponsored in whole or in part by an Internal Revenue Service-designated nonprofit organization. Event permits for these registrants can be used at any trade show, garden show or horticultural exhibit.

Dr. Awinash Bhatkar, Coordinator for Plant Quality Programs, has determined that for each year of the first five years the rule is in effect, there will be no fiscal implications for state and local government as a result of enforcing or administering the rule as proposed.

Mr. Bhatakar has also 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 to facilitate registration under the Nursery/Floral Registration Classification. There will be no fiscal implication to microbusinessses or small nursery-floral businesses or distributors, or to individual growers and or others required to comply with the rule as proposed.

Comments on the proposal may be submitted to Dr. Awinash Bhatkar, Coordinator for Plant Quality Programs, Texas Department of Agriculture, P. O. Box 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

The amendments are proposed in accordance with Texas Agriculture Code §71.042, which provides the department with the authority to adopt rules for the immunity and protection of plants from diseases and insect pests.

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

§22.3. Nursery/Floral Registration Classification and Fees.

(a) (No Change.)

(b) Registration and renewal fees are:

(1) Class 1--$60. Includes businesses that [~~who~~] sell, lease, or distribute, but do not grow nursery products and/or floral items, such as garden centers, stores, landscape contractors, floral shops, interior decorators, and street vendors.

(2) Class 2--$90. Includes permanently located businesses that [~~who~~] sell, lease, or distribute, nursery products and/or floral items and have a growing area of 435,600 square feet (ten acres) or less.

(3) Class 3--$120. Includes permanently located businesses that [~~who~~] sell, lease, or distribute, nursery products and/or floral items and have a growing area of 435,601-871,200 square feet (in excess of ten acres to twenty acres).

(4) Class 4--$150. Includes permanently located businesses that [~~who~~] sell, lease, or distribute nursery products and/or floral items and have a growing area of 871,201 square feet or more (over twenty acres).

(5) Class M--$150. Includes businesses that [~~who~~] sell, lease, or distribute nursery products and/or floral items at temporary markets such as flea markets, arts and craft shows, plant or flower shows, or other temporary markets other than that described in subsection (d) of this section. Class M registrants must obtain an event permit for each day nursery products and/or floral items are sold. Thirty [~~A maximum number of 30~~] event permits are provided [~~is allowed~~] at no additional cost under this registration . One [~~,i.e. one~~] event permit equals one day (or any portion of a 24 hour period) at one location. Selling nursery products and/or floral items for any portion of a 24 hour period constitutes the use of one event permit. The fee for a Class M registration certificate will not be prorated. Additional event permits may be purchased in blocks of 10 permits at a cost of $50 per block. There will be no limit on the number of blocks that can be purchased.

(c) Class 1, 2, 3, and 4 certificate holders may obtain up to ten [~~an~~] event permits [~~permit~~] at no additional cost under a registration to sell, barter, lease, or distribute nursery products and/or floral items at trade shows, garden shows, or other horticultural exhibits [~~, sponsored in whole or in part by an Internal Revenue Service-designated nonprofit organization at no additional cost under a registration~~]. Additional event permits may be purchased in blocks of ten permits at the cost of $50 per block. There will be no limit on the number of blocks that can be purchased.

(d) Neither registration with the department nor event permits are required for participation in trade shows, garden shows, or other horticultural exhibits, [~~sponsored in whole or in part by an Internal Revenue Service-designated nonprofit organization,~~] so long as nursery products and/or floral items are not sold, bartered, leased, or distributed from stock located on the premises of the show or exhibit .

(e) (No Change.)

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

Filed with the Office of the Secretary of State on August 26, 2002.

TRD-200205620
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 463-4075

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TITLE 22. EXAMINING BOARDS

PART 1. TEXAS BOARD OF ARCHITECTURAL EXAMINERS

CHAPTER 1. ARCHITECTS
SUBCHAPTER A. SCOPE; DEFINITIONS

22 TAC §1.1

The Texas Board of Architectural Examiners proposes an amendment to §1.1 for Title 22, Chapter 1, Subchapter A, pertaining to the purpose for the Rules and Regulations of the Board. The existing rule indicates the purpose as being to interpret and implement Texas Civil Statutes, Article 249a. The amendment to this rule is intended to simplify the rule without substantively changing the Board's authority or duties. The amendment to this rule is being proposed as a result of the agency's review of Title 22, Chapter 1, Subchapter A as mandated by Section 2001.039 of the Texas Government Code.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the section is in effect, there will be no additional fiscal implications for state or local government as a result of enforcing or administering the section.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the section is in effect the public benefits expected as a result of the amendment to the rule are that the rule will be easier to understand and interpret.

There will be no significant impact on small business.

There will be no significant change in the cost to persons required to comply with the section.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendment is proposed pursuant to Section 3(b) of Article 249a, Vernon's Texas Civil Statutes, which provides the Texas Board of Architectural Examiners with authority to promulgate rules

The proposed amendment to this section does not affect any other statutes.

§1.1. Purpose.

The Rules and Regulations of the Board [~~rules and regulations of the Texas Board of Architectural Examiners~~] are set forth for the purpose of interpreting and implementing the Architects' Registration Law. [~~Texas Civil Statutes, Article 249a, the regulation of the practice of architecture in Texas; establishing the board and conferring upon it responsibility for registration of architects and the regulation of the practice of architecture.~~]

This 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 22, 2002.

TRD-200205521
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 305-8535

♦ ♦ ♦

22 TAC §§1.2 - 1.4

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

The Texas Board of Architectural Examiners proposes the repeal of §1.2, pertaining to citations; §1.3, pertaining to the Board's regulatory authority; and §1.4, pertaining to severability, for Title 22, Chapter 1, Subchapter A.

These rules are being repealed because they are superfluous restatements of general provisions of the law and it is not necessary to include them in the Board's rules.

The modifications are being made as a result of the agency's review of Title 22, Chapter 1, Subchapter A, as mandated by Section 2001.039 of the Texas Government Code.

Cathy L. Hendricks, Executive Director, has determined that for each of the first five years the proposed repeal is in effect, there are expected to be no significant fiscal implications for state or local government as a result of the repeal.

Ms. Hendricks has also determined that for each year of the first five years after the repeal, the public benefits anticipated as a result of the repeal will be that the elimination of unnecessary provisions in the rules will make it easier to understand and apply the remaining provisions.

The repeal is not expected to impact small business significantly.

No significant economic cost to persons affected by the repeal is expected as a result of the repeal.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The repeal is proposed pursuant to Section 3(b) and 5(b) of Article 249a, Vernon's Texas Civil Statutes, which provide the Texas Board of Architectural Examiners with authority to promulgate rules and include the implied authority to repeal rules that have been promulgated.

This proposed repeal does not affect any other statutes.

§1.2. Citation.

§1.3. Board's Regulatory Authority.

§1.4. Severability.

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

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Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
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For further information, please call: (512) 305-8535

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22 TAC §1.5

The Texas Board of Architectural Examiners proposes an amendment to §1.5 for Title 22, Chapter 1, Subchapter A, pertaining to the definitions of words and terms used in Title 22, Chapter 1. The amendment to this rule is intended to update the definitions of words and terms on the list, remove obsolete words and terms from the list, and provide definitions for words and terms being added to the list. The amendment to this rule is being proposed as a result of the agency's review of Title 22, Chapter 1, Subchapter A as mandated by Section 2001.039 of the Texas Government Code.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the section is in effect, there will be no additional fiscal implications for state or local government as a result of enforcing or administering the section.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the section is in effect the public benefits expected as a result of the amendment to the rule are that the Board's rules will be more specific and easier to understand and follow because the terms used therein will be more clearly defined.

There will be no additional impact on small business.

There will be no change in the cost to persons required to comply with the section.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendment is proposed pursuant to Section 3(b) and Section 5(b) of Article 249a, Vernon's Texas Civil Statutes, which provide the Texas Board of Architectural Examiners with authority to promulgate rules.

The proposed amendment to this section does not affect any other statutes.

§1.5. Terms Defined Herein.

The following words and terms, when used in this chapter, [~~these rules,~~] shall have the following meanings, unless the context clearly indicates otherwise.

(1) The Act--The Architects' Registration Law.

(2) Actual Signature--A signature produced personally by the individual whose name is signed or an authorized copy of such signature.

(3) Administrative Procedure Act (APA)--Texas Government Code §§2001.001 et seq.

(4) APA--Administrative Procedure Act.

(5) Applicant--An individual who has submitted an application for registration or reinstatement but has not yet completed the registration or reinstatement process.

(6) Architect--An individual who holds a valid architectural registration certificate granted by the Board.

(7) Architect of Record--An Architect who has submitted an affidavit confirming that the Architect is employed on a full-time basis by or formally associated with a business entity that offers or provides architectural services in Texas. The Architect of Record for a business entity shall be responsible for answering or designating another individual to answer inquiries of the Board concerning matters under the jurisdiction of the Board which are related to the business entity's Practice of Architecture.

(8) Architect Registration Examination (ARE)--The standardized test that a Candidate must pass in order to obtain architectural registration by examination in Texas.

(9) Architect Registration Examination Financial Assistance Fund (AREFAF)--A program administered by the Board which provides monetary awards to Candidates who meet the program's criteria.

(10) Architects' Registration Law--Article 249a, Vernon's Texas Civil Statutes.

(11) Architectural Barriers Act--Article 9102, Vernon's Texas Civil Statutes.

(12) Architectural Intern--An individual enrolled in the Intern Development Program (IDP).

(13) ARE--Architect Registration Examination.

(14) AREFAF--Architect Registration Examination Financial Assistance Fund.

(15) Authorship--The state of having personally created something.

(16) Barrier-Free Design--The design of a building or a facility or the design of an alteration of a building or a facility which complies with the Texas Accessibility Standards or the Americans with Disabilities Act.

(17) Board--Texas Board of Architectural Examiners.

(18) Candidate--An Applicant who has been approved by the Board to take the ARE.

(19) CEPH--Continuing Education Program Hour(s).

(20) Chairman--The member of the Board who serves as the Board's presiding officer.

(21) Construction Documents--Plans; specifications; and addenda, change orders, Supplementary Instructions, and other Supplemental Documents issued by an Architect for the purpose(s) of regulatory approval, permit, and/or construction.

(22) Consultant--An individual who prepares or assists in the preparation of technical design documents issued by an Architect for use in connection with the Architect's Construction Documents.

(23) Contested Case--A proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing.

(24) Continuing Education Program Hour (CEPH)--At least fifty (50) minutes of time spent in an activity that qualifies to fulfill the Board's continuing education requirements.

(25) Council Certification--Certification granted by the National Council of Architectural Registration Boards to registered architects who have satisfied certain standards related to architectural education, training, and examination.

(26) Delinquent--A registration status signifying that an Architect's registration has expired because the Architect has failed to remit the applicable renewal fee to the Board.

(27) Direct Supervision--That degree of supervision by an individual overseeing the work of another whereby the supervisor and the individual being supervised work in close proximity to one another and the supervisor has both control over and detailed professional knowledge of the work prepared under his or her supervision.

(28) E-mail Directory--A listing of e-mail addresses used to advertise architectural services and published on the Internet under circumstances where the Architects included in the list have control over the information included in the list.

(29) Emeritus Architect (or Architect Emeritus)--An honorary title that may be used by an Inactive Architect who has retired from the Practice of Architecture.

(30) Feasibility Study--A report of a detailed investigation and analysis conducted to determine the advisability of a proposed architectural project from a technical architectural standpoint.

(31) Good Standing--

(A) a registration status signifying that an Architect is not delinquent in the payment of any fees owed to the Board or

(B) an application status signifying that an Applicant or Candidate is not delinquent in the payment of any fees owed to the Board, is not the subject of a pending TBAE enforcement proceeding, and has not been the subject of formal disciplinary action by an architectural registration board that would provide a ground for the denial of the application for architectural registration in Texas.

(32) Governmental Entity--A state agency or department; a district, authority, county, municipality, or other political subdivision of the state; or a publicly owned utility.

(33) Governmental Jurisdiction--A state, territory, or country located outside the State of Texas.

(34) IDP--The Intern Development Program as administered by the National Council of Architectural Registration Boards.

(35) Inactive--A registration status signifying that an Architect may not Practice Architecture in the State of Texas.

(36) Intern Development Program (IDP)--A comprehensive internship program the requirements of which are established, interpreted, and enforced by NCARB.

(37) Intern Development Training Requirement--Architectural experience necessary in order for an Applicant to obtain architectural registration by examination in Texas.

(38) Institutional Residential Facility--A building intended for occupancy on a 24-hour basis by persons who are receiving custodial care from the proprietors or operators of the building. Hospitals, dormitories, nursing homes and other assisted living facilities, and correctional facilities are examples of Institutional Residential Facilities.

(39) Licensed--Registered.

(40) Member Board--An architectural registration board that is part of the nonprofit federation of architectural registration boards known as NCARB.

(41) NAAB--National Architectural Accrediting Board.

(42) National Architectural Accrediting Board (NAAB)--An agency that accredits professional degree programs in architecture in the United States.

(43) National Council of Architectural Registration Boards (NCARB)--A nonprofit federation of architectural registration boards from fifty-five (55) states and territories of the United States.

(44) NCARB--National Council of Architectural Registration Boards

(45) Nonregistrant--An individual who is not an Architect.

(46) Practice Architecture--Performing or doing or offering or attempting to do or perform any service, work, act, or thing within the scope of the Practice of Architecture.

(47) Practicing Architecture--Performing or doing or offering or attempting to do or perform any service, work, act, or thing within the scope of the Practice of Architecture.

(48) Practice of Architecture--Any service or creative work, either public or private, applying the art and science of developing design concepts, planning for functional relationships and intended uses, and establishing the form, appearance, aesthetics, and construction details, for any building or buildings, or environs, to be constructed, enlarged or altered, the proper application of which requires architectural education, training, and experience.

(49) Prototypical--From an architectural design intentionally created not only to establish the architectural parameters of a building or facility to be constructed but also to serve as a functional model on which future variations of the basic architectural design would be based for use in additional locations.

(50) Principal--An Architect who is in charge of an organization's Practice of Architecture, either alone or with other architects.

(51) Public Entity--A state, a city, a county, a city and county, a district, a department or agency of state or local government which has official or quasi-official status, an agency established by state or local government though not a department thereof but subject to some governmental control, or any other political subdivision or public corporation.

(52) Registered--Licensed.

(53) Registrant--An Architect.

(54) Reinstatement--The procedure through which an architectural registration certificate that has been cancelled, Surrendered, or revoked by the Board may be restored.

(55) Renewal--The procedure through which an Architect pays an annual fee so that the Architect's registration certificate will continue to be effective.

(56) Responsible Charge--That degree of control over and detailed knowledge of the content of technical submissions during their preparation as is ordinarily exercised by registered architects applying the required professional standard of care.

(57) Rules and Regulations of the Board--22 Texas Administrative Code §§1.1 et seq.

(58) Rules of Procedure of SOAH--1 Texas Administrative Code §§155.1 et seq.

(59) Secretary-Treasurer--The member of the Board who signs the official copy of the minutes from each meeting of the Board and maintains records related to Board members' attendance at meetings of the Board.

(60) SOAH--State Office of Administrative Hearings.

(61) State Office of Administrative Hearings (SOAH)--A Texas Governmental Entity created to serve as an independent forum for the conduct of adjudicative hearings in the executive branch of Texas government.

(62) Supervision and Control--Supervision by an architect overseeing the work of another whereby

(A) the supervisor and the individual being supervised can document frequent and detailed communication with one another and the supervisor has both control over and detailed professional knowledge of the work; or

(B) the supervisor is in Responsible Charge of the work and the individual performing the work is employed by the supervisor or by the supervisor's employer.

(63) Supplemental Document--A document that modifies or adds to the technical architectural content of an existing Construction Document.

(64) Supplementary Instruction--A directive regarding the modification of or an addition to the technical architectural content of an existing Construction Document.

(65) Surrender--The act of relinquishing all privileges associated with the possession of a valid architectural registration certificate.

(66) TBAE--Texas Board of Architectural Examiners.

(67) TDLR--Texas Department of Licensing and Regulation.

(68) Texas Department of Licensing and Regulation (TDLR)--A Texas state agency responsible for the implementation and enforcement of the Texas Architectural Barriers Act.

(69) TGSLC--Texas Guaranteed Student Loan Corporation.

(70) Vice-Chairman--The member of the Board who serves as the assistant presiding officer and, in the absence of the Chairman, serves as the Board's presiding officer and, if necessary, succeeds the Chairman until a new Chairman is appointed.

~~[(1) APA--Administrative Procedure Act, Government Code, Chapter 2001.]~~

~~[(2) Applicant--An individual who has submitted an application for registration.]~~

~~[(3) Architect--An individual currently registered to practice architecture in the State of Texas.]~~

~~[(4) Architect(s) of responsibility--The architect(s) through whom a firm is authorized to offer/perform architectural services and/or whose architect's(s') seal(s) and signature(s) appears on contract documents issued from that firm.]~~

~~[(5) Architects' registration law--Regulation of the practice of architecture, Texas Civil Statutes, Article 249a.]~~

~~[(6) Architectural plans--Graphic floor plans which describe the functional relationships and intended use of space, exitways, and the control of architectural barriers in habitable buildings.]~~

~~[(7) Architecturally related documents--Supplemental instructions; change orders; graphic exterior elevations which describe the form, aesthetics, and appearance of habitable buildings; and construction of details describing the assembly and installation of construction components of habitable buildings, excluding structural, mechanical, and electrical systems.]~~

~~[(8) Architectural specifications--Written descriptions of materials, and construction features in relation to quality, color, pattern, performance characteristics, and workmanship requirements for components involved in the construction of habitable buildings, excluding structural, mechanical, and electrical systems.]~~

~~[(9) ARE--The current architect registration examination, prepared by NCARB.]~~

~~[(10) Candidate--An individual who has qualified for examination.]~~

[(11) Construction Documents--Plans, specifications, and related documents issued by an architect, landscape architect, or interior designer for the purpose(s) of regulatory approval, permit, or construction.]

[(12) Contract documents--Documents issued for permits, or construction purposes, consisting of architectural plans, specifications, and related documents.]

[(13) Coordination of consultant's work--Comparative review by the architect of the construction documents as prepared by the architect and by each of his or her consultants for the purpose of revealing possible conflicts and omissions and for observing the consultant's proper seal or other certification applied to his or her own work. Revisions necessary for coordination shall remain the responsibility of the consultants.]

[(14) Direct Supervision--That degree of supervision by a person overseeing the work of another whereby the supervisor and the individual being supervised work in close proximity to one another and the supervisor has both control over and detailed professional knowledge of the work prepared under his or her supervision.]

[(15) Emeritus Status--An honorary title that allows a retired architect who no longer wishes to actively practice architecture to retain his or her professional title but does not confer the right to practice as a registered professional.]

[(16) IDP--Intern development program.]

[(17) IDP applicant--An individual who is obtaining the IDP diversified experience requirements set forth in the Texas Table of Diversified Experience Requirements for IDP, and has submitted an application for registration to the board.]

[(18) Institutional residential facility--Any building intended for occupancy of persons on a 24-hour basis who are receiving custodial care from the proprietors or operators of the building.]

[(19) NAAB--National Architectural Accrediting Board.]

[(20) NCARB--National Council of Architectural Registration Boards.]

[(21) Principal--An individual who is an architect, and in charge of an organization's architectural practice, either alone or with other architects.]

[(22) Registrant--See architect.]

[(23) Reinstatement--The procedure through which a registration certificate that has been revoked by the Board may be restored to active or emeritus status.]

[(24) Responsible Charge--That degree of control over and detailed knowledge of the content of technical submissions during their preparation as is ordinarily exercised by registered architects applying the required professional standard of care.]

[(25) Supervision and Control--Supervision by an architect overseeing the work of another whereby:]

[(A) the supervisor and the individual being supervised can document frequent and detailed communication with one another and the supervisor has both control over and detailed professional knowledge of the work; or]

[(B) the supervisor is in responsible charge of the work and the person performing the work is employed by the supervisor or by the supervisor's employer.]

[(26) Table of equivalents--The table of education and experience qualifications used by the board to qualify candidates for examination.]

[(27) TBAE--Texas Board of Architectural Examiners.]

This 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 22, 2002.

TRD-200205523
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 305-8535

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22 TAC §§1.6 - 1.8

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

The Texas Board of Architectural Examiners proposes the repeal of §1.6, pertaining to the Board's office location; §1.7, pertaining to the person for service of process; and §1.8, pertaining to meetings and notices thereof for Title 22, Chapter 1, Subchapter A.

These rules are being repealed because they are outdated or superfluous and it is not necessary to include such provisions in the Board's rules.

The modifications are being made as a result of the agency's review of Title 22, Chapter 1, Subchapter A, as mandated by Section 2001.039 of the Texas Government Code.

Cathy L. Hendricks, Executive Director, has determined that for each of the first five years the proposed repeal is in effect, there are expected to be no significant fiscal implications for state or local government as a result of the repeal.

Ms. Hendricks has also determined that for each year of the first five years after the repeal, the public benefits anticipated as a result of the repeal will be that the elimination of unnecessary provisions in the rules will make it easier to understand and apply the remaining provisions.

The repeal is not expected to impact small business significantly.

No significant economic cost to persons affected by the repeal is expected as a result of the repeal.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The repeal is proposed pursuant to Section 3(b) and 5(b) of Article 249a, Vernon's Texas Civil Statutes, which provide the Texas Board of Architectural Examiners with authority to promulgate rules and include the implied authority to repeal rules that have been promulgated.

This proposed repeal does not affect any other statutes.

§1.6. Office.

§1.7. Person for Service of Process.

§1.8. Meetings and Notices Thereof.

This 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 22, 2002.

TRD-200205524
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
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For further information, please call: (512) 305-8535

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22 TAC §1.9

The Texas Board of Architectural Examiners proposes an amendment to §1.9 for Title 22, Chapter 1, Subchapter A, pertaining to officers and employees of the Board. The existing rule designates what officers and employees may be appointed, elected, or hired to do the business of the Board and specifies certain procedures to be followed by the Board. The amendment to this rule is intended to identify defined terms through the use of capitalization, delete provisions that are superfluous in light of Rule 1.13 and in light of requirements specified in other law, and eliminate obsolete provisions such as those describing the responsibilities of the secretary-treasurer. The amendment to this rule is being proposed as a result of the agency's review of Title 22, Chapter 1, Subchapter A as mandated by Section 2001.039 of the Texas Government Code.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the section is in effect, there will be no additional fiscal implications for state or local government as a result of enforcing or administering the section.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the section is in effect the public benefits expected as a result of the amendment to the rule are that the elimination of superfluous and obsolete provisions will enhance the rules' efficiency and usefulness and that the clear identification of defined terms will let affected persons know they should refer to the definitions for further information.

There will be no significant impact on small business.

There will be no change in the cost to persons required to comply with the section.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendment is proposed pursuant to Section 3 and Section 5(b) of Article 249a, Vernon's Texas Civil Statutes, which provide the Texas Board of Architectural Examiners with authority to promulgate rules, including rules related to the Board's powers, duties, and functions.

The proposed amendment to this section does not affect any other statutes.

§1.9. Officers and Employees.

As prescribed by law, the Governor shall appoint a Chairman, and the Board shall elect a Vice-Chairman and a Secretary-Treasurer. The Chairman [~~governor shall appoint a chairman, the board shall elect a vice-chairman and secretary-treasurer. The chairman~~] shall hold office until replaced by the governor. The Vice-Chairman and Secretary-Treasurer [~~vice-chairman and secretary-treasurer~~] shall hold office until their successors have been elected. [~~elected and qualified.~~]

[~~(1) The chairman shall, when present, preside at all meetings; appoint all committees; sign all certificates of registration issued; and perform all other duties pertaining to his office.~~]

[~~(2) The vice-chairman shall, in the absence of the chairman, fulfill the responsibilities of the chairman and, if necessary, succeed the chairman until a new chairman has been appointed by the governor without election in the then current year.~~]

[~~(3) The secretary-treasurer shall, with the assistance of such executive and clerical help as may be required, keep a record of all the proceedings of the board and all monies received or expended by the board, which record shall be open to public inspection at all reasonable times.~~]

[~~(4) The board may employ such executive, stenographic, and office assistance, including an executive director, as is necessary and such professional assistance at examination as is required, and shall rent office space as necessary to house the staff and records.~~]

[~~(5) The board may designate the executive director who shall have possession, on behalf of the secretary-treasurer, of all the official records of the board and who may, under the supervision of the board and the secretary-treasurer, perform such administrative and ministerial duties as the board authorizes.~~]

[~~(6) The board authorizes the executive director to sign expenditure vouchers, or in the absence of the executive director, those employees the executive director authorizes, in writing, and have signature cards on file at the Comptroller of Public Accounts.~~]

This 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 22, 2002.

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Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
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For further information, please call: (512) 305-8535

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22 TAC §1.10

The Texas Board of Architectural Examiners proposes new §1.10 for Title 22, Chapter 1, Subchapter A, pertaining to the appointment of committees necessary to conduct the business of the Board. The new rule is being proposed as a result of the Board's decision that committees are useful in increasing the board's efficiency with regard to certain types of task. The new rule also is being proposed as a result of the agency's review of Title 22, Chapter 1, Subchapter A, as mandated by Section 2001.039 of the Texas Government Code. The new rule directs the Chairman to appoint members of the Board to serve on committees as necessary to conduct the business of the board.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the new rule is in effect, possible fiscal implications for state or local government expected as a result of enforcing or administering the new rule include costs associated with committee

meetings, such as travel expenses, which must be borne by the agency.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the new rule is in effect the public benefits expected as a result of the new rule are that the Board will be able to complete some tasks, such as reviewing and revising rules, more efficiently.

The new rule will have no impact on small business.

There will be no change in the cost to persons required to comply with the section.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The new rule is proposed pursuant to Section 3(b) and Section 5(b) of Article 249a, Vernon's Texas Civil Statutes, which provide the Texas Board of Architectural Examiners with authority to promulgate rules.

The proposed new rule does not affect any other statutes.

§1.10. Committees.

The Chairman shall appoint members of the Board to serve on committees as necessary to conduct the business of the Board.

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

Filed with the Office of the Secretary of State on August 22, 2002.

TRD-200205526
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 305-8535

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22 TAC §1.11

The Texas Board of Architectural Examiners proposes an amendment to §1.11 for Title 22, Chapter 1, Subchapter A, pertaining to the official seal for the Board. The existing rule requires that the agency use a seal similar to that of the State of Texas with the words "Texas Board of Architectural Examiners" replacing the words "the State of Texas." The amendment to this rule corrects a punctuation error. The amendment to this rule is being proposed as a result of the agency's review of Title 22, Chapter 1, Subchapter A as mandated by Section 2001.039 of the Texas Government Code.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the section is in effect there will be no additional fiscal implications for state or local government as a result of enforcing or administering the section.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the section is in effect the public benefits expected as a result of the amendment to the rule are that a grammatical error in the rule will have been corrected.

There will be no significant impact on small business.

There will be no change in the cost to persons required to comply with the section.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendment is proposed pursuant to Section 3(b) and Section 5(b) of Article 249a, Vernon's Texas Civil Statutes, which provide the Texas Board of Architectural Examiners with authority to promulgate rules.

The proposed amendment to this section does not affect any other statutes.

§1.11. Official Seal.

As its official seal, the board will use a seal similar to that of the State of Texas with the words "Texas Board of Architectural Examiners" replacing the words "The State of Texas" [~~Texas,~~"] inscribed around the perimeter.

This 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 22, 2002.

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Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
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For further information, please call: (512) 305-8535

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22 TAC §1.12

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

The Texas Board of Architectural Examiners proposes the repeal of §1.12 for Title 22, Chapter 1, Subchapter A, which identifies the attorneys that the Board may engage.

This rule is being repealed because it is superfluous in light of existing statutory language designating the attorneys that may represent the Board.

The modifications are being made as a result of the agency's review of Title 22, Chapter 1, Subchapter A, as mandated by Section 2001.039 of the Texas Government Code.

Cathy L. Hendricks, Executive Director, has determined that for each of the first five years the proposed repeal is in effect, there are expected to be no significant fiscal implications for state or local government as a result of the repeal.

Ms. Hendricks has also determined that for each year of the first five years after the repeal, the public benefits anticipated as a result of the repeal will be that the elimination of unnecessary provisions in the rules will make it easier to understand an apply the remaining provisions.

The repeal is not expected to impact small business significantly.

No significant economic cost to persons affected by the repeal is expected as a result of the repeal.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The repeal is proposed pursuant to Section 3(b) and 5(b) of Article 249a, Vernon's Texas Civil Statutes, which provide the Texas Board of Architectural Examiners with authority to promulgate rules and include the implied authority to repeal rules that have been promulgated.

This proposed repeal does not affect any other statutes.

§1.12. Attorneys.

This 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 22, 2002.

TRD-200205528
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 305-8535

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22 TAC §1.13

The Texas Board of Architectural Examiners proposes an amendment to §1.13 for Title 22, Chapter 1, Subchapter A, pertaining to how the Board conducts business. The existing rule requires the Board to use Robert's Rules of Order unless required otherwise by law to conduct the business of the Board. The amendment to this rule is intended to make a stylistic change in the language of the rule. The change is not substantive. The term "board" also has been capitalized because it is a defined term. The amendment to this rule is being proposed as a result of the agency's review of Title 22, Chapter 1, Subchapter A as mandated by Section 2001.039 of the Texas Government Code.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the section is in effect, there will be no additional fiscal implications for state or local government as a result of enforcing or administering the section.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the section is in effect the public benefits expected as a result of the amendment to the rule are that an awkward stylistic aspect of the rule will have been corrected. Also, the clear identification of defined terms will let affected persons know they should refer to the definitions for further information.

There will be no additional impact on small business.

There will be no change in the cost to persons required to comply with the section.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendment is proposed pursuant to Section 3(b) and Section 5(b) of Article 249a, Vernon's Texas Civil Statutes, which provide the Texas Board of Architectural Examiners with authority to promulgate rules.

The proposed amendment to this section does not affect any other statutes.

§1.13. Robert's Rules of Order.

Unless required otherwise by law or these rules, Robert's Rules of Order shall be used in the conduct of business by the Board [~~this board~~].

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

Filed with the Office of the Secretary of State on August 22, 2002.

TRD-200205529
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 305-8535

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22 TAC §§1.14 - 1.18

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

The Texas Board of Architectural Examiners proposes the repeal of §1.14, pertaining to what constitutes a quorum; §1.15, pertaining to who shall sign certificates of registration; §1.16, pertaining to the Board's official records; §1.17, pertaining to reimbursement for expenses incurred in the conduct of Board business; and §1.18 pertaining to NCARB for Title 22, Chapter 1, Subchapter A.

These rules are being repealed because Rule 1.14 is unnecessary because Robert's Rules of Order satisfactorily govern this issue; it is unnecessary to have a rule designating who shall sign certificates or registration; Rule 1.16 is superfluous because other law requires the Board to maintain the designated records; Rule 1.17 is unnecessary because other law governs the reimbursement of the Board and its staff; and Rule 1.18 is being repealed so that the Board will have increased flexibility to determine whether to maintain membership in national and regional organizations. In addition, Subsection (b) of the rule is unnecessary because the Board may direct staff to provide information regarding a registration examination at any time. Subsection (c) is unnecessary because in order for an outside entity to successfully administer a registration examination for the agency, the agency must offer such cooperation to the outside entity.

The modifications are being made as a result of the agency's review of Title 22, Chapter 1, Subchapter A, as mandated by Section 2001.039 of the Texas Government Code.

Cathy L. Hendricks, Executive Director, has determined that for each of the first five years the proposed repeal is in effect, there are expected to be no significant fiscal implications for state or local government as a result of the repeal.

Ms. Hendricks has also determined that for each year of the first five years after the repeal, the public benefits anticipated as a result of the repeal will be that the elimination of unnecessary provisions in the rules will make it easier to understand and apply the remaining provisions.

The repeal is not expected to impact small business significantly.

No significant economic cost to persons affected by the repeal is expected as a result of the repeal.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The repeal is proposed pursuant to Section 3(b) and 5(b) of Article 249a, Vernon's Texas Civil Statutes, which provide the Texas Board of Architectural Examiners with authority to promulgate rules and include the implied authority to repeal rules that have been promulgated.

This proposed repeal does not affect any other statutes.

§1.14. Quorum.

§1.15. Signing Certificates.

§1.16. Official Records.

§1.17. Expenses.

§1.18. NCARB.

This 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 22, 2002.

TRD-200205530
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 305-8535

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22 TAC §1.14

The Texas Board of Architectural Examiners proposes new §1.14 for Title 22, Chapter 1, Subchapter A, pertaining to procedures for addressing the Board. The new rule is being proposed as a result of the agency's review of Title 22, Chapter 1, Subchapter A, as mandated by Section 2001.039 of the Texas Government Code. The new rule requires individuals who wish to address the Board during a public meeting to submit to the Board's Executive Director a request which must include a summary of the issue to be presented. The request must be submitted at least forty-five days before the scheduled date of the public meeting, and the presentation must be limited to 5 minutes, which may be extended at the Board's discretion.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the new rule is in effect, no significant fiscal implications for state or local government are expected as a result of enforcing or administering the section.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the new rule is in effect the public benefits expected as a result of the new rule will be that the public will be better informed of their right to address the Board, and procedures will be in place to help ensure public presentations are controlled and properly posted pursuant to the Open Meetings Act.

No significant impact on small business is expected.

There is expected to be no significant change in the cost to persons required to comply with the section other than minimal costs associated with notifying the agency.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The new rule is proposed pursuant to Section 3(b) and (g) and Section 5(b) of Article 249a, Vernon's Texas Civil Statutes, which provide the Texas Board of Architectural Examiners with authority to promulgate rules, including rules related to providing the public with a reasonable opportunity to appear before the Board.

The proposed new rule does not affect any other statutes.

§1.14. Procedure for Addressing the Board.

(a) In order to address the Board during a public meeting, a member of the public must submit to the Board's Executive Director a request to address the Board and a summary of the issue to be presented so that the issue may be included on the agenda for the public meeting.

(b) A request to address the Board must be submitted to the Executive Director at least forty-five (45) days before the scheduled date of the public meeting during which the member of the public wishes to address the Board.

(c) Each member of the public who addresses the Board shall be allotted five (5) minutes to make a presentation to the Board. At the sole discretion of the Board, the five-minute period may be extended if necessary.

This 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 22, 2002.

TRD-200205531
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 305-8535

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CHAPTER 3. LANDSCAPE ARCHITECTS
SUBCHAPTER A. SCOPE: DEFINITIONS

22 TAC §3.1

The Texas Board of Architectural Examiners proposes an amendment to §3.1 for Title 22, Chapter 3, Subchapter A, pertaining to the purpose for the Rules and Regulations of the Board. The existing rule indicates the purpose as being to interpret and implement Texas Civil Statutes, Article 249c. The amendment to this rule is intended to simplify the rule without substantively changing the Board's authority or duties. The amendment to this rule is being proposed as a result of the agency's review of Title 22, Chapter 3, Subchapter A as mandated by Section 2001.039 of the Texas Government Code.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the section is in effect, there will be no additional fiscal implications for state or local government as a result of enforcing or administering the section.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the section is in effect the public benefits expected as a result of

the amendment to the rule are that the rule will be easier to understand and interpret.

There will be no significant impact on small business.

There will be no significant change in the cost to persons required to comply with the section.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendment is proposed pursuant to Section 4(a) of Article 249c, Vernon's Texas Civil Statutes, which provides the Texas Board of Architectural Examiners with authority to promulgate rules.

The proposed amendment to this section does not affect any other statutes.

§3.1. Purpose.

The Rules and Regulations of the Board [~~rules and regulations of the Texas Board of Architectural Examiners~~] are set forth for the purpose of interpreting and implementing the Landscape Architects' Registration Law. [~~Texas Civil Statutes, Article 249c, (the regulation of the practice of landscape architecture) in Texas, and establishing the board and conferring upon it responsibility for registration of landscape architects and the regulation of the practice of landscape architecture.~~]

This 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 22, 2002.

TRD-200205532
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 305-8535

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22 TAC §§3.2 - 3.4

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

The Texas Board of Architectural Examiners proposes the repeal of §3.2, pertaining to citations; §3.3, pertaining to the Board's regulatory authority; and §3.4, pertaining to severability, for Title 22, Chapter 3, Subchapter A.

These rules are being repealed because they are superfluous restatements of general provisions of the law and it is not necessary to include them in the Board's rules.

The modifications are being made as a result of the agency's review of Title 22, Chapter 3, Subchapter A, as mandated by Section 2001.039 of the Texas Government Code.

Cathy L. Hendricks, Executive Director, has determined that for each of the first five years the proposed repeal is in effect, there are expected to be no significant fiscal implications for state or local government as a result of the repeal.

Ms. Hendricks has also determined that for each year of the first five years after the repeal, the public benefits anticipated as a result of the repeal will be that the elimination of unnecessary provisions in the rules will make it easier to understand and apply the remaining provisions.

The repeal is not expected to impact small business significantly.

No significant economic cost to persons affected by the repeal is expected as a result of the repeal.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The repeal is proposed pursuant to Section 4(a) of Article 249c, Vernon's Texas Civil Statutes, which provides the Texas Board of Architectural Examiners with authority to promulgate rules and includes the implied authority to repeal rules that have been promulgated.

This proposed repeal does not affect any other statutes.

§3.2. Citation.

§3.3. Board's Regulatory Authority.

§3.4. Severability.

This 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 22, 2002.

TRD-200205533
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 305-8535

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22 TAC §3.5

The Texas Board of Architectural Examiners proposes an amendment to §3.5 for Title 22, Chapter 3, Subchapter A, pertaining to the definitions of words and terms used in Title 22, Chapter 3. The amendment to this rule is intended to update the definitions of words and terms on the list, remove obsolete words and terms from the list, and provide definitions for words and terms being added to the list. The amendment to this rule is being proposed as a result of the agency's review of Title 22, Chapter 3, Subchapter A as mandated by Section 2001.039 of the Texas Government Code.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the section is in effect, there will be no additional fiscal implications for state or local government as a result of enforcing or administering the section.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the section is in effect the public benefits expected as a result of the amendment to the rule are that the Board's rules will be more specific and easier to understand and follow because the terms used therein will be more clearly defined.

There will be no additional impact on small business.

There will be no change in the cost to persons required to comply with the section.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendment is proposed pursuant to Section 4(a) of Article 249c, Vernon's Texas Civil Statutes, which provides the Texas Board of Architectural Examiners with authority to promulgate rules, including rules.

The proposed amendment to this section does not affect any other statutes.

§3.5. Terms Defined Herein.

The following words and terms, when used in this chapter, [~~these rules,~~] shall have the following meanings, unless the context clearly indicates otherwise.

(1) The Act--The Landscape Architects' Registration Law.

(2) Actual Signature--A signature produced personally by the individual whose name is signed or an authorized copy of such signature.

(3) Administrative Procedure Act (APA)--Texas Government Code §§2001.001 et seq.

(4) APA--Administrative Procedure Act.

(5) Applicant--An individual who has submitted an application for registration or reinstatement but has not yet completed the registration or reinstatement process.

(6) Architectural Barriers Act--Article 9102, Vernon's Texas Civil Statutes.

(7) Authorship--The state of having personally created something.

(8) Barrier-Free Design--The design of a facility or the design of an alteration of a facility which complies with the Texas Accessibility Standards or the Americans with Disabilities Act.

(9) Board--Texas Board of Architectural Examiners.

(10) Candidate--An Applicant who has been approved by the Board to take the LARE.

(11) CEPH--Continuing Education Program Hour(s).

(12) Chairman--The member of the Board who serves as the Board's presiding officer.

(13) CLARB--Council of Landscape Architectural Registration Boards.

(14) Construction Documents--Plans; specifications; and addenda, change orders, Supplementary Instructions, and other Supplemental Documents issued by a Landscape Architect for the purpose(s) of regulatory approval, permit, and/or construction.

(15) Consultant--An individual who prepares or assists in the preparation of technical design documents issued by a Landscape Architect for use in connection with the Landscape Architect's Construction Documents.

(16) Contested Case--A proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing.

(17) Continuing Education Program Hour (CEPH)--At least fifty (50) minutes of time spent in an activity that qualifies to fulfill the Board's continuing education requirements.

(18) Council of Landscape Architectural Registration Boards (CLARB)--An international nonprofit organization whose members are landscape architectural licensing boards of the U.S. states and Canadian provinces that license landscape architects.

(19) Delinquent--A registration status signifying that a Landscape Architect's registration has expired because the Landscape Architect has failed to remit the applicable renewal fee to the Board.

(20) Direct Supervision--That degree of supervision by an individual overseeing the work of another whereby the supervisor and the individual being supervised work in close proximity to one another and the supervisor has both control over and detailed professional knowledge of the work prepared under his or her supervision.

(21) E-mail Directory--A listing of e-mail addresses used to advertise landscape architectural services and published on the Internet under circumstances where the Landscape Architects included in the list have control over the information included in the list.

(22) Emeritus Landscape Architect (or Landscape Architect Emeritus)--An honorary title that may be used by an Inactive Landscape Architect who has retired from the Practice of Landscape Architecture.

(23) Feasibility Study--A report of a detailed investigation and analysis conducted to determine the advisability of a proposed landscape architectural project from a technical landscape architectural standpoint.

(24) Good Standing--

(A) a registration status signifying that a Landscape Architect is not delinquent in the payment of any fees owed to the Board or

(B) an application status signifying that an Applicant or Candidate is not delinquent in the payment of any fees owed to the Board, is not the subject of a pending TBAE enforcement proceeding, and has not been the subject of formal disciplinary action by a landscape architectural registration board that would provide a ground for the denial of the application for landscape architectural registration in Texas.

(25) Governmental Entity--A state agency or department; a district, authority, county, municipality, or other political subdivision of the state; or a publicly owned utility.

(26) Governmental Jurisdiction--A state, territory, or country located outside the State of Texas.

(27) Inactive--A registration status signifying that a Landscape Architect may not Practice Landscape Architecture in the State of Texas.

(28) LAAB--Landscape Architectural Accreditation Board

(29) Landscape Architect--An individual who holds a valid landscape architectural registration certificate granted by the Board.

(30) Landscape Architect of Record--A Landscape Architect who has submitted an affidavit confirming that the Landscape Architect is employed on a full-time basis by or formally associated with a business entity that offers or provides landscape architectural services in Texas. The Landscape Architect of Record for a business entity shall be responsible for answering or designating another individual to answer inquiries of the Board concerning matters under the jurisdiction of the Board which are related to the business entity's practice of Landscape Architecture.

(31) Landscape Architect Registration Examination (LARE)--The standardized test that a Candidate must pass in order to obtain landscape architectural registration by examination in Texas.

(32) Landscape Architects' Registration Law--Article 249c, Vernon's Texas Civil Statutes.

(33) Landscape Architectural Accreditation Board (LAAB)--An agency that accredits professional degree programs in landscape architecture in the United States.

(34) Landscape Architectural Intern--An individual participating in an internship to complete the experiential requirements for landscape architectural registration in Texas.

(35) Landscape Architecture--The art and science of landscape analysis, landscape planning, and landscape design, including the performance of professional services such as consultation, investigation, research, the preparation of general development and detailed site design plans, the preparation of studies, the preparation of specifications, and responsible supervision related to the development of landscape areas for:

(A) the planning, preservation, enhancement, and arrangement of land forms, natural systems, features, and plantings, including ground and water forms;

(B) the planning and design of vegetation, circulation, walks, and other landscape features to fulfill aesthetic and functional requirements;

(C) the formulation of graphic and written criteria to govern the planning and design of landscape construction development programs, including:

(i) the preparation, review, and analysis of master and site plans for landscape use and development;

(ii) the analysis of environmental, physical, and social considerations related to land use;

(iii) the preparation of drawings, construction documents, and specifications; and

(iv) construction observation;

(D) design coordination and review of technical submissions, plans, and construction documents prepared by individuals working under the direction of the Landscape Architect;

(E) the preparation of feasibility studies, statements of probable construction costs, and reports and site selection for landscape development and preservation;

(F) the integration, site analysis, and determination of the location of buildings, structures, and circulation and environmental systems;

(G) the analysis and design of:

(i) site landscape grading and drainage;

(ii) systems for landscape erosion and sediment control; and

(iii) pedestrian walkway systems;

(H) the planning and placement of uninhabitable landscape structures, plants, landscape lighting, and hard surface areas;

(I) the collaboration of Landscape Architects with other professionals in the design of roads, bridges, and structures regarding the functional, environmental, and aesthetic requirements of the areas in which they are to be placed; and

(J) field observation of landscape site construction, revegetation, and maintenance.

(36) LARE--Landscape Architect Registration Examination

(37) Licensed--Registered.

(38) Member Board--A landscape architectural registration board that is part of CLARB.

(39) Nonregistrant--An individual who is not a Landscape Architect.

(40) Registrant--A Landscape Architect.

(41) Reinstatement--The procedure through which a landscape architectural registration certificate that has been cancelled, Surrendered, or revoked by the Board may be restored.

(42) Renewal--The procedure through which a Landscape Architect pays an annual fee so that the Landscape Architect's registration certificate will continue to be effective.

(43) Responsible Charge--That degree of control over and detailed knowledge of the content of technical submissions during their preparation as is ordinarily exercised by registered landscape architects applying the required professional standard of care.

(44) Rules and Regulations of the Board--22 Texas Administrative Code §§3.1 et seq.

(45) Rules of Procedure of SOAH--1 Texas Administrative Code §§155.1 et seq.

(46) Secretary-Treasurer--The member of the Board who signs the official copy of the minutes from each meeting of the Board and maintains records related to Board members' attendance at meetings of the Board.

(47) SOAH--State Office of Administrative Hearings.

(48) State Office of Administrative Hearings (SOAH)--A Texas Governmental Entity created to serve as an independent forum for the conduct of adjudicative hearings in the executive branch of Texas government.

(49) Supervision and Control--Supervision by a landscape architect overseeing the work of another whereby

(A) the supervisor and the individual being supervised can document frequent and detailed communication with one another and the supervisor has both control over and detailed professional knowledge of the work; or

(B) the supervisor is in Responsible Charge of the work and the individual performing the work is employed by the supervisor or by the supervisor's employer.

(50) Supplemental Document--A document that modifies or adds to the technical landscape architectural content of an existing Construction Document.

(51) Supplementary Instruction--A directive regarding the modification of or an addition to the technical landscape architectural content of an existing Construction Document.

(52) Surrender--The act of relinquishing all privileges associated with the possession of a valid landscape architectural registration certificate.

(53) TBAE--Texas Board of Architectural Examiners.

(54) TDLR--Texas Department of Licensing and Regulation.

(55) Texas Department of Licensing and Regulation (TDLR)--A Texas state agency responsible for the implementation and enforcement of the Texas Architectural Barriers Act.

(56) TGSLC--Texas Guaranteed Student Loan Corporation.

(57) Vice-Chairman--The member of the Board who serves as the assistant presiding officer and, in the absence of the Chairman, serves as the Board's presiding officer and, if necessary, succeeds the Chairman until a new Chairman is appointed.

~~[(1) APA--Administrative Procedure Act, Government Code, Chapter 2001.]~~

~~[(2) Applicant--An individual who has submitted an application for registration.]~~

~~[(3) Candidate--An individual who has qualified for examination.]~~

~~[(4) CLARB--Council of Landscape Architectural Registration Boards.]~~

~~[(5) Construction Documents--Plans, specifications, and related documents issued by an architect, landscape architect, or interior designer for the purpose(s) of regulatory approval, permit, or construction.]~~

~~[(6) Contract documents--Documents issued for bidding, permit, or contract construction purposes, consisting of drawings, specifications, addenda, or change orders.]~~

~~[(7) Coordination of consultant's work--Comparative review by the landscape architect of the construction documents as prepared by the landscape architect and by each of his/her consultants for the purpose of revealing possible conflicts and omissions and for observing the consultant's proper seal or other certification applied to his/her own work. Revisions necessary for coordination shall remain the responsibility of the consultants.]~~

~~[(8) Direct Supervision--That degree of supervision by a person overseeing the work of another whereby the supervisor and the individual being supervised work in close proximity to one another and the supervisor has both control over and detailed professional knowledge of the work prepared under his or her supervision.]~~

~~[(9) Emeritus Status--An honorary title that allows a retired landscape architect who no longer wishes to actively practice landscape architecture to retain his or her professional title but does not confer the right to practice as a registered professional.]~~

~~[(10) LAAB--Landscape Architectural Accreditation Board.]~~

~~[(11) LARE--Landscape Architect Registration Examination, prepared by CLARB.]~~

~~[(12) Landscape architect--An individual currently registered to practice landscape architecture in the State of Texas.]~~

~~[(13) Landscape architect(s)-of-responsibility--The landscape architect(s) through whom a firm is authorized to offer/perform landscape architectural services and/or whose landscape architect(s') seal(s) and signature(s) appears on contract documents issued from that firm.]~~

~~[(14) Landscape Architects' Registration Law--Regulation of the Practice of Landscape Architecture, Texas Civil Statutes, Article 249c.]~~

~~[(15) Principal--An individual who is a landscape architect and in charge of an organization's landscape architecture practice, either alone or with others.]~~

~~[(16) Registrant--See landscape architect.]~~

~~[(17) Reinstatement--The procedure through which a registration certificate that has been revoked by the Board may be restored to active or Emeritus Status.]~~

~~[(18) Responsible Charge--That degree of control over and detailed knowledge of the content of technical submissions during their preparation as is ordinarily exercised by registered landscape architects applying the required professional standard of care.]~~

~~[(19) Supervision and Control--Supervision by a landscape architect overseeing the work of another whereby:]~~

~~[(A) the supervisor and the individual being supervised can document frequent and detailed communication with one another and the supervisor has both control over and detailed professional knowledge of the work; or]~~

~~[(B) the supervisor is in responsible charge of the work and the person performing the work is employed by the supervisor or by the supervisor's employer.]~~

~~[(20) TBAE--Texas Board of Architectural Examiners.]~~

This 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 22, 2002.

TRD-200205534
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 305-8535

♦ ♦ ♦

22 TAC §§3.6 - 3.8

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

The Texas Board of Architectural Examiners proposes the repeal of §3.6, pertaining to the Board's office location; §3.7, pertaining to the person for service of process; and §3.8, pertaining to meetings and notices thereof for Title 22, Chapter 3, Subchapter A.

These rules are being repealed because they are outdated or superfluous and it is not necessary to include such provisions in the Board's rules.

The modifications are being made as a result of the agency's review of Title 22, Chapter 3, Subchapter A, as mandated by Section 2001.039 of the Texas Government Code.

Cathy L. Hendricks, Executive Director, has determined that for each of the first five years the proposed repeal is in effect, there are expected to be no significant fiscal implications for state or local government as a result of the repeal.

Ms. Hendricks has also determined that for each year of the first five years after the repeal, the public benefits anticipated as

a result of the repeal will be that the elimination of unnecessary provisions in the rules will make it easier to understand and apply the remaining provisions.

The repeal is not expected to impact small business significantly.

No significant economic cost to persons affected by the repeal is expected as a result of the repeal.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The repeal is proposed pursuant to Section 4(a) of Article 249c, Vernon's Texas Civil Statutes, which provides the Texas Board of Architectural Examiners with authority to promulgate rules and includes the implied authority to repeal rules that have been promulgated.

This proposed repeal does not affect any other statutes.

§3.6. Office.
§3.7. Person for Service of Process.
§3.8. Meetings and Notices Thereof.

This 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 22, 2002.

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Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
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For further information, please call: (512) 305-8535

♦ ♦ ♦

22 TAC §3.9

The Texas Board of Architectural Examiners proposes an amendment to §3.9 for Title 22, Chapter 3, Subchapter A, pertaining to officers and employees of the Board. The existing rule designates what officers and employees may be appointed, elected, or hired to do the business of the Board and specifies certain procedures to be followed by the Board. The amendment to this rule is intended to identify defined terms through the use of capitalization, delete provisions that are superfluous in light of Rule 3.13 and in light of requirements specified in other law, and eliminate obsolete provisions such as those describing the responsibilities of the secretary-treasurer. The amendment to this rule is being proposed as a result of the agency's review of Title 22, Chapter 3, Subchapter A as mandated by Section 2001.039 of the Texas Government Code.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the section is in effect, there will be no additional fiscal implications for state or local government as a result of enforcing or administering the section.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the section is in effect the public benefits expected as a result of the amendment to the rule are that the elimination of superfluous and obsolete provisions will enhance the rules' efficiency and usefulness and that the clear identification of defined terms will let affected persons know they should refer to the definitions for further information.

There will be no significant impact on small business.

There will be no change in the cost to persons required to comply with the section.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendment is proposed pursuant to Section 4(a) of Article 249c, and Section 3 of Article 249a, Vernon's Texas Civil Statutes, which provide the Texas Board of Architectural Examiners with authority to promulgate rules, including rules related to the Board's powers, duties, and functions.

The proposed amendment to this section does not affect any other statutes.

§3.9. Officers and Employees.

As prescribed by law, the Governor shall appoint a Chairman, and the Board shall elect a Vice-Chairman and a Secretary-Treasurer. The Chairman [~~governor shall appoint a chairman, the board shall elect a vice-chairman and secretary-treasurer. The chairman~~] shall hold office until replaced by the governor. The Vice-Chairman and Secretary Treasurer [~~vice-chairman and secretary-treasurer~~] shall hold office until their successors have been elected. [~~elected and qualified.~~]

[~~(1) The chairman shall, when present, preside at all meetings; appoint all committees; sign all certificates of registration issued; and perform all other duties pertaining to his office.~~]

[~~(2) The vice-chairman shall, in the absence of the chairman, fulfill the responsibilities of the chairman and, if necessary, succeed the chairman until a new chairman has been appointed by the governor without election in the then current year.~~]

[~~(3) The secretary-treasurer shall, with the assistance of such executive and clerical help as may be required, keep a record of all the proceedings of the board and of all monies received or expended by the board, which record shall be open to public inspection at all reasonable times.~~]

[~~(4) The board may employ such executive, stenographic, and office assistance, including an executive director, as is necessary and such professional assistance at examinations as is required, and shall rent office space as necessary to house the staff and records.~~]

[~~(5) The board may designate the executive director who shall have possession, on behalf of the secretary-treasurer, of all official records of the board and who may, under the supervision of the board and the secretary-treasurer, perform such administrative and ministerial duties as the board authorizes.~~]

[~~(6) The board authorizes the executive director to sign expenditure vouchers, or in the absence of the executive director, those employees the executive director authorizes, in writing, and have signature cards on file at the Comptroller of Public Accounts.~~]

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

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Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 305-8535

♦ ♦ ♦

22 TAC §3.10

The Texas Board of Architectural Examiners proposes new §3.10 for Title 22, Chapter 3, Subchapter A, pertaining to the appointment of committees necessary to conduct the business of the Board. The new rule is being proposed as a result of the Board's decision that committees are useful in increasing the board's efficiency with regard to certain types of task. The new rule also is being proposed as a result of the agency's review of Title 22, Chapter 3, Subchapter A, as mandated by Section 2001.039 of the Texas Government Code. The new rule directs the Chairman to appoint members of the Board to serve on committees as necessary to conduct the business of the board.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the new rule is in effect, possible fiscal implications for state or local government expected as a result of enforcing or administering the new rule include costs associated with committee meetings, such as travel expenses, which must be borne by the agency.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the new rule is in effect the public benefits expected as a result of the new rule are that the Board will be able to complete some tasks, such as reviewing and revising rules, more efficiently.

The new rule will have no impact on small business.

There will be no change in the cost to persons required to comply with the section.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The new rule is proposed pursuant to Section 4(a) of Article 249c, Vernon's Texas Civil Statutes, which provides the Texas Board of Architectural Examiners with authority to promulgate rules.

The proposed new rule does not affect any other statutes.

§3.10. Committees.

The Chairman shall appoint members of the Board to serve on committees as necessary to conduct the business of the Board.

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

Filed with the Office of the Secretary of State on August 22, 2002.

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Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
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For further information, please call: (512) 305-8535

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22 TAC §3.11

The Texas Board of Architectural Examiners proposes an amendment to §3.11 for Title 22, Chapter 3, Subchapter A, pertaining to the official seal for the Board. The existing rule requires that the agency use a seal similar to that of the State of Texas with the words "Texas Board of Architectural Examiners" replacing the words "the State of Texas." The amendment to this rule corrects a punctuation error. The amendment to this rule is being proposed as a result of the agency's review of Title 22, Chapter 3, Subchapter A as mandated by Section 2001.039 of the Texas Government Code.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the section is in effect there will be no additional fiscal implications for state or local government as a result of enforcing or administering the section.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the section is in effect the public benefits expected as a result of the amendment to the rule are that a grammatical error in the rule will have been corrected.

There will be no significant impact on small business.

There will be no change in the cost to persons required to comply with the section.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendment is proposed pursuant to Section 4(a) of Article 249c, Vernon's Texas Civil Statutes, which provides the Texas Board of Architectural Examiners with authority to promulgate rules.

The proposed amendment to this section does not affect any other statutes.

§3.11. Official Seal.

As its official seal, the board will use a seal similar to that of the State of Texas with the words "Texas Board of Architectural Examiners" replacing the words "The State of Texas" [~~Texas,~~"] inscribed around the perimeter.

This 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 22, 2002.

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Cathy L. Hendricks, ASID/IIDA
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Texas Board of Architectural Examiners
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For further information, please call: (512) 305-8535

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22 TAC §3.12

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

The Texas Board of Architectural Examiners proposes the repeal of §3.12 for Title 22, Chapter 3, Subchapter A, which identifies the attorneys that the Board may engage.

This rule is being repealed because it is superfluous in light of existing statutory language designating the attorneys that may represent the Board.

The modifications are being made as a result of the agency's review of Title 22, Chapter 3, Subchapter A, as mandated by Section 2001.039 of the Texas Government Code.

Cathy L. Hendricks, Executive Director, has determined that for each of the first five years the proposed repeal is in effect, there are expected to be no significant fiscal implications for state or local government as a result of the repeal.

Ms. Hendricks has also determined that for each year of the first five years after the repeal, the public benefits anticipated as a result of the repeal will be that the elimination of unnecessary provisions in the rules will make it easier to understand an apply the remaining provisions.

The repeal is not expected to impact small business significantly.

No significant economic cost to persons affected by the repeal is expected as a result of the repeal.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The repeal is proposed pursuant to Section 4(a) of Article 249c, Vernon's Texas Civil Statutes, which provides the Texas Board of Architectural Examiners with authority to promulgate rules and includes the implied authority to repeal rules that have been promulgated.

This proposed repeal does not affect any other statutes.

§3.12. Attorneys.

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

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Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
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For further information, please call: (512) 305-8535

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22 TAC §3.13

The Texas Board of Architectural Examiners proposes an amendment to §3.13 for Title 22, Chapter 3, Subchapter A, pertaining to how the Board conducts business. The existing rule requires the Board to use Robert's Rules of Order unless required otherwise by law to conduct the business of the Board. The amendment to this rule is intended to make a stylistic change in the language of the rule. The change is not substantive. The term "board" also has been capitalized because it is a defined term. The amendment to this rule is being proposed as a result of the agency's review of Title 22, Chapter 3, Subchapter A as mandated by Section 2001.039 of the Texas Government Code.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the section is in effect, there will be no additional fiscal implications for state or local government as a result of enforcing or administering the section.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the section is in effect the public benefits expected as a result of the amendment to the rule are that an awkward stylistic aspect of the rule will have been corrected. Also, the clear identification of defined terms will let affected persons know they should refer to the definitions for further information.

There will be no additional impact on small business.

There will be no change in the cost to persons required to comply with the section.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendment is proposed pursuant to Section 4(a) of Article 249c, Vernon's Texas Civil Statutes, which provides the Texas Board of Architectural Examiners with authority to promulgate rules.

The proposed amendment to this section does not affect any other statutes.

§3.13. Robert's Rules of Order.

Unless required otherwise by law or these rules, Robert's Rules of Order shall be used in the conduct of business by the Board [~~this board~~].

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

Filed with the Office of the Secretary of State on August 22, 2002.

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Cathy L. Hendricks, ASID/IIDA
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Texas Board of Architectural Examiners
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For further information, please call: (512) 305-8535

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22 TAC §§3.14 - 3.18

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

The Texas Board of Architectural Examiners proposes the repeal of §3.14, pertaining to what constitutes a quorum; §3.15, pertaining to who shall sign certificates of registration; §3.16, pertaining to the Board's official records; §3.17, pertaining to reimbursement for expenses incurred in the conduct of Board business; and §3.18 pertaining to the Council of Landscape Architectural Registration Boards (CLARB) for Title 22, Chapter 3, Subchapter A.

These rules are being repealed because Rule 3.14 is unnecessary because Robert's Rules of Order satisfactorily govern this issue; it is unnecessary to have a rule designating who shall sign certificates or registration; Rule 3.16 is superfluous because other law requires the Board to maintain the designated records; Rule 3.17 is unnecessary because other law governs the reimbursement of the Board and its staff; and Rule 3.18 is being repealed so that the Board will have increased flexibility to determine whether to maintain membership in national and regional organizations. In addition, Subsection (b) of the rule is unnecessary because the Board may direct staff to provide information regarding a registration examination at any time. Subsection (c)

is unnecessary because in order for an outside entity to successfully administer a registration examination for the agency, the agency must offer such cooperation to the outside entity.

The modifications are being made as a result of the agency's review of Title 22, Chapter 3, Subchapter A, as mandated by Section 2001.039 of the Texas Government Code.

Cathy L. Hendricks, Executive Director, has determined that for each of the first five years the proposed repeal is in effect, there are expected to be no significant fiscal implications for state or local government as a result of the repeal.

Ms. Hendricks has also determined that for each year of the first five years after the repeal, the public benefits anticipated as a result of the repeal will be that the elimination of unnecessary provisions in the rules will make it easier to understand and apply the remaining provisions.

The repeal is not expected to impact small business significantly.

No significant economic cost to persons affected by the repeal is expected as a result of the repeal.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The repeal is proposed pursuant to Section 4(a) of Article 249c, Vernon's Texas Civil Statutes, which provides the Texas Board of Architectural Examiners with authority to promulgate rules and includes the implied authority to repeal rules that have been promulgated.

This proposed repeal does not affect any other statutes.

§3.14. Quorum.

§3.15. Signing Certificates.

§3.16. Official Records.

§3.17. Expenses.

§3.18. Council of Landscape Architectural Registration Boards (CLARB).

This 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 22, 2002.

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Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
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For further information, please call: (512) 305-8535

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22 TAC §3.14

The Texas Board of Architectural Examiners proposes new §3.14 for Title 22, Chapter 3, Subchapter A, pertaining to procedures for addressing the Board. The new rule is being proposed as a result of the agency's review of Title 22, Chapter 3, Subchapter A, as mandated by Section 2001.039 of the Texas Government Code. The new rule requires individuals who wish to address the Board during a public meeting to submit to the Board's Executive Director a request which must include a summary of the issue to be presented. The request must be submitted at least forty-five days before the scheduled date of the public meeting, and the presentation must be limited to 5 minutes, which may be extended at the Board's discretion.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the new rule is in effect, no significant fiscal implications for state or local government are expected as a result of enforcing or administering the section.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the new rule is in effect the public benefits expected as a result of the new rule will be that the public will be better informed of their right to address the Board, and procedures will be in place to help ensure public presentations are controlled and properly posted pursuant to the Open Meetings Act.

No significant impact on small business is expected.

There is expected to be no significant change in the cost to persons required to comply with the section other than minimal costs associated with notifying the agency.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The new rule is proposed pursuant to Section 4(a) of Article 249c, and Section 3(g) of Article 249a, Vernon's Texas Civil Statutes, which provide the Texas Board of Architectural Examiners with authority to promulgate rules, including rules related to providing the public with a reasonable opportunity to appear before the Board.

The proposed new rule does not affect any other statutes.

§3.14. Procedure for Addressing the Board.

(a) In order to address the Board during a public meeting, a member of the public must submit to the Board's Executive Director a request to address the Board and a summary of the issue to be presented so that the issue may be included on the agenda for the public meeting.

(b) A request to address the Board must be submitted to the Executive Director at least forty-five (45) days before the scheduled date of the public meeting during which the member of the public wishes to address the Board.

(c) Each member of the public who addresses the Board shall be allotted five (5) minutes to make a presentation to the Board. At the sole discretion of the Board, the five-minute period may be extended if necessary.

This 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 22, 2002.

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Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
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For further information, please call: (512) 305-8535

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CHAPTER 5. INTERIOR DESIGNERS
SUBCHAPTER A. SCOPE; DEFINITIONS

22 TAC §5.1

The Texas Board of Architectural Examiners proposes an amendment to §5.1 for Title 22, Chapter 5, Subchapter A, pertaining to the purpose for the Rules and Regulations of the Board. The existing rule indicates the purpose as being to interpret and implement Texas Civil Statutes, Article 249a. The amendment to this rule is intended to simplify the rule without substantively changing the Board's authority or duties. The amendment to this rule is being proposed as a result of the agency's review of Title 22, Chapter 5, Subchapter A, as mandated by §2001.039 of the Texas Government Code.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the section is in effect, there will be no additional fiscal implications for state or local government as a result of enforcing or administering the section.

Ms. Hendricks has also determined that for the first five-year period the section is in effect the public benefits expected as a result of the amendment to the rule are that the rule will be easier to understand and interpret. There will be no significant impact on small business. There will be no change in the cost to persons required to comply with the section.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The amendment is proposed pursuant to §5(d) of Article 249e, Vernon's Texas Civil Statutes, which provides the Texas Board of Architectural Examiners with authority to promulgate rules.

The proposed amendment to this section does not affect any other statutes.

§5.1. Purpose.

The Rules and Regulations of the Board [~~rules and regulations of the Texas Board of Architectural Examiners~~] are set forth for the purpose of interpreting and implementing the Interior Designers' Registration Law [~~Texas Civil Statutes, Article 249e, the Regulation of the Practice of Interior Design in Texas; establishing the board and conferring upon it responsibility for registration of interior designers and the regulation of the practice of interior design~~].

This 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 22, 2002.

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Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
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For further information, please call: (512) 305-8535

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22 TAC §§5.2 - 5.4

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

The Texas Board of Architectural Examiners proposes the repeal of §5.2, pertaining to citations; §5.3, pertaining to the Board's regulatory authority; and §5.4, pertaining to severability, for Title 22, Chapter 5, Subchapter A.

These rules are being repealed because they are superfluous restatements of general provisions of the law and it is not necessary to include them in the Board's rules.

The modifications are being made as a result of the agency's review of Title 22, Chapter 5, as mandated by §2001.039 of the Texas Government Code.

Cathy L. Hendricks, Executive Director, has determined that for each of the first five years the proposed repeal is in effect, there are expected to be no significant fiscal implications for state or local government as a result of the repeal.

Ms. Hendricks has also determined that for each year of the first five years after the repeal, the public benefits anticipated as a result of the repeal will be that the elimination of unnecessary provisions in the rules will make it easier to understand and apply the remaining provisions. The repeal is not expected to impact small business significantly. No significant economic cost to persons affected by the repeal is expected as a result of the repeal.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The repeal is proposed pursuant to §5(d) of Article 249e, Vernon's Texas Civil Statutes, which provides the Texas Board of Architectural Examiners with authority to promulgate rules and includes the implied authority to repeal rules that have been promulgated.

This proposed repeal does not affect any other statutes.

§5.2. Citation.

§5.3. Board's Regulatory Authority.

§5.4. Severability.

This 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 22, 2002.

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Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
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For further information, please call: (512) 305-8535

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22 TAC §5.5

The Texas Board of Architectural Examiners proposes an amendment to §5.5 for Title 22, Chapter 5, Subchapter A, pertaining to the definitions of words and terms used in Title 22, Chapter 5. The amendment to this rule is intended to update the definitions of words and terms on the list, remove obsolete words and terms from the list, and provide definitions for words and terms being added to the list. The amendment to this rule is being proposed as a result of the agency's review of Title 22, Chapter 5, Subchapter A, as mandated by §2001.039 of the Texas Government Code.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period

the section is in effect, there will be no additional fiscal implications for state or local government as a result of enforcing or administering the section.

Ms. Hendricks has also determined that for the first five-year period the section is in effect the public benefits expected as a result of the amendment to the rule are that the Board's rules will be more specific and easier to understand and follow because the terms used therein will be more clearly defined. There will be no additional impact on small business. There will be no change in the cost to persons required to comply with the section.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The amendment is proposed pursuant to §5(d) of Article 249e, Vernon's Texas Civil Statutes, which provides the Texas Board of Architectural Examiners with authority to promulgate rules.

The proposed amendment to this section does not affect any other statutes.

§5.5. Terms Defined Herein.

The following words and terms, when used in this chapter [~~these rules~~], shall have the following meanings, unless the context clearly indicates otherwise.

(1) The Act--The Interior Designer's Registration Law.

(2) Actual Signature--A signature produced personally by the individual whose name is signed or an authorized copy of such signature.

(3) Administrative Procedure Act (APA)--Texas Government Code §§2001.001 et seq.

(4) APA--Administrative Procedure Act.

(5) Applicant--An individual who has submitted an application for registration or reinstatement but has not yet completed the registration or reinstatement process.

(6) Architectural Interior Construction--A building project that involves only the inside elements of a building and, in order to be completed, necessitates the "practice of architecture" as that term is defined in 22 Texas Administrative Code §1.5.

(7) Authorship--The state of having personally created something.

(8) Barrier-Free Design--The design of a facility or the design of an alteration of a facility which complies with the Texas Accessibility Standards or the Americans with Disabilities Act.

(9) Board--Texas Board of Architectural Examiners.

(10) Candidate--An Applicant who has been approved by the Board to take the interior design registration examination.

(11) CEPH--Continuing Education Program Hour(s).

(12) Chairman--The member of the Board who serves as the Board's presiding officer.

(13) Construction Documents--Plans; specifications; and addenda, change orders, Supplementary Instructions, and other Supplemental Documents issued by an Interior Designer for the purpose(s) of regulatory approval, permit, or construction.

(14) Consultant--An individual who prepares or assists in the preparation of technical design documents issued by an Interior Designer for use in connection with the Interior Designer's Construction Documents.

(15) Contested Case--A proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing.

(16) Continuing Education Program Hour (CEPH)--At least fifty (50) minutes of time spent in an activity that qualifies to fulfill the Board's continuing education requirements.

(17) Delinquent--A registration status signifying that an Interior Designer's registration has expired because the Interior Designer has failed to remit the applicable renewal fee to the Board.

(18) Direct Supervision--That degree of supervision by an individual overseeing the work of another whereby the supervisor and the individual being supervised work in close proximity to one another and the supervisor has both control over and detailed professional knowledge of the work prepared under his or her supervision.

(19) E-mail Directory--A listing of e-mail addresses used to advertise interior design services and published on the Internet under circumstances where the Interior Designers included in the list have control over the information included in the list.

(20) Emeritus Interior Designer (or Interior Designer Emeritus)--An honorary title that may be used by an Inactive Interior Designer who has retired from the Practice of Interior Design.

(21) Feasibility Study--A report of a detailed investigation and analysis conducted to determine the advisability of a proposed interior design project from a technical interior design standpoint.

(22) FIDER--Foundation for Interior Design Education Research.

(23) Foundation for Interior Design Education Research (FIDER)--An agency that sets standards for postsecondary interior design education and evaluates college and university interior design programs.

(24) Good Standing--

(A) a registration status signifying that an Interior Designer is not delinquent in the payment of any fees owed to the Board; or

(B) an application status signifying that an Applicant or Candidate is not delinquent in the payment of any fees owed to the Board, is not the subject of a pending TBAE enforcement proceeding, and has not been the subject of formal disciplinary action by an interior design registration board that would provide a ground for the denial of the application for interior design registration in Texas.

(25) Governmental Jurisdiction--A state, territory, or country located outside the State of Texas.

(26) Inactive--A registration status signifying that an Interior Designer may not Practice Interior Design in the State of Texas.

(27) Interior Design--The identification, research, or development of creative solutions to problems relating to the function or quality of the interior environment; the performance of services relating to interior spaces, including programming, design analysis, space planning of non-load-bearing interior construction, and application of aesthetic principles, by using specialized knowledge of interior construction, building codes, equipment, materials, or furnishings; or the preparation of interior design plans, specifications, or related documents about the design of non-load-bearing interior spaces.

(28) Interior Designer--An individual who holds a valid interior design registration certificate granted by the Board.

(29) Interior Designer of Record--An Interior Designer who has submitted an affidavit confirming that the Interior Designer is employed on a full-time basis by or formally associated with a business entity that uses the title "interior designer" or the term "interior design" to describe itself or a service it offers or performs in Texas. The Interior Designer of Record for a business entity shall be responsible for answering or designating another individual to answer inquiries of the Board concerning matters under the jurisdiction of the Board which are related to the business entity's use of the title "interior designer" or the term "interior design."

(30) Interior Designer's Registration Law--Article 249e, Vernon's Texas Civil Statutes.

(31) Interior Design Intern--An individual participating in an internship to complete the experiential requirements for interior design registration by examination in Texas.

(32) Licensed--Registered.

(33) Member Board--An interior design registration board that is part of NCIDQ.

(34) National Council for Interior Design Qualification (NCIDQ)--a nonprofit organization of state and provisional interior design regulatory agencies and national organizations whose membership is made up in total or in part of interior designers.

(35) NCIDQ--National Council for Interior Design Qualification.

(36) Nonregistrant--An individual who is not an Interior Designer.

(37) Registrant--An Interior Designer.

(38) Reinstatement--The procedure through which an interior design registration certificate that has been cancelled, Surrendered, or revoked by the Board may be restored.

(39) Renewal--The procedure through which an Interior Designer pays an annual fee so that the Interior Designer's registration certificate will continue to be effective.

(40) Responsible Charge--That degree of control over and detailed knowledge of the content of technical submissions during their preparation as is ordinarily exercised by registered interior designers applying the required professional standard of care.

(41) Rules and Regulations of the Board--22 Texas Administrative Code §§5.1 et seq.

(42) Rules of Procedure of SOAH--1 Texas Administrative Code §§155.1 et seq.

(43) Secretary-Treasurer--The member of the Board who signs the official copy of the minutes from each meeting of the Board and maintains records related to Board members' attendance at meetings of the Board.

(44) SOAH--State Office of Administrative Hearings.

(45) State Office of Administrative Hearings (SOAH)--A Texas Governmental Entity created to serve as an independent forum for the conduct of adjudicative hearings in the executive branch of Texas government.

(46) Supervision and Control--Supervision by an interior designer overseeing the work of another whereby:

(A) the supervisor and the individual being supervised can document frequent and detailed communication with one another and the supervisor has both control over and detailed professional knowledge of the work; or

(B) the supervisor is in Responsible Charge of the work and the individual performing the work is employed by the supervisor or by the supervisor's employer.

(47) Supplemental Document--A document that modifies or adds to the technical interior design content of an existing Construction Document.

(48) Supplementary Instruction--A directive regarding the modification of or an addition to the technical interior design content of an existing Construction Document.

(49) Surrender--The act of relinquishing all privileges associated with the possession of a valid interior design registration certificate.

(50) Table of Equivalents for Education and Experience in Interior Design--22 Texas Administrative Code §§5.201 et seq.

(51) TBAE--Texas Board of Architectural Examiners.

(52) TDLR--Texas Department of Licensing and Regulation.

(53) Texas Department of Licensing and Regulation (TDLR)--A Texas state agency responsible for the implementation and enforcement of the Texas Architectural Barriers Act.

(54) TGSLC--Texas Guaranteed Student Loan Corporation.

(55) Vice-Chairman--The member of the Board who serves as the assistant presiding officer and, in the absence of the Chairman, serves as the Board's presiding officer and, if necessary, succeeds the Chairman until a new Chairman is appointed.

~~[(1) APA--Administrative Procedure Act, Government Code, Chapter 2001.]~~

~~[(2) Applicant--An individual who has submitted an application for registration.]~~

~~[(3) Candidate--An individual who has qualified for examination.]~~

~~[(4) Construction Documents--Plans, specifications, and related documents issued by an architect, landscape architect, or interior designer for the purpose(s) of regulatory approval, permit, or construction.]~~

~~[(5) Contract documents--Documents issued for permits, or construction purposes, consisting of plans, specifications, and related documents.]~~

~~[(6) Coordination of consultant's work--Comparative review by the interior designer of the construction documents as prepared by the interior designer and by each of his or her consultants for the purpose of revealing possible conflicts and omissions and for observing the consultant's proper seal or other certification applied to his or her own work. Revisions necessary for coordination shall remain the responsibility of the consultants.]~~

~~[(7) Direct Supervision--That degree of supervision by a person overseeing the work of another whereby the supervisor and the individual being supervised work in close proximity to one another and the supervisor has both control over and detailed professional knowledge of the work prepared under his or her supervision.]~~

[(8) Emeritus Status--An honorary title that allows a retired interior designer who no longer wishes to actively practice interior design to retain his or her professional title but does not confer the right to practice as a registered professional.]

[(9) FIDER--Foundation for Interior Design Education Research.]

[(10) Interior designer--An individual currently registered to use the title "interior designer" and authorized to offer or perform "interior design" services in the State of Texas.]

[(11) Interior Designers' Registration Law--Regulation of the Practice of Interior Design, Texas Civil Statutes, Article 249e.]

[(12) NCIDQ--National Council for Interior Design Qualification.]

[(13) Principal--An individual who is an interior designer, and in charge of an organization's interior design practice, either alone or with other interior designers.]

[(14) Registrant--See interior designer.]

[(15) Reinstatement--The procedure through which a registration certificate that has been revoked by the Board may be restored to active or emeritus status.]

[(16) Responsible Charge--That degree of control over and detailed knowledge of the content of technical submissions during their preparation as is ordinarily exercised by registered interior designers applying the required professional standard of care.]

[(17) Supervision and Control--Supervision by an interior designer overseeing the work of another whereby:]

[(A) the supervisor and the individual being supervised can document frequent and detailed communication with one another and the supervisor has both control over and detailed professional knowledge of the work; or]

[(B) the supervisor is in responsible charge of the work and the person performing the work is employed by the supervisor or by the supervisor's employer.]

[(18) Table of Equivalents--The latest edition of the document used by the board to qualify candidates for examination, entitled Table of Equivalents for Education and Experience in Interior Design.]

[(19) TBAE--Texas Board of Architectural Examiners.]

This 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 22, 2002.

TRD-200205545
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
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For further information, please call: (512) 305-8535

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22 TAC §§5.6 - 5.8

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

The Texas Board of Architectural Examiners proposes the repeal of §5.6, pertaining to the Board's office location; §5.7, pertaining to the person for service of process; and §5.8, pertaining to meetings and notices thereof for Title 22, Chapter 5, Subchapter A.

These rules are being repealed because they are outdated or superfluous and it is not necessary to include such provisions in the Board's rules.

The modifications are being made as a result of the agency's review of Title 22, Chapter 5, Subchapter A, as mandated by §2001.039 of the Texas Government Code.

Cathy L. Hendricks, Executive Director, has determined that for each of the first five years the proposed repeal is in effect, there are expected to be no significant fiscal implications for state or local government as a result of the repeal.

Ms. Hendricks has also determined that for each year of the first five years after the repeal, the public benefits anticipated as a result of the repeal will be that the elimination of unnecessary provisions in the rules will make it easier to understand and apply the remaining provisions. The repeal is not expected to impact small business significantly. No significant economic cost to persons affected by the repeal is expected as a result of the repeal.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The repeal is proposed pursuant to §5(d) of Article 249e, Vernon's Texas Civil Statutes, which provides the Texas Board of Architectural Examiners with authority to promulgate rules and includes the implied authority to repeal rules that have been promulgated.

This proposed repeal does not affect any other statutes.

§5.6. Office.
§5.7. Person for Service of Process.
§5.8. Meetings and Notices Thereof.

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

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Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
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22 TAC §5.9

The Texas Board of Architectural Examiners proposes an amendment to §5.9 for Title 22, Chapter 5, Subchapter A, pertaining to officers and employees of the Board. The existing rule designates what officers and employees may be appointed, elected, or hired to do the business of the Board and specifies certain procedures to be followed by the Board. The amendment to this rule is intended to identify defined terms through the use of capitalization, delete provisions that are superfluous in light of §5.13 and in light of requirements specified in other law, and eliminate obsolete provisions such as those describing the

responsibilities of the secretary-treasurer. The amendment to this rule is being proposed as a result of the agency's review of Title 22, Chapter 5, Subchapter A, as mandated by §2001.039 of the Texas Government Code.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the section is in effect, there will be no additional fiscal implications for state or local government as a result of enforcing or administering the section.

Ms. Hendricks has also determined that for the first five-year period the section is in effect the public benefits expected as a result of the amendment to the rule are that the elimination of superfluous and obsolete provisions will enhance the rules' efficiency and usefulness and that the clear identification of defined terms will let affected persons know they should refer to the definitions for further information. There will be no significant impact on small business. There will be no change in the cost to persons required to comply with the section.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The amendment is proposed pursuant to §5(d) of Article 249e and §3 of Article 249a, Vernon's Texas Civil Statutes which provide the Texas Board of Architectural Examiners with authority to promulgate rules, including rules related to the Board's powers, duties, and functions.

The proposed amendment to this section does not affect any other statutes.

§5.9. Officers and Employees.

As prescribed by law, the Governor shall appoint a Chairman, and the Board shall elect a Vice-Chairman and a Secretary-Treasurer. The Chairman [~~governor shall appoint a chairman, the board shall elect a vice-chairman, and secretary-treasurer. The chairman~~] shall hold office until replaced by the governor. The Vice-Chairman and Secretary-Treasurer [~~vice-chairman and secretary-treasurer~~] shall hold office until their successors have been elected [~~and qualified~~].

[~~(1) The chairman shall, when present, preside at all meetings; appoint all committees; sign all certificates of registration issued; and perform all other duties pertaining to his office.~~]

[~~(2) The vice-chairman shall, in the absence of the chairman, fulfill the responsibilities of the chairman and, if necessary, succeed the chairman until a new chairman has been appointed by the governor without election in the then current year.~~]

[~~(3) The secretary-treasurer shall, with the assistance of such executive and clerical help as may be required, keep a record of all proceedings of the board and of all monies received or expended by the board, which record shall be open to public inspection at all reasonable times.~~]

[~~(4) The board may employ such executive, stenographic, and office assistance, including an executive director, as is necessary and such professional assistance at examinations as is required, and shall rent office space as necessary to house the staff and records.~~]

[~~(5) The board may designate the executive director who shall have possession, on behalf of the secretary-treasurer, of all the official records of the board and who may, under the supervision of the board and the secretary-treasurer, perform such administrative and ministerial duties as the board authorizes.~~]

[~~(6) The board authorizes the executive director to sign expenditure vouchers, or in the absence of the executive director, those employees the executive director authorizes, in writing, and have signature cards on file at the Comptroller of Public Accounts.~~]

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

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Cathy L. Hendricks, ASID/IIDA
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Texas Board of Architectural Examiners
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For further information, please call: (512) 305-8535

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22 TAC §5.10

The Texas Board of Architectural Examiners proposes a new §5.10 for Title 22, Chapter 5, Subchapter A, pertaining to the appointment of committees necessary to conduct the business of the Board. The new rule is being proposed as a result of the Board's decision that committees are useful in increasing the board's efficiency with regard to certain types of task. The new rule also is being proposed as a result of the agency's review of Title 22, Chapter 5, Subchapter A, as mandated by §2001.039 of the Texas Government Code. The new rule directs the Chairman to appoint members of the Board to serve on committees as necessary to conduct the business of the board.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the new rule is in effect, possible fiscal implications for state or local government expected as a result of enforcing or administering the new rule include costs associated with committee meetings, such as travel expenses, which must be borne by the agency.

Ms. Hendricks has also determined that for the first five-year period the new rule is in effect the public benefits expected as a result of the new rule are that the Board will be able to complete some tasks, such as reviewing and revising rules, more efficiently. The new rule will have no impact on small business. There will be no change in the cost to persons required to comply with the section.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The new rule is proposed pursuant to §5(d) of Article 249e, Vernon's Texas Civil Statutes, which provides the Texas Board of Architectural Examiners with authority to promulgate rules.

The proposed new rule does not affect any other statutes.

§5.10. Committees.

The Chairman shall appoint members of the Board to serve on committees as necessary to conduct the business of the Board.

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

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Cathy L. Hendricks, ASID/IIDA
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For further information, please call: (512) 305-8535

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22 TAC §5.12

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

The Texas Board of Architectural Examiners proposes the repeal of §5.12 for Title 22, Chapter 5, Subchapter A, which identifies the attorneys that the Board may engage.

This rule is being repealed because it is superfluous in light of existing statutory language designating the attorneys that may represent the Board.

The modifications are being made as a result of the agency's review of Title 22, Chapter 5, Subchapter A, as mandated by §2001.039 of the Texas Government Code.

Cathy L. Hendricks, Executive Director, has determined that for each of the first five years the proposed repeal is in effect, there are expected to be no significant fiscal implications for state or local government as a result of the repeal.

Ms. Hendricks has also determined that for each year of the first five years after the repeal, the public benefits anticipated as a result of the repeal will be that the elimination of unnecessary provisions in the rules will make it easier to understand and apply the remaining provisions. The repeal is not expected to impact small business significantly. No significant economic cost to persons affected by the repeal is expected as a result of the repeal.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The repeal is proposed pursuant to §5(d) of Article 249e, Vernon's Texas Civil Statutes, which provides the Texas Board of Architectural Examiners with authority to promulgate rules and includes the implied authority to repeal rules that have been promulgated.

This proposed repeal does not affect any other statutes.

§5.12. Attorneys.

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

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Cathy L. Hendricks, ASID/IIDA
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Texas Board of Architectural Examiners
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For further information, please call: (512) 305-8535

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22 TAC §5.13

The Texas Board of Architectural Examiners proposes an amendment to §5.13 for Title 22, Chapter 5, Subchapter A, pertaining to how the Board conducts business. The existing rule requires the Board to use Robert's Rules of Order unless required otherwise by law to conduct the business of the Board. The amendment to this rule is intended to make a stylistic change in the language of the rule. The change is not substantive. The term "board" also has been capitalized because it is a defined term. The amendment to this rule is being proposed as a result of the agency's review of Title 22, Chapter 5, Subchapter A, as mandated by §2001.039 of the Texas Government Code.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the section is in effect, there will be no additional fiscal implications for state or local government as a result of enforcing or administering the section.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the section is in effect the public benefits expected as a result of the amendment to the rule are that an awkward stylistic aspect of the rule will have been corrected. Also, the clear identification of defined terms will let affected persons know they should refer to the definitions for further information. There will be no additional impact on small business. There will be no change in the cost to persons required to comply with the section.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The amendment is proposed pursuant to §5(d) of Article 249e, Vernon's Texas Civil Statutes, which provides the Texas Board of Architectural Examiners with authority to promulgate rules, including rules.

The proposed amendment to this section does not affect any other statutes.

§5.13. Robert's Rules of Order.
Unless required otherwise by law or these rules, Robert's Rules of Order shall be used in the conduct of business by the Board [~~this board~~].

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

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22 TAC §§5.14 - 5.18

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

The Texas Board of Architectural Examiners proposes the repeal of §5.14, pertaining to what constitutes a quorum; §5.15, pertaining to who shall sign certificates of registration; §5.16,

pertaining to the Board's official records; §5.17, pertaining to reimbursement for expenses incurred in the conduct of Board business; and §5.18 pertaining to National Council for Interior Design Qualification for Title 22, Chapter 5, Subchapter A.

These rules are being repealed because §5.14 is unnecessary because Robert's Rules of Order satisfactorily govern this issue; it is unnecessary to have a rule designating who shall sign certificates or registration; §5.16 is superfluous because other law requires the Board to maintain the designated records; §5.17 is unnecessary because other law governs the reimbursement of the Board and its staff; and §5.18 is being repealed so that the Board will have increased flexibility to determine whether to maintain membership in national and regional organizations. In addition, subsection (b) of the rule is unnecessary because the Board may direct staff to provide information regarding a registration examination at any time. Subsection (c) is unnecessary because in order for an outside entity to successfully administer a registration examination for the agency, the agency must offer such cooperation to the outside entity.

The modifications are being made as a result of the agency's review of Title 22, Chapter 5, Subchapter A, as mandated by §2001.039 of the Texas Government Code.

Cathy L. Hendricks, Executive Director, has determined that for each of the first five years the proposed repeal is in effect, there are expected to be no significant fiscal implications for state or local government as a result of the repeal.

Ms. Hendricks has also determined that for each year of the first five years after the repeal, the public benefits anticipated as a result of the repeal will be that the elimination of unnecessary provisions in the rules will make it easier to understand and apply the remaining provisions. The repeal is not expected to impact small business significantly. No significant economic cost to persons affected by the repeal is expected as a result of the repeal.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The repeal is proposed pursuant to §5(d) of Article 249e, Vernon's Texas Civil Statutes, which provides the Texas Board of Architectural Examiners with authority to promulgate rules and includes the implied authority to repeal rules that have been promulgated.

This proposed repeal does not affect any other statutes.

§5.14. Quorum.
§5.15. Signing Certificates.
§5.16. Official Records.
§5.17. Expenses.
§5.18. National Council for Interior Design Qualification.

This 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 22, 2002.

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Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
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For further information, please call: (512) 305-8535

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22 TAC §5.14

The Texas Board of Architectural Examiners proposes a new §5.14 for Title 22, Chapter 5, Subchapter A, pertaining to procedures for addressing the Board. The new rule is being proposed as a result of the agency's review of Title 22, Chapter 5, Subchapter A, as mandated by §2001.039 of the Texas Government Code. The new rule requires individuals who wish to address the Board during a public meeting to submit to the Board's Executive Director a request which must include a summary of the issue to be presented. The request must be submitted at least forty-five days before the scheduled date of the public meeting, and the presentation must be limited to 5 minutes, which may be extended at the Board's discretion.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the new rule is in effect, no significant fiscal implications for state or local government are expected as a result of enforcing or administering the section.

Ms. Hendricks has also determined that for the first five-year period the new rule is in effect the public benefits expected as a result of the new rule will be that the public will be better informed of their right to address the Board, and procedures will be in place to help ensure public presentations are controlled and properly posted pursuant to the Open Meetings Act. No significant impact on small business is expected. There is expected to be no significant change in the cost to persons required to comply with the section other than minimal costs associated with notifying the agency.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The new rule is proposed pursuant to §5(d) of Article 249e and §3(g) of Article 249(a), Vernon's Texas Civil Statutes, which provide the Texas Board of Architectural Examiners with authority to promulgate rules, including rules related to providing the public with a reasonable opportunity to appear before the Board.

The proposed new rule does not affect any other statutes.

§5.14. Procedure for Addressing the Board.

(a) In order to address the Board during a public meeting, a member of the public must submit to the Board's Executive Director a request to address the Board and a summary of the issue to be presented so that the issue may be included on the agenda for the public meeting.

(b) A request to address the Board must be submitted to the Executive Director at least forty-five (45) days before the scheduled date of the public meeting during which the member of the public wishes to address the Board.

(c) Each member of the public who addresses the Board shall be allotted five (5) minutes to make a presentation to the Board. At the sole discretion of the Board, the five-minute period may be extended if necessary.

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

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Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
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PART 21. TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

CHAPTER 463. APPLICATIONS AND EXAMINATIONS

22 TAC §463.13

The Texas State Board of Examiners of Psychologists proposes amendments to §463.13, concerning Requirements for Experienced Out-of-State Applicants. The amendments are being proposed in order to add to the pool of experienced out-of-state applicants those persons who hold the CPQ credential granted by the ASPPB. However, such persons must be provisionally licensed and have current proof that no disciplinary action has ever been taken against their license, nor is there any pending complaint against their license.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Lee 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 to make the rules easier for the licensees and public to follow and understand. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Kourtney D. McDonald, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700.

The amendments are proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

The proposed amendment does not affect other statutes, articles, or codes.

§463.13. Requirements for Experienced Out-of-State Applicants.

(a) An applicant who provides documentation that the applicant has been actively licensed and in good standing as a psychologist in another jurisdiction [~~for 10 years, and~~] for at least 5 consecutive years immediately preceding the filing of [~~consecutively before~~] the application, [~~is submitted~~] must meet the following requirements, which are a substitute for Board rule §463.11:

(1) The applicant must have already obtained provisional licensure and must document that the applicant is a provisionally licensed psychologist in good standing.

(2) Supervised experience. The applicant must affirm that the applicant has received 3,000 hours of experience supervised by a psychologist licensed in the state where the supervision took place. At least half of these hours (1,500 hours) must have been completed after the doctoral degree was conferred or completed. The formal internship year may be met either before or after the doctoral degree was conferred or completed, as indicated on the official transcript.

(3) The applicant must document that the applicant has not received any disciplinary action by any other jurisdiction and that there is no pending action or complaint against the applicant in any other jurisdiction.

(b) Licensees holding the Certification of Professional Qualification in Psychology (CPQ) Credential Granted by the Association of State and Provincial Psychology Boards (ASPPB). An out-of-state licensee holding a CPQ credential granted by the ASPPB meets the requirements of Board rule §463.11. In addition, out-of-state licensees who hold a CPQ credential must meet requirements (a)(1) and (a)(3) listed above. The Board reserves the right to accept or reject licensure for persons holding the CPQ credential.

This 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 23, 2002.

TRD-200205607
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 305-7700

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CHAPTER 465. RULES OF PRACTICE

22 TAC §465.11

The Texas State Board of Examiners of Psychologists proposes amendments to §465.11, concerning Informed Consent/Describing Psychological Services. The amendments are being proposed in order to emphasize the requirement that informed consent must be documented in writing.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Lee 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 to make the rules easier for the licensees and public to follow and understand. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Kourtney D. McDonald, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700.

The amendments are proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

The proposed amendment does not affect other statutes, articles, or codes.

§465.11. Informed Consent/Describing Psychological Services.

(a) Licensees obtain and document in writing informed consent concerning all services they intend to provide to the patient, client or other recipient(s) of the psychological services prior to initiating the services, using language that is reasonably understandable to the recipients unless consent is precluded by applicable federal or state law.

(b) - (h) (No change.)

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

Filed with the Office of the Secretary of State on August 23, 2002.

TRD-200205608
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 305-7700

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22 TAC §465.12

The Texas State Board of Examiners of Psychologists proposes amendments to §465.12, concerning Privacy and Confidentiality. The amendments are being proposed in order to clarify the duties of licensees with respect to confidentiality and the interplay of informed consent in the process.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Lee 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 to make the rules easier for the licensees and public to follow and understand. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Kourtney D. McDonald, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700.

The amendments are proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

The proposed amendment does not affect other statutes, articles, or codes.

§465.12. Privacy and Confidentiality.

(a) (No change.)

(b) Licensees must inform their patients or clients about confidentiality and foreseeable limitations on confidentiality created by existing and reasonably foreseeable circumstances prior to the commencement of services as a part of the informed consent process described in Rule 465.11.

(c) - (f) (No change.)

(g) Licensees may share information for consultation purposes without a consent only to the extent necessary to achieve the purposes of the consultation. Licensees shall exclude [~~and excluding~~] information that could lead to the identification of the patient or client.

(h) (No change.)

(i) Licensees include in written and oral reports and consultations, only information germane to the purpose for which the communication is made.

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

Filed with the Office of the Secretary of State on August 23, 2002.

TRD-200205609
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 305-7700

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22 TAC §465.13

The Texas State Board of Examiners of Psychologists proposes amendments to §465.13, concerning Personal Problems, Conflicts and Dual Relationships. The amendments are being proposed in order to eliminate rules on sexual misconduct which are covered in Board rule §465.33.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Lee 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 to make the rules easier for the licensees and public to follow and understand. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Kourtney D. McDonald, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700.

The amendments are proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

The proposed amendment does not affect other statutes, articles, or codes.

§465.13. Personal Problems, Conflicts and Dual Relationships.

(a) (No change.)

(b) Dual Relationships.

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

[~~(3) Licensees do not have sexual relationships with a client or patient.~~]

(3) [~~(4)~~] Licensees do not provide psychological services to an individual with whom they have had sexual relationships.

[~~(5) Licensees do not have sexual relationships with persons over whom they have supervisory, evaluative or other authority, including students, trainees or supervisees.~~]

(4) [~~(6)~~] Licensees do not terminate the delivery of psychological services with an individual in order to engage in a sexual relationship with that person.

(5) [~~(7)~~] A licensee considering a professional relationship that would result in a dual or multiple relationship shall take appropriate measures, such as obtaining professional consultation or assistance, to determine whether there is a risk that the dual relationship could impair the licensee's objectivity or cause harm to the other party. If potential for impairment or harm exists, the licensee shall not provide services regardless of the wishes of the other party.

(6) [~~(8)~~] A licensee in a potentially harmful dual or multiple relationship must cease to provide psychological services to the other party, regardless of the wishes of that party.

This 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 23, 2002.

TRD-200205610
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 305-7700

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22 TAC §465.15

The Texas State Board of Examiners of Psychologists proposes amendments to §465.15, concerning Fees and Financial Arrangements. The amendments are being proposed in order to clarify the requirement for reporting psychological services to third payers.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Lee 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 to make the rules easier for the licensees and public to follow and understand. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Kourtney D. McDonald, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700.

The amendments are proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

The proposed amendment does not affect other statutes, articles, or codes.

§465.15. Fees and Financial Arrangements.

(a) General Requirements.

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

(4) In reporting their services [~~their reports~~] to third-party payers [~~for services~~], licensees accurately state the nature, date and amount of the services provided, the fees, and the identity of the individual(s) who actually provided the services.

(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 23, 2002.

TRD-200205611
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 305-7700

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22 TAC §465.16

The Texas State Board of Examiners of Psychologists proposes amendments to §465.16, concerning Evaluation, Assessment, Testing, and Reports. The amendments are being proposed in order to clarify the limitations on licensees who must produce reports on patients without benefit of an examination or independent testing.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Lee 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 to make the rules easier for the licensees and public to follow and understand. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Kourtney D. McDonald, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700.

The amendments are proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

The proposed amendment does not affect other statutes, articles, or codes.

§465.16. Evaluation, Assessment, Testing, and Reports.

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

(c) Limitations.

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

(5) Licensees provide opinions about the psychological characteristics of individuals only after they have conducted an examination adequate to support their statements or conclusions. When such an examination is not performed, licensees document any efforts they made to obtain such an examination and clarify the probable impact of their limited information on the reliability and validity of their conclusions.

(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 23, 2002.

TRD-200205612
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 305-7700

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22 TAC §465.17

The Texas State Board of Examiners of Psychologists proposes amendments to §465.17, concerning Therapy and Counseling. The amendments are being proposed in order to create additional notice for patients whose treatment plans are being altered and to tie such changes to the requirements of informed consent in Board rule §465.11.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Lee 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 to make the rules easier for the licensees and public to follow and understand. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Kourtney D. McDonald, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700.

The amendments are proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

The proposed amendment does not affect other statutes, articles, or codes.

§465.17. Therapy and Counseling.

(a) (No change.)

(b) Treatment plans.

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

(3) Licensees alter and document the alteration in the treatment plan when clinically indicated.

(4) Licensees confer with and obtain consent from the recipient(s) concerning significant alterations in the treatment plan in accordance with Board rule 465.11(b).

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

Filed with the Office of the Secretary of State on August 23, 2002.

TRD-200205613
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 305-7700

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PART 24. TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

CHAPTER 571. LICENSING

The Texas Board of Veterinary Medical Examiners ("Board") proposes amendments to §571.31 concerning Reciprocal Agreements, §571.59 concerning Expired Licenses, and §571.61 concerning Inactive License Status, and the repeal of §571.60 concerning Expiration of License to Practice.

The amendments to §571.31 propose non-substantive wording changes. The Subchapter B designation is changed from "Reciprocal" to "Reciprocal Licensing Agreements." The title of the section is changed by adding the word "Licensing" between the words "Reciprocal" and "Agreements." Other word changes are proposed to state clearly that the Board shall not accept license applications under any former reciprocal licensing agreements with any state.

The amendments to §571.59 change the name of the section from "Cancelled Licenses" to "Expired Licenses" to be consistent with the Veterinary Licensing Act, Texas Occupations Code, Chapter 801. The amendments further provide that a licensee who has failed to renew his or her license for a period of one year or more and wants to reinstate the license may be required to appear before the Board to explain the circumstances surrounding the failure to timely renew and the reasons for wanting the license reinstated. The amendments specify the factors that the Board will address in considering whether to reinstate the license without the former licensee being required to take and pass the state licensing examination. Failure to meet each of the factors will result in the former licensee being required to submit to the examination. In the past, the Board has considered these factors as a matter of policy. The amended section will now incorporate that policy into a rule so that affected former licensees will clearly know the Board's requirements.

§571.61 sets out the requirements for veterinarians who wish to cease the practice of veterinary medicine and go on inactive status. The purpose of the amendments is to make non-substantive wording changes and delete obsolete provisions; delete the current provision authorizing a $500 per day administrative penalty for an inactive licensee practicing veterinary medicine; and make changes in the continuing education requirements for an inactive licensee who wishes to return to active license status.

Eliminating the $500 per day administrative penalty will give the Board flexibility to determine the appropriate penalty in each case. The Veterinary Licensing Act (Chapter 801, Texas Occupations Code) authorizes a range of penalties for violations of the Act, including administrative penalties up to $2500 for each violation; civil penalties; criminal penalties; and injunctive relief. The Board should not restrict itself by rule to a narrow range of available penalties.

The current section permits an inactive licensee who wishes to return to active status and who has maintained an annual average of 15 hours of continuing education (CE) to be placed on active license status without additional requirements. If the annual average is less than 15 hours, the licensee must complete 30 hours of CE in the 12 months immediately following the licensee's attaining of regular license status. The amendments will change the required hours of CE to 17 and 34 hours, respectively. This change is consistent with the Board's intention to increase the required CE for all licensees from 15 to 17 hours per annum. This will help increase veterinarians' knowledge of their constantly changing profession and thus promote public confidence in the profession.

The repeal of §571.60 is proposed because information included in the section is being incorporated into another section dealing with expired licenses. Retention of this section would be redundant and unnecessary.

Mr. Ron Allen, Executive Director, has determined that for the first five-year period the amended sections and repeal are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section. There will be no effect on small businesses. There will be no anticipated economic cost to persons required to comply with the amended sections and repeal as proposed.

For the amendments to §571.31, Mr. Allen has also determined that for the first five years the amended section is in effect the public benefit anticipated as a result of enforcing the amended section will be to eliminate confusion as to the purpose of the section and clearly indicate to affected parties the purpose of the section. For the amendments to §571.59, Mr. Allen has also determined that for the first five years the section is in effect the public benefit anticipated as a result of enforcing the amended section will be to assure the public that veterinarians with expired licenses will have to meet specific standards in order to continue practicing veterinary medicine in this state. For the amendments to §571.61, Mr. Allen has also determined that for the first five years the section is in effect the public benefit anticipated as a result of enforcing the amended section will be to (a) provide a wide range of enforcement mechanisms to the Board, thus enhancing the public's confidence in the Board's enforcement program to prevent unauthorized practice; and (b) increase the knowledge and competence of veterinarians who will be required to obtain additional CE hours for a regular license. There will be no anticipated economic cost to persons required to comply with the amendments to §571.61 as proposed, except for a small amount of additional financial outlay that may be required to secure an additional two hours of CE. For the repeal of §571.60, Mr. Allen has also determined that for the first five years the repeal is in effect the public benefit will be to eliminate redundant language and simplify the public's ability to find pertinent information concerning expired licenses in one section.

Comments on the proposal may be submitted in writing to Lee Mathews, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Suite 2-330, Austin, Texas 78701-3998, phone (512) 305-7555, and must be received within 30 days of publication.

SUBCHAPTER B. RECIPROCAL LICENSING AGREEMENTS

22 TAC §571.31

The amendment to §571.31 is proposed under the authority of the Veterinary Licensing Act, Texas Occupations Code, §801.151 (a) which states that the Board may adopt rules necessary to administer the chapter. The amendments affect the Veterinary Licensing Act, Texas Occupations Code, §801.252 which pertains to licensing eligibility requirements.

§571.31. Reciprocal Licensing Agreements.

The [~~Texas State~~] Board [~~of Veterinary Medical Examiners~~] shall not [~~will no longer~~] accept applications for licensure under any former reciprocal agreements with any state.

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

Filed with the Office of the Secretary of State on August 22, 2002.

TRD-200205514
Lee H. Mathews
General Counsel
Texas Board of Veterinary Medical Examiners
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 305-7555

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SUBCHAPTER C. LICENSE RENEWALS

22 TAC §571.59, §571.61

The amendments to §571.59 and §571.61 are proposed under the authority of the Veterinary Licensing Act, Texas Occupations Code, §801.151 (a) which states that the Board may adopt rules necessary to administer the chapter. The amendments affect the Veterinary Licensing Act, Texas Occupations Code, §§801.303 and 801.305 which pertain to renewal of expired licenses; and §801.306 which pertains to licensing eligibility requirements.

§571.59. Expired [~~Cancelled~~] Licenses.

(a) A veterinarian's license expires on March 1 of each calendar year. On or before March 1, a licensee must renew an unexpired license, in writing, by paying the required fee and furnishing all information required by the Board for renewal.

(b) A licensee who has failed to renew his or her license for a period of one year or more and wishes to reinstate the license may be required to appear before the Board to explain why the licensee allowed the license to expire and the licensee's reasons for wanting it reinstated. Subject to subsection (c) of this section, the licensee must take and pass the SBE and comply with §571.3 of this title (relating to Eligibility for Examination and Licensure).

(c) A licensee who has failed to renew his or her license for a period of one year or more may reinstate the licensee's expired license without taking and passing the SBE if the licensee:

(1) previously had a Texas license and lived and/or practiced in Texas;

(2) moved to another state and is licensed and practices in that state;

(3) has been practicing in the other state during the past two years preceding application for reinstatement in Texas;

(4) intends to return to and practice in Texas;

(5) furnishes a letter of good standing from all states where the licensee is currently licensed; and

(6) submits a complete application for license reinstatement within two years of the date the license expired and could not be renewed. [~~Every applicant for license renewal who has failed to renew his/her license for a period of one year or more may be required to appear before the board to explain why the license was allowed to lapse and the reason for wanting it reinstated. The applicant also needs to submit to reexamination and comply with the requirements and procedures for obtaining an original license.~~]

§571.61. Inactive License Status.

(a) (No change.)

(b) Restrictions. The following restrictions shall apply to licensees whose licenses are on inactive status: [~~.~~]

(1) Except as provided in §801.404, Texas Occupations Code [~~the Act, §3 (a)(1)~~], the licensee may not engage in the practice of veterinary medicine or otherwise provide treatment to any animal in the State of Texas.

(2) If the licensee possesses or obtains a federal Drug Enforcement Administration (DEA) and/or a Department of Public Safety (DPS) controlled substances registration for a Texas location, the licensee must comply with §573.43 and §573.50 of this title (relating to Misuse of DEA Narcotics Registration and Controlled Substances Records Keeping for Drugs on Hand, respectively) [~~If the licensee possesses or obtains a DEA and/or Texas Controlled Substances registration for location in Texas, the licensee must comply with Board §573.43 and §573.50 of this title (relating to Rules of Professional Conduct). Violation of these rules will result in disciplinary action~~].

(c) (No change.)

(d) Continuing Education Requirements

(1) If a licensee on inactive status requesting a return to regular license status has maintained an annual average of 17 [~~15~~] hours of continuing education, not including any portion of the reactivation year, the licensee will be placed on regular license status without any additional requirements. If the average annual continuing education is less than 17 [~~15~~] hours, the licensee will be placed on regular license status but must complete 34 [~~30~~] hours of continuing education in the twelve months immediately following the licensee's attaining of regular license status.

(2) For the year of activation, proof of 17 [~~15~~] hours of continuing education shall not be required for an active license renewal in the year following reactivation.

(3) For purposes of this subsection, the terms "year" and "annual" mean the calendar year.

(e)-(f) (No change.)

[~~(g) Penalty. A licensee on inactive status found to be actively practicing veterinary medicine in the state of Texas shall be subject to an administrative penalty of $500 per day for each violation. Submission of false or otherwise misleading information or any other misrepresentation contained on any request for inactive status, renewal of inactive status or return to active status shall be a violation of this rule.~~]

[~~(h) Reinstatement Directly to Inactive Status. Licensees failing to timely renew their licenses during the 1995 renewal period (January 1, 1995 - February 28, 1995), whose licenses have not been cancelled for previous non-renewals, may apply for reinstatement directly to inactive status.~~]

This 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 22, 2002.

TRD-200205513
Lee H. Mathews
General Counsel
Texas Board of Veterinary Medical Examiners
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 305-7555

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22 TAC §571.60

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

The repeal of §571.60 is proposed under the authority of the Veterinary Licensing Act, Texas Occupations Code, §801.151 (a) which states that the Board may adopt rules necessary to administer the chapter. The repeal affects the Veterinary Licensing Act, Texas Occupations Code, §§801.303 and 801.305 which pertain to renewal of expired licenses.

§571.60. Expiration Of License To Practice.

This 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 22, 2002.

TRD-200205512
Lee H. Mathews
General Counsel
Texas Board of Veterinary Medical Examiners
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 305-7555

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CHAPTER 573. RULES OF PROFESSIONAL CONDUCT

The Texas Board of Veterinary Medical Examiners ("Board") proposes the repeal of §573.31 concerning Ban on Testimonials and Endorsements and new §573.45 concerning Extra-Label or Off-Label Use of Drugs.

Section 573.31 prohibits a veterinarian from writing testimonials on the virtues of remedies, instruments, equipment or food except to report the results of properly controlled experiments or clinical to scientific journals or meetings. The Texas Attorney General in Opinion No. JC-0458 recently discussed the constitutionality of an absolute ban on advertising by health care professionals contained in Section 101.201 of the Texas Occupations

Code. The Attorney General noted that there is nothing inherently misleading, false, or deceptive about testimonials and that a categorical ban on testimonials may be unconstitutional. Section 573.31 does not contain an absolute ban on testimonials, but seems restrictive enough that it may violate constitutional provisions discussed in the Opinion.

New §573.45 concerns off-label use, which is the use of a drug in an animal that is not in accordance with the drug's approved labeling. Such usage is common in the veterinary medical profession and is safe in most cases. However, unforeseen adverse results can sometimes occur with such usage and the Board believes that guidelines should be adopted to govern such usage and direct the veterinarian to inform the client of such usage in certain cases. The section defines the situations where off-label usage may occur and provides a listing of those criteria that should guide the veterinarian in exercising his discretion in individual situations. The section provides that if off-label usage does not meet the criteria set out in the section, the veterinarian should inform the client that such usage is off-label and may pose a risk to the health of the animal.

Mr. Ron Allen, Executive Director, has determined that for the first five-year period this repeal and new section are in effect there will be no fiscal implications for state or local government. Mr. Allen has also determined that for the first five years the repeal is in effect the public benefit of the repeal will be to encourage the healthy exchange and circulation of information and opinions on veterinary products and services and thus provide more informed choices for the public. For new §573.45, Mr. Allen has determined that for the first five years the amended section is in effect the public benefit anticipated as a result of enforcing the amended section will be to inform the public of considerations that may determine the use of certain drugs for patients and encourage informed consent for off-label treatment regimens by the animals' owners. This will encourage increased public confidence in the veterinary medical profession. There will be no effect on small businesses. There will be no anticipated economic cost to persons affected by the repeal or to comply with the new section as proposed.

Comments on the proposal may be submitted in writing to Lee Mathews, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Suite 2-330, Austin, Texas 78701-3998, phone (512) 305-7555, and must be received within 30 days of publication.

SUBCHAPTER D. ADVERTISING, ENDORSEMENTS AND CERTIFICATES

22 TAC §573.31

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

The repeal of §573.31 is proposed under the authority of the Veterinary Licensing Act, Texas Occupations Code, §801.151 (a) which states that the Board may adopt rules necessary to administer the chapter. The repeal affects §101.201 of the Texas Occupations Code which pertains to false, misleading and deceptive advertising.

§573.31. Ban On Testimonials And Endorsements.

This 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 22, 2002.

TRD-200205511
Lee H. Mathews
General Counsel
Texas Board of Veterinary Medical Examiners
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 305-7555

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SUBCHAPTER E. PRESCRIBING AND/OR DISPENSING MEDICATION

22 TAC §573.45

New §573.45 is proposed under the authority of the Veterinary Licensing Act, Texas Occupations Code, §801.151 (a) which states that the Board may adopt rules necessary to administer the chapter. The amendment affects the Veterinary Licensing Act, Texas Occupations Code, §801.351 which pertains to a veterinarian assuming responsibility for medical judgments regarding the health of an animal.

§573.45. Extra-Label Or Off-Label Use Of Drugs.

(a) Extra-label or off-label use is the actual or intended use of a drug in an animal that is not in accordance with the approved labeling, and includes, but is not limited to:

(1) use in species not listed in the labeling;

(2) use for diseases or other conditions not listed in the labeling;

(3) use at dosage levels, frequencies, or routes of administration other than those stated in the labeling; and

(4) deviation from the labeled withdrawal time based on these different uses.

(b) A veterinarian must use his or her discretion in the off-label use of drugs for animals. In exercising such discretion, a veterinarian shall consider, to the extent possible:

(1) whether the off-label use of a drug meets the community standard of humane care and treatment set out in Rule 573.22;

(2) the established safety of the off-label usage;

(3) the inclusion of a drug in a standard veterinary formulary;

(4) analyses of off-label usage in the veterinary medical literature and in articles and commentaries written by the veterinarian's peers in the veterinary medical profession;

(5) information provided by the drug's manufacturer, vendor or the FDA as to whether off-label usage of a drug may present a risk to public health; and

(6) any other sources of pertinent information.

(c) If anticipated off-label use of a drug is not commonly accepted or used by average veterinarians in the community in which the veterinarian practices or if the off-label usage does not have an established safety record, the veterinarian shall orally or in writing inform the client that the off-label usage is not commonly accepted or used in the veterinary community and that such usage could pose a risk to the health of the animal.

This 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 22, 2002.

TRD-200205510
Lee H. Mathews
General Counsel
Texas Board of Veterinary Medical Examiners
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 305-7555

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CHAPTER 577. GENERAL ADMINISTRATIVE DUTIES

SUBCHAPTER B. STAFF AND MISCELLANEOUS

22 TAC §577.15

The Texas Board of Veterinary Medical Examiners ("Board") proposes amendments to §577.15 concerning Fee Schedule. The fee schedule is contained in a graphic published in the graphics section of the *Texas Register*.

The amendments increase the Board's required fees for renewals of all categories of license renewals by four dollars ($4.00). This increase in fees is required to cover the costs of the Board's legislative appropriation for FY 2003. In addition , a five dollar ($5.00) subscription fee is proposed for regular license renewals and inactive license renewals, including delinquent renewals. The $5.00 fee is not applicable to special license renewals and provisional licenses. The subscription fee is mandated by Senate Bill 187 passed by the 77th Texas Legislature to cover the costs of establishing a common electronic infrastructure by which licensing agencies can provide license renewals and other services electronically (on-line).

Mr. Ron Allen, Executive Director, has determined that for the first five-year period the amended section is in effect there will be fiscal implications for state or local government as a result of enforcing or administering the section. The fee increases will result in a gain to the state's general revenue of $53,424 in FY 2003; $54,864 in FY 2004; $56,322 in FY 2005; $56,322 in FY 2006; and $56,322 in FY 2007.

Mr. Allen has also determined that for the first five years the amended section is in effect the public benefit anticipated as a result of enforcing the section will be to accurately inform licensees as to the reasons for a fee increase and thus encourage compliance with Board rules and encourage more veterinarians to begin using on-line license renewal programs. There will be no effect on small businesses.

Comments on the proposed amendments may be submitted in writing to Lee Mathews, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Suite 2-330, Austin, Texas 78701-3998, phone (512) 305-7555, and must be received within 30 days of publication.

The amendments are proposed under the authority of the Veterinary Licensing Act, Texas Occupations Code, §801.151 (a) which states that the Board may adopt rules necessary to administer the chapter. The amendments affect the Veterinary Licensing Act, Texas Occupations Code, §801.303 which pertains to renewal license fees.

§577.15. Fee Schedule.

The following fees are adopted by the Board:
Figure: 22 TAC §577.15

This 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 22, 2002.

TRD-200205509
Lee H. Mathews
General Counsel
Texas Board of Veterinary Medical Examiners
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 305-7555

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TITLE 25. HEALTH SERVICES

PART 2. TEXAS DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

CHAPTER 417. AGENCY AND FACILITY RESPONSIBILITIES

SUBCHAPTER G. COMMUNITY RELATIONS

25 TAC §§417.301 - 417.316

(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 §§417.301 - 417.316 of Chapter 417, Subchapter G, concerning community relations. New §§417.301 - 417.311 and 417.313 - 417.316 of Chapter 417, Subchapter G, 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.

The contemporaneous repeal and adoption of these subchapters would fulfill the requirements of the Texas Government Code, §2001.039, concerning the periodic review of agency rules.

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.

Jane Hilfer, director, Central Office Community Relations, 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 the operation of volunteer programs at facilities

and the operation of facilities' VSCs which generate resources on the facilities' behalf for the needs of persons served, to enhance existing facility operations, for recognition projects, for education projects, and for new initiatives to improve the quality of life for persons served. 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 the Texas Government Code, Chapter 2255, which requires a state agency authorized by statute to accept money from a private donor or for which a private organization exists that is designed to further the purposes and duties of the agency to adopt rules governing the relationship between the donor or organization and the agency and its employees.

These proposed sections would affect the Texas Government Code, Chapter 2255.

§417.301. Purpose.
§417.302. Application.
§417.303. Definitions.
§417.304. Volunteer Programs.
§417.305. Volunteer Program Procedures.
§417.306. Awards and Recognition of Volunteers and Visiting Groups.
§417.307. Volunteer Services Council (VSC).
§417.308. Fundraising and Solicitation.
§417.309. Donations.
§417.310. Naming of Non-Capital Improvement Projects.
§417.311. Volunteer Services State Council (VSSC).
§417.312. Texas Foundation on Mental Health and Mental Retardation.
§417.313. Auditing and Reporting Guidelines.
§417.314. Exhibits.
§417.315. References.
§417.316. 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 23, 2002.

TRD-200205589
Andrew Hardin
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 206-5216

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25 TAC §§417.301 - 417.311, 417.313 - 417.316

The Texas Department of Mental Health and Mental Retardation (TDMHMR) proposes new §§417.301 - 417.311 and 417.313 - 417.316 of Chapter 417, Subchapter G, concerning community relations. Existing §§417.301 - 417.316 of Chapter 417, Subchapter G, 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 delineate policy and establish uniform operating standards for volunteer services and fundraising at the Texas Department of Mental Health and Mental Retardation.

Although the proposed new rules would add policies and operating standards for the Volunteer Service State Council (VSSC), the overall policies and operating standards in these proposed new rules are not significantly different from the policies and operating standards contained in the rules proposed for repeal. The additional policies and operating standards for the VSSC are consistent with the existing policies and operating standards for all volunteer services councils (VSCs). Specific procedures relating to volunteer training, assessment of volunteers' performance, and conducting exit interviews would be deleted in rule and incorporated in the Community Relations Program Manual. The memorandum of understanding between a VSC and a facility would include a statement that the VSC and all VSC members are prohibited from lobbying the Texas Legislature as a VSC or a VSC member. The section governing the Texas Foundation for Mental Health and Mental Retardation would be deleted because the foundation is no longer in existence.

The contemporaneous repeal and adoption of these subchapters would fulfill the requirements of the Texas Government Code, §2001.039, concerning the periodic review of agency rules.

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.

Jane Hilfer, director, Central Office Community Relations, 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 the operation of volunteer programs at facilities and the operation of facilities' VSCs which generate resources on the facilities' behalf for the needs of persons served, to enhance existing facility operations, for recognition projects, for education projects, and for new initiatives to improve the quality of life for persons served. 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 the Texas Government Code, Chapter 2255, which requires a state agency authorized by statute to accept money from a private donor or for which a private organization exists that is designed to further the purposes and duties of the agency to adopt rules governing the relationship between the donor or organization and the agency and its employees.

These proposed sections would affect the Texas Government Code, Chapter 2255.

§417.301. Purpose.

The purpose of this subchapter is to delineate policy and establish uniform operating standards for volunteer services and fundraising at the Texas Department of Mental Health and Mental Retardation.

§417.302. Application.

This subchapter applies to all facilities and Central Office of the Texas Department of Mental Health and Mental Retardation.

§417.303. Definitions.

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

(1) Cash--Currency, checks, drafts, money orders, and other forms of legal tender.

(2) Chief executive officer (CEO)--The superintendent or director of a facility.

(3) CO Community Relations--The Central Office division whose staff are responsible for providing support to community relations staff at facilities.

(4) Community relations staff--The staff who manage the volunteer programs and oversee volunteer fundraising activities at a facility.

(5) Director of community relations--The employee responsible for coordinating the community relations functions and volunteer programs at a facility.

(6) Donation--A contribution of anything of value (e.g., funds or in-kind goods and services) freely given to a VSC or facility.

(7) Donor--An individual, group, or organization that makes a donation.

(8) Employee--An individual who is legally employed to perform work and who is paid a salary or wage by a facility or Central Office.

(9) Facility--A state school, state hospital, or state center operated by TDMHMR.

(10) 501(c)(3) organization--An organization recognized by the Internal Revenue Service as a nonprofit corporation and granted the right to receive tax deductible contributions under §501(c)(3) of the Internal Revenue Code.

(11) Long Term Friendship--A personal relationship between an employee and a specific person served which developed over a period of time, as verified by the appropriate professional, based upon the quality and duration of the relationship.

(12) Person served--A person receiving mental health or mental retardation services at a facility.

(13) TDMHMR--The Texas Department of Mental Health and Mental Retardation.

(14) Visiting group--A group of varying individuals associated with an organization (e.g., civic, fraternal, corporate, religious, social, service, or education), which is not affiliated with TDMHMR, that visits a facility (e.g., tours) or participates in a special event at a facility and has constant and adequate staff supervision.

(15) Volunteer--An individual who is not part of a visiting group and who provides time, personal attention, or services to persons served, TDMHMR, a facility, or a VSC without payment. Volunteers may include:

(A) community citizens;

(B) family members of persons served when not acting on behalf of the person served;

(C) employees when not acting in the capacity of employment;

(D) persons served when not acting solely on behalf of themselves; and

(E) community restitution volunteers who are required by a court to provide a specified number of hours of volunteer services in lieu of a jail sentence.

(16) Volunteer services council (VSC)--A facility's 501(c)(3) organization that is formed for generating resources on behalf of the facility.

(17) Volunteer Services State Council (VSSC)--A statewide nonprofit organization serving volunteer services councils and volunteer groups of community MHMR centers.

§417.304. Volunteer Programs.

(a) Value of volunteers and donors. Volunteers and donors of the Texas Department of Mental Health and Mental Retardation (TDMHMR) are highly valued as an essential component of its functions. Volunteers are recognized and supported in their efforts to provide goods, services, and personal attention for persons served which enhance and enrich the best treatment and habilitation the state can provide. Donors are recognized and supported in their efforts to enhance the fundraising capabilities and revenue development of TDMHMR, which enables it to provide additional services and goods to the people it serves.

(b) Requirement to operate volunteer program. Each facility must operate a volunteer program with a full-time director.

(c) Insurance. Each facility must purchase insurance with TDMHMR funds to protect volunteers and visiting groups in the performance of their assigned duties.

(d) Professional ethics in volunteer administration. The administration of all volunteer programs shall be in accordance with the Association for Volunteer Administration's (AVA) *Professional Ethics in Volunteer Administration*. A copy of *Professional Ethics in Volunteer Administration* can be obtained by contacting CO Community Relations, TDMHMR, P.O. Box 12668, Austin, TX 78711-2668.

(e) Volunteer guidelines.

(1) Volunteers and visiting groups must comply with all applicable rules, regulations, policies, and procedures of TDMHMR and the facility, specifically including but not limited to:

(A) Chapter 414, Subchapter A of this title, concerning Client-Identifying Information;

(B) Chapter 404, Subchapter E of this title, concerning Rights of Persons Receiving Mental Health Services;

(C) Chapter 405, Subchapter Y of this title, concerning Client Rights - Mental Retardation Services; and

(D) Chapter 417, Subchapter K of this title, concerning Abuse, Neglect, and Exploitation in TDMHMR Facilities.

(2) A volunteer or visiting group may not give money directly to a person served. If a volunteer or visiting group wishes to donate money to a specific person served, then the volunteer or visiting group must consult the director of community relations for the proper procedure for doing so.

(3) A volunteer or visiting group may not take or accept money directly from a person served.

(4) Keys to state buildings, state vehicles, or state equipment may not be issued to volunteers and visiting groups unless determined necessary by the director of community relations, as documented in writing, and approved by the CEO or designee.

(5) Volunteers and visiting groups may use state property only in connection with their assigned duties or in connection with activities of the VSC.

(6) Volunteers and visiting groups may not use facility letterhead.

(7) Volunteers and visiting groups may not photograph, film, or record any person served unless:

(A) community relations staff determine that photographing, filming, or recording the person served is necessary or desirable; and

(B) valid authorization is obtained from the person served or his/her legally authorized representative in accordance with Chapter 414, Subchapter A of this title (concerning Client-Identifying Information), using the "Authorization for Publication" form referenced as Exhibit A in §417.314 of this title (relating to Exhibits).

(8) All portions of volunteer records which directly or indirectly identify a person served or a person formerly served are confidential and may only be disclosed as authorized by federal or state statute and Chapter 414, Subchapter A of this title, concerning Client-Identifying Information.

(9) A facility may provide free meals to volunteers if the volunteer is on duty during mealtime; and

(10) A facility may reimburse a volunteer for out-of-pocket expenses in accordance with the facility's policies and procedures.

(11) Each volunteer must represent TDMHMR's position if identifying him/herself as a volunteer of TDMHMR, a facility, program, or council. This does not preclude a volunteer from speaking freely about any matter as a private citizen, provided the volunteer clarifies that such comments are the individual's opinion and are not made on behalf of TDMHMR, the facility, program, or council.

(12) Volunteers and visiting groups may ride as passengers in state vehicles in connection with their volunteer assignment as permitted by facility policies and procedures.

(13) Volunteers may drive state and non-state vehicles and transport persons served in such vehicles as permitted by facility policies and procedures.

(f) Current employees as volunteers. Employees may volunteer at a facility if they do so willingly and without coercion.

(1) Except for the situation described in paragraph (2) of this subsection, the functional area and geographic location of an employee's volunteer assignments must be as far removed as possible from his/her regular work assignments and duties.

(2) If an employee and a person served have a long term friendship as defined in §417.303(12) of this title (relating to Definitions), then, as permitted by facility policies and procedures, the employee may take the person served to his/her home or other location to participate in a special activity (e.g., holiday celebration), provided the special activity allows for quality one-to-one time between the employee and the person served.

(3) Employee volunteers must submit a statement verifying that they are volunteering their time without coercion using the "Employee Volunteer Statement" form, referenced as Exhibit B in §417.314 of this title (relating to Exhibits). A copy of the signed form must be filed in the community relations office and in the employee's personnel file.

(g) Former employees as volunteers. Former employees who are eligible for rehire may volunteer at a facility after a waiting period specified by the facility's policies and procedures.

(h) Persons served as volunteers.

(1) A person served may volunteer at the facility if:

(A) the duties the person will be performing:

(i) do not constitute a job which is or should be the work of a paid employee; and

(ii) are included in the job description of a volunteer assignment;

(B) the person has, willingly and without coercion, expressed a desire to volunteer and understands that the activity is a free-will service which means "without pay";

(C) there are no privileges available to the person that are not also available to persons served who do not volunteer;

(D) appropriate orientation and on-the-job training are provided to enable the person to understand and perform the duties of the volunteer assignment;

(E) the person understands the risks, if any, of the volunteer assignment;

(F) the person's volunteer assignment is not incompatible with his/her treatment plan; and

(G) the person's volunteer assignment is not on the same unit in which the person resides.

(2) If the person served is also employed by the facility, then the person's volunteer assignment must be as far removed as possible from his/her work assignments and duties.

(3) Persons served who volunteer must submit a statement verifying that they are volunteering their time without coercion using the "Client Volunteer Statement" form, referenced as Exhibit C in §417.314 of this title (relating to Exhibits). A copy of the signed form must be filed in the community relations office and in the person's record.

(4) Activities engaged in by persons served for their own benefit as opposed to activities for the common benefit (e.g., gardening/cultivating a plant, as opposed to trimming the shrubs) are not considered volunteered services, and are not subject to the provisions of this subchapter.

(5) Former persons served may volunteer at a facility at which they previously received services at the discretion of the director of community relations.

(i) Family members as volunteers. A family member of a person served may volunteer at a facility if the family member's volunteer assignment is not on the same unit in which the person served resides.

§417.305. Volunteer Program Procedures.

(a) Request for volunteers. Requests for volunteers from facility staff must be submitted to the community relations office for processing.

(b) Volunteer assignment job description. Each volunteer assignment must have a job description that accurately describes the duties of the assignment. All job descriptions must be reviewed periodically and revised as needed to accurately describe the duties actually being performed by the volunteer.

(c) Discrimination prohibited. Facility staff may not unlawfully discriminate against a volunteer or volunteer applicant based on race, color, national origin, religion, sex, handicap, veteran status, or political affiliation. Facility staff may not discriminate against a volunteer or volunteer applicant based on sexual orientation.

(d) Volunteer application and placement process. Individuals interested in volunteering at a facility must complete an application for volunteer service using the "Volunteer Application" form, referenced as Exhibit D in §417.314 of this title (relating to Exhibits), or an appropriate substitute.

(1) A individual must be at least 14 years of age to apply for volunteer service.

(A) Facilities may specify a minimum age above 14 years for specific volunteer assignments.

(B) Volunteer applicants who are ages 14-17 years must have permission from their parent or legal guardian as documented on the "Parental Permission Form For Volunteers Under 18 Years of Age," referenced as Exhibit E in §417.314 of this title (relating to Exhibits).

(C) The number of volunteer hours for minors must not exceed the number of hours per week allowed for minors to work under the Fair Labor Standards Act.

(2) All prospective volunteers are subject to a criminal history and registry check as authorized in the Texas Health and Safety Code, §533.007, and required by the Texas Health and Safety Code, §250.003 and Chapter 414, Subchapter K of this title, concerning Criminal History and Registry Clearances. Completion of the criminal history and registry clearance must occur prior to volunteer placement.

(3) All prospective volunteers must be approved for volunteer assignment by the director of community relations. A prospective volunteer is given a volunteer assignment with the agreement of the supervising staff member.

(4) Before reporting to their volunteer assignment all volunteers are required to complete a basic orientation conducted by the community relations staff. Volunteers must also fulfill any other requirements necessary to successfully perform the duties outlined in the job description of their volunteer assignment.

(e) Separation from volunteer assignment.

(1) The director of community relations may remove a volunteer from his/her assignment if it is determined that the volunteer is unsuited for the assignment. If the volunteer is removed from his/her assignment, the director of community relations may consider the volunteer for another assignment.

(2) A volunteer may decide to leave his/her assignment at any time for any reason. A volunteer who decides to leave his/her assignment shall inform the community relations staff of such decision. If a person served volunteer decides to leave his/her assignment, the community relations staff will notify the person's treatment team.

(f) Visiting group placement. After consulting with the representative of each visiting group the director of community relations shall determine appropriate placement, orientation, and training. There is no minimum age for members of a visiting group.

§417.306. TDMHMR Awards and Recognition of Volunteers and Visiting Groups.

(a) Donors, volunteers, and visiting groups who provide exemplary service may be recognized by TDMHMR or a facility with:

(1) the presentation of local "Star" certificates. The number of local "Star" certificates presented each year is determined by CO Community Relations; and

(2) a nomination for the "TDMHMR Star" awards, statewide volunteer awards presented annually by the TDMHMR commissioner. The number of "TDMHMR Star" awards presented each year is determined by the commissioner.

(b) In addition to certificates and awards, other recognition items may be presented to donors, volunteers, and visiting groups.

(c) Recognition items, including certificates and awards, are purchased with TDMHMR funds. The cost of each recognition item may not exceed the limit mandated in the current appropriations act.

§417.307. Volunteer Services Council (VSC).

(a) Each facility may have a 501(c)(3) organization (i.e., volunteer services council (VSC)) to generate resources on its behalf for the needs of persons served, to enhance existing facility operations, for employee/donor/volunteer/visiting group recognition projects, for education projects, and for new initiatives to improve the quality of life for persons served. Pre-existing VSCs of consolidated facilities may remain independent or choose to merge into a single VSC. Each VSC must comply with the relevant TDMHMR Board Policies and Procedures, TDMHMR rules, state laws and regulations, and Internal Revenue Service requirements. Each VSC is responsible for coordinating its activities with facility administration. The facility CEO has full authority over all functions and projects concerning the facility, including persons served and employees.

(b) The VSC bylaws must outline specific methodology for:

(1) electing board members;

(2) limiting terms of officers and board members by number of years;

(3) replacing board members;

(4) electing a nominating committee; and

(5) joining the VSC.

(c) The following individuals may not be a VSC board member:

(1) a facility employee; and

(2) a facility employee's spouse or minor child.

(d) A memorandum of understanding (MOU) governs the relationship between the facility and the VSC. A sample MOU is referenced as Exhibit F in §417.314 of this title (relating to Exhibits). The MOU must be reviewed in accordance with the Community Relations Program Manual, copies of which may be obtained by contacting

TDMHMR, CO Community Relations, P.O. 12668, Austin, TX 78751. The MOU must:

(1) state that all nominees for the VSC board are subject to the approval of the facility CEO;

(2) state that the facility CEO and director of community relations have non-voting membership on the VSC board and executive committee;

(3) specify the mechanism for resolving conflict with the facility;

(4) state that all VSC members are prohibited from influencing the passage or defeat of legislation as a representative of the VSC, the facility, or TDMHMR;

(5) specify the mechanism that ensures:

(A) solicitation is compatible with the mission, vision, and goals of TDMHMR;

(B) solicitation employs all accepted rules of ethical fundraising;

(C) all proceeds, minus legitimate expenses, are used:

(i) for the needs of persons served;

(ii) to enhance existing facility operations;

(iii) for employee/donor/volunteer/visiting group recognition projects;

(iv) for education projects; and

(v) for new initiatives to improve the quality of life for persons served;

(6) state that, in the event the VSC is audited by the Internal Revenue Service, a copy of the audit report will be forwarded to the director of community relations for submission to CO Community Relations;

(7) state that TDMHMR has the right to review and approve all VSC donations of real property and any permanent improvements to existing real property that may be donated to the facility by the VSC;

(8) state that the VSC and facility have specified in writing the method for recognizing donors, volunteers, and visiting groups;

(9) state the limitations and specifics regarding the amount and type of expenditures the VSC has authorized the director of community relations to make on behalf of the VSC;

(10) state that the VSC and facility have specified in writing the method for facility staff to assist the VSC in processing and receipting donations that ensures the separation of duties;

(11) state whether the facility will maintain a VSC petty cash fund, and if the facility will maintain a petty cash fund, state the fund's purpose and the maximum dollar amount;

(12) state what items the facility will provide to the VSC, including:

(A) office space;

(B) fundraising assistance;

(C) annual training for volunteers, board members, and officers;

(D) clerical and administrative services;

(E) staff assistance for coordination of activities; and

(F) staff assistance with processing donations made to the VSC;

(13) state what items the VSC will provide to support its operations, including:

(A) postage;

(B) printing, including letterhead and newsletters;

(C) special event insurance, when applicable; and

(D) bond for its officers and signatory agents;

(14) state the frequency for which the VSC will obtain a certified, independent audit that complies with §417.313(c) of this title (relating to Auditing and Reporting Guidelines);

(15) state that the VSC may provide feedback and input through the facility CEO regarding the development of TDMHMR's legislative agenda; and

(16) state that the VSC will comply with:

(A) state and federal laws and regulations applicable to non-profit corporations and 501(c)(3) organizations;

(B) applicable TDMHMR rules and policies; and

(C) its bylaws.

(e) Funds generated by a VSC minus legitimate expenses may only be used for the needs of persons served, to enhance existing facility operations, for employee/donor/volunteer/visiting group recognition projects, for education projects, and for new initiatives to improve the quality of life for persons served. Funds may not be used for:

(1) a recognition event, reception, or gift for any legislator;

(2) a recognition event, reception, or gift for any employee, which is not part of TDMHMR's or the facility's established award program;

(3) political contributions or lobbying efforts;

(4) alcoholic beverages, unless used at a fundraising event;

(5) loans, including travel advances;

(6) operating mental health and mental retardation programs, or contracting for mental health and mental retardation programs on behalf of a facility;

(7) cash awards or salary supplementation for employees; and

(8) other purposes determined by TDMHMR to be unethical, unlawful, or inappropriate.

(f) A VSC may not:

(1) authorize a facility employee to sign a VSC check, use a VSC debit card, or use a VSC credit card, such as American Express, VISA, MasterCard, or Wal-Mart; or

(2) hold monies on behalf of facility employees for non-VSC-sponsored activities.

(g) Community relations staff may maintain a VSC petty cash fund for its VSC if guidelines regarding the fund's purpose and maximum dollar amount are included in the memorandum of understanding between the facility and the VSC.

(1) The primary custodian of the petty cash fund is responsible for maintaining receipts and accurate documentation of all petty cash funds disbursed, and furnishing such documentation to the treasurer of the VSC.

(2) The primary and alternate custodians of the petty cash fund must complete a signed responsibility statement for the funds.

(3) An officer of the VSC or an individual who is not the director of community relations or a community relations staff member must conduct and document cash counts or cash audits of the petty cash fund once every two months.

§417.308. Fundraising and Solicitation.

(a) All fundraising and solicitation activities shall be in accordance with codes and standards published by the Association of Fundraising Professionals (AFP). A copy of AFP's current codes and standards can be obtained by contacting the Office of CO Community Relations, TDMHMR, P.O. Box 12668, Austin, TX 78711-2668.

(b) Facilities are authorized to engage in fundraising activities. A facility may work with its VSC to enhance fundraising activities. All fundraising activity requires the approval of the director of community relations.

(c) The community relations staff are the only facility personnel authorized to solicit donations on behalf of the facility unless the director of community relations or CEO has provided approval for other facility staff to do so.

(d) Each facility must have written policies and procedures governing fundraising activity conducted by its employees and persons served (e.g., bakes sales, sales of merchandise) to generate funds for employee and persons served activities.

§417.309. Donations.

(a) Acceptance of Donations.

(1) Donations to the VSC.

(A) Donated funds.

(i) Donated funds are processed in accordance with the specified method as required by the MOU.

(ii) All funds donated to the VSC remain the property of the VSC until they are accepted by the facility.

(B) In-Kind goods and services.

(i) In-kind goods and services are processed in accordance with the specified method as required by the MOU.

(ii) The donor is responsible for determining the value of the in-kind goods for the donor's tax purposes.

(iii) In-kind goods that cannot be used by the VSC may be:

(I) distributed to other nonprofit agencies that have an appropriate use for them;

(II) sold, with the proceeds retained by the VSC, unless sale of the donation is prohibited by the donor; or

(III) discarded, if appropriate.

(iv) In-kind goods and services are assigned a value using the values recommended by TDMHMR for accounting purposes.

(v) All in-kind goods donated to the VSC remain the property of the VSC until they are accepted by the facility.

(2) Donations made directly to a facility. All donations made directly to a facility will be processed by facility staff.

(A) Donated funds.

(i) Funds less than $500 are processed through the facility cashier. Accounting staff are responsible for recording the funds, with the appropriate designation, if applicable, and forwarding a copy of the record to the community relations office.

(ii) Funds $500 or more are processed in accordance with TDMHMR's operating instructions for Donations Valued at $500 or More (417-17).

(iii) Community relations staff are responsible for completing an individual pre-numbered cash receipt for each donation.

(B) Donated goods and services.

(i) The donor is responsible for determining the value of the goods for the donor's tax purposes.

(ii) The community relations staff must assign a value to donated goods and services using values recommended by TDMHMR for accounting purposes. Donated goods valued at $500 or more are processed in accordance with TDMHMR's operating instructions for Donations Valued at $500 or More (417-17).

(iii) Donated goods that cannot be used are processed in accordance with the Community Relations Program Manual, copies of which may be obtained by contacting TDMHMR, CO Community Relations, P.O. 12668, Austin, TX 78751.

(b) Acknowledgment of donations. Donations received by a VSC or facility must be acknowledged in accordance with the Community Relations Program Manual, copies of which may be obtained by contacting TDMHMR, CO Community Relations, P.O. 12668, Austin, TX 78751.

§417.310. Naming of Donations.

(a) The naming of any gift, memorial, or donated item that is not a permanent improvement, as defined in §417.153 of this title (relating to Definitions), is subject to the approval of the director of CO Community Relations.

(b) Any gift, memorial, or donated item that is a permanent improvement, as defined in §417.153 of this title (relating to Definitions), is named in accordance with Chapter 417, Subchapter D of this title, concerning permanent improvements donated by individuals or community groups.

§417.311. Volunteer Services State Council (VSSC).

(a) The Volunteer Services State Council (VSSC) is a nonprofit statewide service organization that partners with TDMHMR to improve the quality and efficiency of TDMHMR's programs and services.

(b) The VSSC bylaws must:

(1) describe the organization's structure;

(2) identify the member organizations that may join the VSSC, including the VSCs of facilities and the volunteer groups of community MHMR centers; and

(3) outline specific methodology for:

(A) electing the board of directors;

(B) limiting terms of board members and officers by number of years;

(C) replacing board members;

(D) selecting a nominating committee; and

(E) joining the VSSC.

(c) A memorandum of understanding (MOU) governs the relationship between the VSSC and TDMHMR. The MOU must:

(1) state that the TDMHMR commissioner or designee, the director of CO Community Relations, and one member of the Texas MHMR Board have nonvoting membership on the VSSC board of directors and executive committee;

(2) specify the mechanism for resolving conflict with TDMHMR;

(3) state that, in the event the VSSC is audited by the Internal Revenue Service, a copy of the audit report will be submitted to CO Community Relations;

(4) state that TDMHMR has the right to review and approve all VSSC donations of real property and any permanent improvements to existing real property that may be donated to TDMHMR by the VSSC;

(5) state the limitations and specifics regarding the amount and type of expenditures the VSSC has authorized the director of CO Community Relations to make on behalf of the VSSC;

(6) state that the VSSC and CO Community Relations have specified in writing the method for CO Community Relations staff to assist the VSSC in processing and receipting donations that ensures the separation of duties;

(7) state what items TDMHMR will provide to the VSSC as determined by TDMHMR to be feasible and within its budgetary constraints, including:

(A) office space;

(B) annual training for volunteers, board members, and officers;

(C) clerical and administrative services;

(D) staff assistance for coordination of activities, including an annual meeting;

(E) staff assistance with processing donations made to the VSSC; and

(F) an informational legislative update to the executive committee.

(8) state what items the VSSC will provide to support its operations, within its budgetary constraints, including:

(A) postage;

(B) printing, including letterhead and meeting materials;

(C) special event insurance, when applicable;

(D) recognition event for Central Office volunteers; and

(E) bond for its officers and signatory agents;

(9) state that the VSSC will provide feedback and input through the commissioner or designee regarding the development of TDMHMR's legislative agenda;

(10) state that the VSSC will host special training conferences as mutually agreed upon by the executive committee and TDMHMR; and

(11) state that the VSSC will comply with:

(A) state and federal laws and regulations applicable to non-profit corporations and 501(c)(3) organizations;

(B) applicable TDMHMR rules and policies; and

(C) its bylaws.

(d) VSSC funds may not be used for:

(1) a recognition event, reception, or gift for any legislator;

(2) a recognition event, reception, or gift for any employee, which is not part of TDMHMR's or Central Office's established award program;

(3) political contributions or lobbying efforts;

(4) alcoholic beverages, unless used at a fundraising event;

(5) loans, including travel advances;

(6) operating mental health and mental retardation programs, or contracting for mental health and mental retardation programs on behalf of TDMHMR;

(7) cash awards or salary supplementation for employees; and

(8) other purposes determined by TDMHMR to be unethical, unlawful, or inappropriate.

(e) The VSSC may not:

(1) authorize a TDMHMR employee to sign a VSSC check, use a VSSC debit card, or use a VSSC credit card; or

(2) hold monies on behalf of TDMHMR employees for non-VSSC-sponsored activities.

§417.313. Auditing and Reporting Guidelines.

(a) CO Community Relations and each facility community relations office are subject to audits conducted by TDMHMR and the state auditor.

(b) Each director of community relations must quarterly submit to CO Community Relations, in accordance with guidelines contained in the Community Relations Program Manual, a report pertaining to:

(1) its volunteer program;

(2) donations to its VSC;

(3) donations to the facility; and

(4) evidence of annual training for volunteers, board members, and officers.

(c) Independent audit and treasurer's report.

(1) Independent audit.

(A) If the VSSC or a VSC has annual gross receipts in excess of $100,000, then it must obtain an annual certified, independent audit in accordance with guidelines contained in the Community Relations Program Manual.

(B) If the VSSC or a VSC has annual gross receipts of less than $100,000, then at least every three years or as required by CO Community Relations it must obtain a one-year certified, independent audit in accordance with guidelines contained in the Community Relations Program Manual.

(C) A copy of the Community Relations Program Manual is available by contacting TDMHMR, CO Community Relations, P.O. 12668, Austin, TX 78751.

(2) Treasurer's report. Each year in which an independent audit is not conducted, the VSSC or a VSC must formulate a treasurer's report that complies with GAAS (specifically FAS-116 and FAS-117).

(d) Annually, the VSSC and each VSC is responsible for submitting to CO Community Relations:

(1) a copy of the MOU;

(2) a copy of:

(A) the audit report and accompanying management letter, and documentation of petty cash disbursements, if applicable; or

(B) the treasurer's report and documentation of petty cash disbursements, if applicable;

(3) a copy of each Form 990 filed with the IRS;

(4) a copy of articles of incorporation, if revised;

(5) a copy of by laws, if revised;

(6) a list of the names, addresses, and officer positions of current officers;

(7) documentation of bond for its officers and signatory agents;

(8) a copy of investment policy, if revised;

(9) evidence of adoption of an annual budget; and

(10) evidence of special event insurance, if purchased.

§417.314. Exhibits.

The following exhibits, referenced in this subchapter, are available by contacting CO Community Relations, TDMHMR Central Office, P.O. Box 12668, Austin, TX 78711-2668:

(1) Exhibit A - "Authorization for Publication" form;

(2) Exhibit B - "Employee Volunteer Statement" form;

(3) Exhibit C - "Client Volunteer Statement" form;

(4) Exhibit D - "Volunteer Application" form;

(5) Exhibit E - "Parental Permission Form For Volunteers Under 18 Years of Age" form; and

(6) Exhibit F - sample memorandum of understanding (MOU).

§417.315. References.

Reference is made to the following state statutes, and TDMHMR rules and policies:

(1) Texas Health and Safety Code, 250.003 and §533.007;

(2) Chapter 414, Subchapter K of this title, concerning Criminal History and Registry Clearances;

(3) Chapter 414, Subchapter A of this title, concerning Client-Identifying Information;

(4) Chapter 404, Subchapter E of this title, concerning Rights of Persons Receiving Mental Health Services;

(5) Chapter 405, Subchapter Y of this title, concerning Client Rights - Mental Retardation Services;

(6) Chapter 417, Subchapter K of this title, concerning Abuse, Neglect, and Exploitation in TDMHMR Facilities;

(7) Fair Labor Standards Act; and

(8) Donations Valued at $500 or More Operating Instruction, 417-17.

§417.316. Distribution.

(a) This subchapter is distributed to:

(1) members of the Texas MHMR Board;

(2) executive, management, and program staff at Central Office;

(3) CEOs of facilities;

(4) members of the VSSC board of directors and executive committee, and all VSSC member organizations; and

(5) advocacy organizations.

(b) CEOs are responsible for the dissemination of the information contained in this subchapter to all appropriate staff members.

This 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 23, 2002.

TRD-200205588
Andrew Hardin
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 206-5216

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 7. CORPORATE AND FINANCIAL REGULATION

SUBCHAPTER A. EXAMINATION AND FINANCIAL ANALYSIS

28 TAC §7.86

The Texas Department of Insurance proposes to amend §7.86 concerning the demonstration of ownership by an insurer or a health maintenance organization (HMO) of its certificated and uncertificated securities. Under Insurance Code Article 21.39-B an insurer is required to have its securities registered in its name except securities held under a custodial agreement and it directs the commissioner to adopt rules authorizing a domestic insurance company to demonstrate ownership of an uncertificated security consistent with common practices of securities exchanges and markets. The section requires custodians to meet certain requirements and requires custodial agreements to contain provisions enumerated in the section. By complying with the section, insurers and HMOs can satisfactorily demonstrate to the department the ownership of the securities they own. The proposed amendment requires HMOs to comply with the requirements of the section. In addition, the department proposes to amend subsection (a) to improve clarity. The proposed amendments to subsection (b), include amending the definition of clearing corporation to reflect a change in the citation to Insurance Code Article 21.39-B and amending the definition of "qualified broker/dealer" by increasing the tangible net worth from $100 million to $250 million. The definitions of securities issuer and transfer agent are proposed for deletion as a result of the proposed deletion of a sentence in subsection (c). Proposed subsection (c) is amended to require an insurer or HMO to be able to

demonstrate to the department that a custodian is qualified under this section. The last sentence in the existing subsection (c) is proposed for deletion since it is not relevant to the subject of the section. Proposed subsection (d)(1) changes the standard of care for a custodian from a fiduciary standard to the reasonable commercial standards of the custodial business. The latter standard is appropriate for the activity. The proposed amendment to subsection (d)(6) deletes an unnecessary reference to statutory deposit requirements since it is not a required provision of a custodial agreement. Subsection (d)(7) is proposed be amended to correct a typographical error. The proposed amendment to subsection (d)(8) clarifies that clearing corporations and the Federal Reserve Book Entry System are not subject to examination. The amendment to subsection (d)(11) proposes to delete an obsolete requirement. The proposed amendments to subsection (d)(12) clarify the insurance coverage required to be maintained by a custodian that holds securities for an insurer or an HMO. Several insurers reported that "securities all risks coverage" could not be found. A proposed new subsection (d)(13) will require a custodian to notify the commissioner when an insurer withdraws all securities held by the custodian. Finally, subsection (e) is proposed to be amended to require insurers and HMOs to comply with the amended section within 90 days of its effective date. HMOs are currently subject to similar requirements under §11.803(5) of this title (relating to Investments, Loans, and Other Assets). An amendment to that section is proposed elsewhere in this issue of the Texas Register which will harmonize the two sections.

Betty Patterson, CPA, AFE, Senior Associate Commissioner, Financial Program, has determined that, for the first five-year period the amended section will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section. There will be no effect on local employment or local economy.

Ms. Patterson also has determined that, for each year of the first five years the proposed section will be in effect, the public benefit anticipated as a result of compliance with the section will be improved financial safeguards and more efficient and accurate safekeeping of insurers' and HMOs' certificated and uncertificated securities held by custodians. The anticipated economic cost to insurers and HMOs required to comply with the amended section will vary for the first year of the first five year period the amended section is in effect. Each insurer and HMO will need to review the custodial agreements currently in place and determine whether changes are necessary to comply with the section as amended. Assuming changes to the custodial agreement are necessary, a new agreement must be prepared and executed by the insurer or HMO and the custodian. If the custodied securities must be transferred to another custodian as a result of the increased net worth requirement for broker/dealers acting as custodians, an insurer or HMO may incur additional costs for the transfer. Since custodial fees are negotiable and are impacted by other services an insurer or HMO may have with the custodian, the total cost of compliance will vary. Based on the department's experience, the cost of compliance with the amended section due to the foregoing activities should not exceed $5,000. After the cost of compliance in the first year of the first five-year period, there are no other anticipated economic costs to insurers or HMOs as a result of the amended section. The department finds it is neither legal nor feasible to waive or reduce the effect of the amended section on insurers or HMOs that are micro or small businesses since the section implements a statutory requirement by establishing minimum standards for the prudent safekeeping of an insurer's or HMO's securities. The department believes those standards must be applied to all insurers and HMOs to assure their investments are prudently protected to minimize the risk of loss of the investments.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on September 6, 2002 to Gene C. Jarmon, Acting General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments must be simultaneously submitted to Betty Patterson, Senior Associate Commissioner, Financial Program, Mail Code 305-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. A request for a public hearing should be submitted separately to the Office of the Chief Clerk.

The amendments are proposed under Insurance Code Articles 21.39-B, 20A.22 and §36.001. Article 21.39-B §6 directs the commissioner to adopt rules authorizing a domestic insurance company to demonstrate ownership of an uncertificated security consistent with common practices of securities exchange markets. Article 21.39-B §3 authorizes the commissioner to promulgate such regulations as may be deemed necessary to carry out the provisions of Article 21.39-B. Insurance Code Article 20A.22(a) authorizes the commissioner to propose reasonable rules as are necessary and proper to carry out the provisions of Insurance Code Chapter 20A. Section 36.001 authorizes the commissioner to determine rules for general and uniform application for the conduct and execution of the duties and functions of the department.

The proposal affects Insurance Code Articles 21.39-B, 20A.22 and 3.33 §7.

§7.86. Custodied Securities.

(a) Purpose. The purpose of this section is to enable insurers and HMOs to demonstrate ownership of securities held by a custodian in a manner consistent with the common practices of securities exchanges and markets while protecting the public interest [~~interests of policyholders and shareholders~~].

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

(1) Clearing corporation--A corporation or system that provides for the book entry settlement and custody of securities and is further defined in Insurance Code, Article 21.39-B, §5(b) [~~§4(b)~~] and Texas Business Commerce and Code, §8.102(a)(5).

(2) Custodian--A qualified bank, qualified broker/dealer or a clearing corporation that accepts deposits of securities from an insurer or HMO and safeguards, holds and reports on such securities pursuant to a written custodial or trust agreement with an insurer or HMO.

(3) Custodied Securities--An insurer's or HMO's securities deposited with a custodian or redeposited with a subcustodian.

(4)-(5) (No change.)

(6) Qualified Broker/Dealer--A securities firm which has, as shown by its most recent audited financial statement, a tangible net worth of at least $250 [~~$100~~] million, is registered with and subject to the jurisdiction of the Securities and Exchange Commission, and is a member of the Securities Investor Protection Corporation.

(7) (No change.)

[~~(8) Securities issuer--The enterprise, organization or other entity which issues securities.~~]

(8) [~~(9)~~] Subcustodian--A qualified bank, qualified broker dealer or a clearing corporation that accepts deposits of securities from a custodian for safeguarding and holding.

(9) HMO--A health maintenance organization as defined in the Insurance Code Article 20A.02(n).

[~~(10) Transfer agent--A person or firm which engages on behalf of a securities issuer in transferring record ownership of securities.~~]

(c) Evidence of Securities Ownership.

(1) An insurer or HMO may demonstrate ownership of its securities by having them held by a custodian pursuant to subsection (d) of this section.

(2) An insurer or HMO shall maintain evidence that the custodian meets the requirements to be a qualified bank or a qualified broker/dealer as defined in subsection (b) of this section. [~~In addition, an insurer may demonstrate ownership of its securities by having them registered in the insurer's name on the books of the securities issuer and/or the securities issuer's transfer agent.~~]

(d) Required Provisions For Custodial Agreements. An [~~Any arrangement involving an~~] insurer's or HMO's deposit of its securities with a custodian must be evidenced by an agreement signed by the insurer or HMO and the custodian. The agreement signed by the insurer or HMO and the custodian must provide for the conditions described in paragraphs (1)-(13) [~~(12)~~] of this subsection:

(1) The custodian shall exercise the same due care that is in accordance with reasonable commercial standards expected of a custodian [~~fiduciary~~] with the responsibility for the safeguarding of the insurer's or HMO's custodied securities and for compliance with all provisions of the custodial agreement, whether the insurer's or HMO's custodied securities are in the custodian's possession or have been redeposited by the custodian with a subcustodian.

(2) The custodian shall indemnify the insurer or HMO for any loss of custodied securities occasioned by the negligence or dishonesty of custodian's officers and employees, or burglary, robbery, hold-up, theft or mysterious disappearance, including loss by damage or destruction. In the event of such loss, the custodian must promptly replace the custodied securities or the value thereof, and the value of any loss of rights or privileges resulting from said loss of custodied securities.

(3) (No change.)

(4) The custodian's official records shall separately identify custodied securities owned by the insurer or the HMO, whether held by the custodian or subcustodian. If held by a subcustodian, the custodian's records shall also identify the subcustodian.

(5) Custodied securities that are in registered form shall be registered only in the name of the insurer or HMO, the custodian or its nominee, or the subcustodian or its nominee.

(6) All activities involving the insurer's or HMO's custodied securities shall be subject to the insurer's or HMO's instructions and the custodied securities shall be withdrawable upon demand of the insurer or HMO. [~~Securities deposited with insurance regulators to satisfy statutory requirements shall not be withdrawn without approval of the appropriate insurance regulatory authority.~~]

(7) The custodian shall furnish, upon request by the insurer or HMO, a confirmation of all transfers of custodied securities to or from the account of the insurer or HMO, and reports of custodied securities sufficient to verify information reported in the insurer's or HMO's annual statement filed with the Texas Department of Insurance and supporting schedules and information required in any audit of the insurer's or HMO's financial statements [~~statement~~] whether the custodied securities are held by the custodian or by a subcustodian.

(8) The insurer, HMO or its designee shall [~~at all times~~] be entitled to examine all records maintained by the custodian or subcustodian relating to the insurer's or HMO's custodied securities during the course of the custodian's regular business hours. This paragraph does not apply to a clearing corporation or the Federal Reserve Book Entry System.

(9) Upon request of the insurer or HMO, the custodian shall be required to send to the insurer or HMO all reports it receives from a clearing corporation or the Federal Reserve book-entry system on their respective systems of internal accounting control, and all reports prepared on the custodian's and subcustodian's systems of internal accounting control of custodied securities.

(10) The custodian shall not use any of the insurer's or HMO's custodied securities for the custodian's benefit and none of the insurer's or HMO's custodied securities shall be loaned, pledged, or hypothecated by the custodian or subcustodian without a written contract executed by the insurer or HMO separate and apart from the custodial agreement.

(11) The custodian is authorized and instructed by the insurer or HMO to honor any requests made by the Texas Department of Insurance for information concerning the insurer's or HMO's custodied securities. The department, from time to time, may request, and the custodian shall furnish, a detailed listing of the insurer's or HMO's custodied securities (whether in the possession of the custodian or with a subcustodian) [~~and an affidavit by the custodian certifying the custodian's safekeeping responsibilities relative to the custodied securities~~]. The custodian's response to such requests shall be made directly to the department and shall encompass all of the insurer's or HMO's custodied securities (whether in the possession of the custodian or with a subcustodian).

(12) The custodian and subcustodian shall maintain the usual and customary insurance coverage for custodial banking risks [~~"securities all risks coverage"~~] at levels considered reasonable and customary for the custodian banking industry covering the custodian's duties and activities as custodian for the insurer's or HMO's assets and shall describe the nature and extent of such insurance protection. Any change in such insurance protection during the term of the custodial agreement shall be promptly disclosed to the insurer or HMO.

(13) The custodian shall provide written notification to the Texas Department of Insurance if the custodial agreement with the insurer or HMO has been terminated or if 100% of the account assets in any one custody account have been withdrawn. This notification shall be submitted to the Senior Associate Commissioner, Financial Program, Mail Code 305-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104 within three business days of the receipt by the custodian of the insurer's written notice of termination or within three business days of the withdrawal of 100% of the account assets.

(e) Effective Date. All insurers and HMOs subject to this section shall comply with subsection (d) of this section no later than 90 [~~180~~] days after the effective date of this section.

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

Filed with the Office of the Secretary of State on August 22, 2002.

TRD-200205516
Gene C. Jarmon
Acting General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 463-6327

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CHAPTER 11. HEALTH MAINTENANCE ORGANIZATIONS

SUBCHAPTER I. FINANCIAL REQUIREMENTS

28 TAC §11.803

The Texas Department of Insurance proposes an amendment to §11.803 concerning loans, investments and other assets of health maintenance organizations (HMOs). The proposed amendment is necessary to harmonize the section with a proposed amendment to §7.86 (relating to Custodied Securities), which is published elsewhere in this issue of the Texas Register. The amendment proposes to delete the requirements in §11.803(5) to demonstrate ownership of HMO investments held by a custodian and substitute the requirements of §7.86 so that HMOs and insurers may demonstrate ownership of securities held by a custodian in the same manner.

Ms. Betty Patterson, Senior Associate Commissioner, Financial Program, has determined that for each year of the first five years the proposed section will be in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the rule. There will be no measurable effect on local employment or the local economy as a result of the proposal.

Ms. Patterson has determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of the proposed section will be more efficient practices with regard to the safeguarding of an HMOs certificated and uncertificated securities held by custodians. The probable economic cost to HMOs that comply with the proposed section will vary for the first year of the first five year period the amended section is in effect. Each HMO will need to review the custodial agreements currently in place and determine whether any modifications are necessary to comply with the section as amended. Assuming modifications to the custodial agreement are necessary, a new agreement must be prepared and executed by the HMO and the custodian. If the custodied securities must be transferred to another custodian as a result of the increased net worth requirement for qualified brokers/dealers acting as custodians, an HMO may incur additional costs for the transfer. Since custodial fees are negotiable and are impacted by other services an HMO may have with the custodian, the total cost of compliance will vary. Based on the department's experience, the cost of compliance with the amended section due to the foregoing activities should not exceed $5,000. After the cost of compliance in the first year of the first five-year period, there are no other anticipated economic costs to HMOs as a result of the proposed section. The department finds it is neither legal nor feasible to waive or reduce the effect of the proposed section on HMOs that are micro or small businesses since the section establishes minimum standards for the prudent safeguarding of an HMO's securities. The department believes those standards must be applied to all HMOs to assure their investments are prudently protected to minimize the risk of loss of the investments.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on September 6, 2002 to Gene C. Jarmon, Acting General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Betty Patterson, Senior Associate Commissioner, Financial Program, Mail Code 305-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. A request for a public hearing should be submitted separately to the Office of the Chief Clerk.

The amendment is proposed under the Insurance Code Article 20A.22 and §36.001. Article 20A.22 authorizes the commissioner to propose reasonable rules as are necessary and proper to carry out the provisions of Insurance Code Chapter 20A. Section 36.001 authorizes the commissioner to determine rules for general and uniform application for the conduct and execution of the duties and functions of the department.

Insurance Code Article 20A.22 is affected by this proposal.

§11.803. Investments, Loans, and Other Assets.

The admitted assets of domestic and foreign HMOs must at all times comply with the provisions of this section.

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

(5) Evidence of ownership. A domestic HMO may demonstrate ownership of its securities by complying with §7.86 of this title (relating to Custodied Securities.) [~~own certificated and uncertificated securities, as evidenced by book entry of banks and securities brokerage limited as follows:~~]

[~~(A) banks must be members of the Federal Deposit Insurance Corporation.~~]

[~~(B) securities brokerage firms are incorporated securities brokers and dealers that:~~]

~~*[(i)*~~ ~~are subject to the regulations of the Securities and Exchange Commission of the United States of America;~~]

~~*[(ii)*~~ ~~are members of the Securities Investor Protection Corporation; and~~]

~~*[(iii)*~~ ~~have a tangible net worth of not less than $100 million.~~]

[~~(C) securities held by a bank or securities brokerage firm must be held in accordance with a custodial agreement entered into between the bank or securities brokerage firm and the HMO.~~]

[~~(D) Amounts invested in uncertificated securities through a securities brokerage firm may not exceed that amount of insurance protection provided by the Securities Investor Protection Corporation except that additional amounts may be invested whenever a securities brokerage firm has in effect additional coverage through an excess securities bond issued by an insurance company licensed in Texas and having a statutory net worth of at least 30 times the face amount of the excess securities bond, but in no event having a statutory net worth of less than $100 million according to its last filed annual statement, and then the limit on the amount that may be invested in uncertificated securities through one securities brokerage firm shall be extended to the total amount covered by the Securities Investor Protection Corporation and the excess securities bond, combined. The HMO shall be responsible for maintaining in its files a copy of the excess securities bond with a letter or copy of a letter furnished by its securities brokerage firm from the insurance company verifying the~~

~~date through which premium is paid that the excess securities bond is in effect. The letter shall also reflect the excess bond number, face amount, company, and address of insuring company and the name and title of the individual signing the letter. Whenever the date is exceeded, the HMO shall be responsible for obtaining a similar letter updating the information. Certificated and uncertificated securities may be evidenced by transaction records such as receipts, invoices, and statements issued by banks and securities brokerage firms evidencing that the records of the bank or securities brokerage firm reflect the HMO's or its nominee's ownership of said securities. In addition, certificated securities shall be maintained in the possession of the HMO as its nominee, subject to obtaining any required approval under the Insurance Code Article 1.28, if located outside the State of Texas, and registered securities shall be in the name of the HMO or its nominee. An HMO may designate a depository where certificated securities are to be held, provided access to said securities is under the control of officers and employees of the HMO or its nominee as designated by the HMO's board of directors. Certificated securities purchased in transit from the vendor need not be in the HMO's or nominee's possession within a period of 45 days from the purchase date. Certificated securities in transit for the purpose of sale within 45 days of shipping date also are exempted from the requirement that they be in the possession of the HMO or its nominee.]~~

(6) (No change.)

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

Filed with the Office of the Secretary of State on August 22, 2002.

TRD-200205515
Gene C. Jarmon
Acting General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 39. PUBLIC NOTICE

SUBCHAPTER H. APPLICABILITY AND GENERAL PROVISIONS

30 TAC §39.403

The Texas Commission on Environmental Quality (commission) proposes an amendment to §39.403, Applicability.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The commission's practice of permitting pre-injection units and other surface units as part of nonhazardous underground injection control (UIC) permits has varied over time, due to the different scope of applications submitted by applicants, and due to different interpretations of statutes and the provisions of 30 TAC Chapter 331, Underground Injection Control. Generally, it has been the applicant's option whether to include pre-injection facility information in their UIC permit applications. About half of the UIC permits issued by the commission for on-site disposal of nonhazardous waste include specifications for pre-injection units. This rulemaking is intended to provide the option of including pre-injection units in a registration under the authority of Texas Water Code (TWC), Chapter 27, and to provide a consistent set of standards and guidance to permit applicants, commission staff, and the general public on application requirements for pre-injection units, whether they are to be authorized by permit or registration. The conforming amendments to Chapter 331 also propose to change the terms "Pre-injection facilities" and "Surface facilities," which are considered to be terms of art, to "Pre-injection units." These changes are proposed for consistency with other agency definitions wherein "facility" usually refers to a property along with structures and other appurtenances, and "unit" usually refers to the individual types of equipment used for the management of waste, such as tanks, pumps, or surface impoundments.

This issue was given preliminary consideration by the commissioners at a work session on October 20, 2000. Staff was directed to conduct additional research on the issue and develop recommendations. Staff returned to work session on January 17, 2001, and presented a list of options to the commissioners relating to the regulation of pre-injection units associated with on-site nonhazardous waste disposal by Class I injection wells and any permitted Class V injection wells. The commissioners directed staff to require applicants for UIC permits to include design information for pre-injection units with the permit application. The commissioners further directed staff to review the design information and ensure the design of the pre-injection units was adequate to protect groundwater. Applicants were to be informed that inclusion of pre-injection units as part of their UIC permit was optional. Applicants who choose not to include pre-injection units in their UIC permits would be subject to a registration process for those facilities. Applicants were also to be informed that sufficient design information must be included in their application so that staff could conduct a thorough technical review and determine whether the pre-injection units are protective of human health and the environment.

Amendments to Chapter 331 are proposed to implement the new registration procedure. Part of that procedure will include mailed public notice and an opportunity for public comment on the registration of pre-injection units. These mailed notice and public comment procedures for registration of UIC pre-injection units are given in the proposed amended and new sections to Chapter 331, specifically proposed new §331.17, Pre-injection Units Registration, and proposed new §331.18, Registration Application, Processing, Notice, Comment, Motion to Overturn. It should be noted that an opportunity to file written comment with the commission will be available to interested parties; however, there will be no opportunity for a contested case hearing on the proposed registrations. Conforming changes are hereby proposed for §39.403, Applicability, to except these notice provisions from Chapter 39. The procedures that apply may be found in proposed new §331.18.

SECTION BY SECTION DISCUSSION

Section 39.403, Applicability, is proposed to be amended to except registrations of pre-injection units for nonhazardous noncommercial injection wells from the public notice requirements in Chapter 39. The requirements that apply may be found in proposed new §331.18. Administrative changes have been made to conform to *Texas Register* requirements.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the first five-year period the proposed rule is in effect, there will be no significant fiscal implications for units of state and local government due to administration and enforcement of the proposed rule. Units of state and local government that do not own or operate pre-injection units at Class I, nonhazardous, noncommercial injection wells would not be affected by the proposed rule.

The proposed rulemaking would exempt the registration of pre-injection units at Class I nonhazardous, noncommercial injection wells from public meeting and contested case hearing requirements. In a concurrent rulemaking in Chapter 331, the commission proposes to exempt from public meeting and contested case hearing requirements, those sites that opt to register their affected pre-injection units in lieu of permitting the units. Pre-injection units are the on-site above ground structures and equipment, including injection pumps, filters, tanks, surface impoundments, and piping for wastewater transmission between any such facilities and the injection well, that are or will be used for storage or processing of waste to be injected into the disposal well. In order to implement the public notice exemption in the concurrent Chapter 331 rulemaking, the commission proposes to update existing regulations in this chapter.

Although this rulemaking intends to exempt applications for pre-injection units from public meeting and contested case hearings, the concurrent rulemaking requires the commission to provide mailed notices to adjacent land owners, allows for a 30-day comment period, and requires the commission to consider the public comments when making final decisions concerning the application.

Units of state and local government do not normally operate injection wells affected by the proposed rule. Additionally, there are no known active injection wells operated by units of government that would be affected by the proposed rule. However, if a unit of government did opt to register a pre-injection unit at a Class I injection well affected by the proposed rule, there would likely be cost savings due to the exemption of existing public meeting and contested case hearing requirements.

PUBLIC BENEFIT AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from enforcement of and compliance with the proposed rule will be potentially increased environmental protection by providing a financial incentive for owners and operators to register their pre-injection units with the commission. The registration of these units would provide the commission with adequate technical data to determine whether the units posed a risk to the environment.

The proposed rulemaking would exempt the registration of pre-injection units at Class I nonhazardous, noncommercial injection wells from public meeting and contested case hearing requirements.

The commission currently receives approximately 20 applications per year for UIC permits that would be affected by the proposed rule. The majority of these applications are from large industrial businesses. For applicants that elect to register pre-injection units at Class I injection wells affected by the proposed rule, there would likely be cost savings, in an amount that cannot be determined at this time, due to the exemption of existing public meeting and contested case hearing requirements.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal implications for small or micro-businesses as a result of implementation of the proposed rule, which is intended to exempt the registration of pre-injection units at Class I nonhazardous, noncommercial injection wells from public meeting and contested case hearing requirements.

The commission currently receives approximately 20 applications per year for UIC permits that would be affected by the proposed rule, some of which are submitted by small and micro-businesses. For applicants that elect to register pre-injection units at Class I injection wells affected by the proposed rule, there would likely be cost savings, in an amount that cannot be determined at this time, due to the exemption of existing public meeting and contested case hearing requirements.

LOCAL EMPLOYMENT IMPACT

The commission has reviewed this proposed rule and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the proposed rule is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. "Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the proposed rule is to amend Chapter 39 to exempt the registration of pre-injection units at Class I, nonhazardous, noncommercial injection wells from the notice provisions of Chapter 39. The proposed rule does so by amending §39.403 to state that registrations for pre-injection units for Class I nonhazardous, noncommercial injection wells are excluded from the application of Chapter 39. The proposed rule substantially advances its purpose by excluding registrations for pre-injection units for Class I nonhazardous, noncommercial injection wells.

The proposed rule meets one criteria of the definition of a major environmental rule because the intent of this rule is to protect the environment or reduce risks to human health from environmental exposure. However, the proposed rule does not meet the two other criteria of the definition of a major environmental rule. It does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs because it does not require more from an applicant than is required by current rules which require that pre-injection units be included in the injection well permit. And the proposed rule does not adversely affect in a material way the environment or the public health and safety of the state or a sector of the state because the proposal is made as part of a rule package which contains specific technical standards for pre-injection units at Class I nonhazardous, noncommercial injection wells. For these reasons, the rule does not meet the definition of a major environmental rule.

In addition, the proposed rule does not exceed the four applicability requirements of Texas Government Code, §2001.0025(a)(1) - (4) in that the proposed rule does not: 1) exceed a standard set by federal law; 2) exceed an express requirement of state law; 3) exceed a requirement of a delegation agreement; or 4) propose to adopt a rule solely under the general powers of the agency.

The proposed rule does not exceed a standard set by federal law because there are no such corresponding federal standards for notice concerning registration of pre-injection units at Class I nonhazardous, noncommercial injection wells. The proposed rule does not exceed an express requirement of state law because TWC, Chapter 27 does not establish express requirements for notice concerning registration of pre-injection units at Class I nonhazardous, noncommercial injection wells. The proposed rule does not exceed the requirements of the delegation agreement because the delegation agreement does not establish express requirements for notice concerning registration of pre-injection units at Class I nonhazardous, noncommercial pre-injection units.

This proposed rule is not adopted solely under the general powers of the agency, but is adopted under the specific provisions of the Texas Injection Well Act, TWC, Chapter 27, §§27.002, 27.003, 27.011, 27.019(a), and 27.051(3).

The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this proposed rule in accordance with Texas Government Code, §2007.043. The commission's preliminary assessment indicates that the Texas Government Code, Chapter 2007 does not apply to this proposed rule because the proposed rule is an action that is taken in response to a real and substantial threat to public health and safety; it is designed to significantly advance the health and safety purpose and it does 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 activities that may pollute fresh water. The Texas Injection Well Act, TWC, Chapter 27, §27.003 states that it is the policy of the state to "prevent underground injection that may pollute fresh water" and "to require the use of all reasonable methods to implement this policy." Section 27.051(3) requires that the commission make a finding, before it issues a permit, "that, with proper safeguards both ground and surface fresh water can be adequately protected from pollution." Section 27.002(4) defines "pollution" as "the alteration of the physical, chemical, or biological quality of or the contamination of, water that makes it harmful, detrimental, or injurious to humans...."

Other proposed rules would minimize this threat by requiring that Class I nonhazardous, noncommercial pre-injection units meet the design criteria for sewerage systems, while offering to applicants the option of using a registration process to authorize such pre-injection units. This rule exempts the registration process from the notice requirements of this chapter because Chapter 39 applies generally to permits and not to registrations.

The proposed rule significantly advances the health and safety purpose by setting a uniform design standard which is protective of human health and safety for certain pre-injection units. The design standards protect health and safety by requiring the management of waste fluids in such a manner as to prevent their excursion into fresh waters in the state.

The proposed rule does not impose a greater burden than is necessary to achieve the health and safety purpose because the proposed design standards for Class I nonhazardous, noncommercial pre- injection units represent the engineering practice necessary to prevent the pollution of fresh water. Further, the proposal allows applicants to use, as an option, a registration process to comply with the proposed rule. The option of using a registration process is expected to provide, in some instances, a less burdensome method of administering the design standards than the present rules, which require that Class I nonhazardous, noncommercial pre-injection units be included in the injection well permit.

The proposed rule is not subject to Texas Government Code, Chapter 2007 because it is exempt under the provisions of §2007.003(b)(13).

Nevertheless, the commission further evaluated this proposed rule and performed a preliminary assessment of whether this proposed rule constitutes a takings under Texas Government Code, Chapter 2007. The specific purpose of the proposed rule is to clarify commission rules for pre-injection units at Class I nonhazardous, noncommercial injection wells so that pre-injection units will be regulated in a more consistent manner. The rule substantially advances this purpose by clarifying the definitions of injection well and pre-injection units; adding registration as an alternative to including pre-injection units in the injection well permit; and explicitly stating the design standards that will apply to all covered pre-injection units. In addition, the requirement to include pre-injection units in a permit or registration is synchronized with renewal of the injection well permit. The proposed rule does not require more from an applicant than is required by current rules, which require that pre-injection units be included in the injection well permit. Since the proposed rule does not require more than would be required by current rules, it does not burden an owner of real property in a manner which would be a statutory or constitutional taking. Specifically, the subject proposed rule does 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 regulation.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the proposed rule 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 rules in 30 TAC Chapter 281, Subchapter B, concerning the CMP. The proposed action concerns only the procedural rules of the commission, is not substantive in nature, does not govern or authorize any actions subject to the CMP, and is not itself capable of adversely affecting a coastal natural resource area (31 TAC Natural Resources and Conservation Code, Chapter 505; 30 TAC §§281.40 et seq.).

Interested persons may submit comments on the consistency of the proposed rule with the CMP during the public comment period.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Log Number 2000-055-331-WS. Comments must be received by 5:00 p.m., October 7, 2002. For further information, please contact Ray Austin, Regulation Development Section, at (512) 239-6814.

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.103, which provides the commission with 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 §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells. The amendment is also proposed under Texas Health and Safety Code (THSC), §361.017 and §361.024, which provide the commission with authority to adopt rules necessary to carry out its powers and duties under the Texas Solid Waste Disposal Act. The amendment is also proposed under THSC, §401.051, which provides the commission with authority to adopt rules necessary to carry out its powers and duties under the Texas Radiation Control Act.

The proposed amendment implements TWC, Chapter 27.

§39.403. Applicability.

(a) (No change.)

(b) As specified in those subchapters, Subchapters H - M of this chapter apply to notices for:

(1) - (13) (No change.)

(14) Water Quality Management Plan [~~(WQMP)~~] updates processed under TWC [~~Texas Water Code~~], Chapter 26, Subchapter B.

(c) Notwithstanding subsection (b) of this section, Subchapters H - M of this chapter do not apply to the following actions and other applications where notice or opportunity for contested case hearings are otherwise not required by law:

(1) - (12) (No change.)

(13) applications for minor modifications of Texas Pollutant Discharge Elimination System [~~(TPDES)~~] permits under §305.62(c)(3) of this title; [~~or~~]

(14) applications for registration and notification of sludge disposal under §312.13 of this title (relating to Actions and Notice); or [,]

(15) applications for registration of pre-injection units for nonhazardous, noncommercial, underground injection wells under §331.17 of this title (relating to Pre-Injection Units Registration).

(d) (No change.)

(e) Applications for radioactive materials licenses [~~Radioactive Materials Licenses~~] under Chapter 336 of this title are not subject to §39.405(c) and (e) of this title; [,] §§39.418 - 39.420 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit; Notice of Application and Preliminary Decision; and Transmittal of the Executive Director's Response to Comments and Decision); [~~39.418 - 39.420,~~] and certain portions of §39.413 of this title (relating to Mailed Notice).

This 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 23, 2002.

TRD-200205591
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 239-4712

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 356. GROUNDWATER MANAGEMENT
SUBCHAPTER B. DESIGNATION OF GROUNDWATER MANAGEMENT AREAS

31 TAC §§356.21 - 356.23

The Texas Water Development Board (the board) proposes new §§356.21-356.23 to 31 TAC Chapter 356 concerning Groundwater Management. The new sections will comprise new Subchapter B, Designation of Groundwater Management Areas. The purpose of the new sections is to designate and delineate groundwater management areas (GMAs) as required by statute.

BACKGROUND AND SUMMARY OF THE BASIS FOR THE PROPOSED RULE

Chapter 35, §35.004 of the Texas Water Code requires the Texas Water Development Board, with assistance from the Texas Natural Resources Conservation Commission, to designate GMAs covering all major and minor aquifers in the state. The initial designation is to be completed by September 1, 2003. The statute provides that each GMA shall be designated with the objective of providing the most suitable area for the management of groundwater resources. The GMAs so designated, shall, to the extent feasible, coincide with the boundaries of a groundwater reservoir or subdivision of a groundwater reservoir (aquifer). The legislation also authorizes the board to consider other factors in making its designation, including the boundaries of political subdivisions.

The board staff explored three possible approaches to delineate and designate proposed GMAs, considering hydrology, water-use patterns, and political boundaries to varying extents and received public comments on preliminary boundary designations.

The hydrologic approach, which has been selected as the primary basis for delineating boundaries of the proposed GMAs in this proposed new rule, designates boundaries in a manner that coincides most closely with the boundaries of aquifers. Board hydrogeologists used aquifers and other hydrologic boundaries to

guide the delineation of these GMAs. The boundaries generally honor the boundaries of the major aquifers of Texas as identified by the board. In areas with multiple major aquifers, preference generally was placed on the overlying aquifer. Several of the major aquifers were divided into multiple GMAs. These divisions were based on hydrogeology and current water-use patterns and coincide with natural features where possible. The board determined that this methodology was the most appropriate basis for the designation of GMAs in the proposed rule. This decision was based primarily upon the statutory direction set forth in the Texas Water Code §35.004 that the GMA boundaries are to coincide with the groundwater reservoir boundaries to the extent feasible, with the objective of providing the most suitable area for management of the groundwater resource. Other factors, such as political boundaries, were considered in the designation as well. The proposed delineation honors existing priority groundwater management areas (PGMAs).

To delineate the GMAs, Board staff developed a GMA geographic information system (GIS) layer which utilizes relevant portions of other GIS layers. These other GIS layers are: major aquifers, minor aquifers, river basins, counties, groundwater conservation districts, priority groundwater management areas, rivers, roads, and international and state boundaries. The selected information from these layers constitutes a data set denoting the proposed GMAs.

Proposed new §356.21 describes the scope of the subchapter as a delineation of groundwater management areas as required by Texas Water Code, Chapter 35, §35.004.

Proposed new §356.22 provides for definition of terms in the new subchapter.

Proposed new §356.23 designates and delineates the new groundwater management areas. Three digital files collectively constituting a data set delineating the groundwater management area boundary lines are adopted by reference. A CD-ROM containing the data is located in the offices of the board and is on file with the Secretary of State, Texas Register. The CD-ROM contains all of the geographic information system data used to create the boundaries as well as software and instructions on how to locate a specific area by coordinates or other means on a digital map. The same information can also be found on the board's website at http://www.twdb.state.tx.us.

Ms. Melanie Callahan, Director of Fiscal Services, has determined that for the first five-year period these sections are in effect, there will not be fiscal implications on state and local government as a result of enforcement and administration of the sections.

Ms. Callahan has also determined that for the first five years the sections as proposed are in effect, the public benefit anticipated as a result of enforcing the sections will be improved coordination in the management of groundwater resources in Texas. Ms. Callahan has determined there will not be economic costs to small businesses or individuals required to comply with the sections as proposed.

The board has reviewed the proposed rulemaking in accordance with the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule and is not subject to the requirements of that provision.

Comments on the proposed amendments will be accepted for 30 days following publication and may be submitted to Jorge Arroyo, Director of Special Projects, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231, by e-mail to jarroyo@twdb.state.tx.us or by fax @ 512/463-5580. A public hearing concerning the proposed rule will be held on September 30, 2002, 1:30 p.m. to 5:00 p.m., Stephen F. Austin Building, Room 118, 1700 North Congress Avenue, Austin, Texas.

In addition, public meetings concerning the proposed rule will be held at the following locations on the following dates:

September 5, 2002 6:30 p.m. to 8:30 p.m.

Plainview Country Club (South Ballroom)

2902 West 4th Street

Plainview, Texas

September 9, 2002 6:30 p.m. to 8:30 p.m.

San Angelo Research and Extension Center

7887 U.S. Highway 87 North

San Angelo, Texas

September 10, 2002 6:30 p.m. to 8:30 p.m.

Sul Ross State University

Lawrence Hall Room 300

Alpine, Texas

September 12, 2002 6:30 p.m. to 8:30 p.m.

Gillespie County Agricultural Center (Room 100)

Fredericksburg, Texas

September 18, 2002 6:30 p.m. to 8:30 p.m.

Corpus Christi City Hall (Council Chambers)

Corpus Christi, Texas

September 19, 2002 6:30 p.m. to 8:30 p.m.

Wharton County Civic Center

Wharton, Texas

September 25, 2002 6:30 p.m. to 8:30 p.m.

Raddison Hotel

2843 WNW Loop 323

Tyler, Texas

September 26, 2002 6:30 p.m. to 8:30 p.m.

Tarleton State University

Student Development Center Ballroom

Stephenville, Texas

The new sections are proposed under the authority of the Texas Water Code, Chapter 6, §6.101 which provides the board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, as well as under the authority of Texas Water Code, Chapter 35, §35.004 which provides that the Texas Water Development Board shall designate groundwater management areas covering all major and minor aquifers in the state.

The statutory provisions affected by the proposed amendments are Texas Water Code, Chapter 35.

§356.21. Scope of Subchapter.

This subchapter shall serve as the board's delineation of groundwater management areas pursuant to the requirement of Texas Water Code, Chapter 35, §35.004.

§356.22. Definitions of Terms.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. Words defined in Texas Water Code, Chapter 35, Groundwater Studies, and not defined here shall have the meanings provided in Chapter 35.

(1) Board -- The Texas Water Development Board.

(2) Groundwater management area -- An area designated and delineated by the Texas Water Development Board.

(3) Groundwater -- Water percolating below the earth.

(4) Groundwater reservoir -- A specific subsurface water-bearing reservoir having ascertainable boundaries containing groundwater.

(5) Aquifer -- Groundwater reservoir as defined in paragraph (4) of this subsection.

§356.23. Designation of Groundwater Management Areas.

Three digital files entitled "Groundwater_Management_Areas.shp," "Groundwater_Management_Areas.dbf," and "Groundwater_Management_Areas.shx" collectively constituting the data set delineating groundwater management area boundary lines for the State of Texas are adopted by reference. The boundaries of the groundwater management areas were created using a geographic information system. The digital files and a graphic representation of the groundwater management area boundaries entitled "Groundwater_Management_Areas.jpg" are available on a CD-ROM located in the offices of the Texas Water Development Board, on the board's web site at http:\\www.twdb.state.tx.us, and are on file with the Secretary of State, Texas Register. The graphic representation includes groundwater management area boundaries superimposed on a map that includes Texas county lines. The digital files entitled "Groundwater_Management_Areas.shp," "Groundwater_Management_Areas.dbf," and "Groundwater_Management_Areas.shx" are controlling in the event of a conflict with any graphic representation.

This 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 26, 2002.

TRD-200205621
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: November 13, 2002
For further information, please call: (512) 463-7981

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CHAPTER 363. FINANCIAL ASSISTANCE PROGRAMS

SUBCHAPTER A. GENERAL PROVISIONS

DIVISION 2. GENERAL APPLICATION PROCEDURES

31 TAC §363.17

The Texas Water Development Board (board) proposes an amendment to 31 TAC §363.17 concerning financial assistance for projects funded with grants from the Water Loan Assistance Fund, authorized by Chapter 15, Subchapter C of the Texas Water Code. The amendment is intended to implement the relevant provisions of Senate Bill 312 which expanded the board's authority to provide grant assistance for certain projects, including those for which federal grant funds are placed in the loan fund, those which have received a specific legislative appropriation, and those providing desalination, brush control, weather modification, regionalization or regional water quality enhancement services as defined by board rule, including regional conveyance systems.

Section 363.17 is proposed to be amended to describe those additional types of projects for which the board may provide grant assistance from the Water Loan Assistance Fund. Implementation of the proposed amendment will further define the board's financial assistance programs and provide guidance to proponents of the newly authorized types of projects.

Ms. Melanie Callahan, Director of Fiscal Services, has determined that for the first five-year period these changes are in effect there will no be fiscal implications on state and local government as a result of enforcement and administration of the sections.

Ms. Callahan has also determined that for the first five years the changes as proposed are in effect the public benefit anticipated as a result of implementing the amended section will be the identification of the procedures the board will follow in considering applications for legislatively appropriated grant funds that are available to eligible applicants for the specified types of projects. Ms. Callahan has further determined there will be no increased economic cost to small businesses or individuals required to comply with the sections as proposed because the provisions apply only to political subdivisions applying for board assistance.

It is estimated that the rule amendment will not adversely affect local economies because the rule pertains to a voluntary program and will be utilized by governmental entities to access the benefits of a non-repayable financial assistance program administered by the board.

Comments on the proposed amendment will be accepted for 30 days following publication and may be submitted to Robert Moreland, Attorney, 512/936-0863, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231, or by fax at 512/463-5580.

The amendments are proposed under the authority of the Texas Water Code, §§6.101, 15.003, and 15.403.

The statutory provision affected by the proposed amendment is Texas Water Code, Chapter 15, §15.102.

§363.17. Grants from Water Loan Assistance Fund.

(a) The board may provide grants from the Water Loan Assistance Fund for projects that include supplying water or wastewater service to areas in which:

(1) water supply services:

(A) from a community water system, do not provide drinking water of a quality that meets the standards set forth by the commission in 30 TAC §§290.1-290.26, 30 TAC §§290.38-290.51, and any applicable standards of any governmental unit with jurisdiction over such area;

(B) from individual wells, after treatment, do not provide drinking water of a quality that meets the standards set forth by the

commission in 30 TAC §§290.3, 290.4, 290.10, and 290.13, and any applicable standards of any governmental unit with jurisdiction over such area; or

(C) do not exist or are not provided, including a temporary interruption of service due to emergency conditions; and

(D) the financial resources are inadequate to provide water supply or sewer services that meet the standards and requirements of the commission as set forth herein; or

(2) sewer services:

(A) from any organized sewage collection and treatment facilities, do not comply with the standards and requirements set forth by the commission in 30 TAC Chapter 305;

(B) for on-site sewerage facilities, do not comply with the standards and requirements set forth by the commission in 30 TAC Chapter 285 and 313; or

(C) do not exist or are not provided, including a temporary interruption of service due to emergency conditions; and

(D) the financial resources are inadequate to provide water supply or sewer services that meet the standards and requirements of the commission as set forth herein; or

(3) for purposes of any federal funds for colonias deposited in the water assistance fund, such area meets the federal criteria for use of such funds.

(b) The board may also provide grants from the Water Loan Assistance Fund for projects:

(1) for which federal grant funds are placed in the loan fund;

(2) for which a specific legislative appropriation is made; or

(3) for desalination, brush control, weather modification, and regionalization and for providing regional water quality enhancement services as defined by board rule, including regional conveyance systems.

(c) [~~(b)~~] Grant funds will be administered according to the terms of an agreement between the board and the grantee.

This 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 22, 2002.

TRD-200205560
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: October 16, 2002
For further information, please call: (512) 463-7981

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 79. LEGAL SERVICES

SUBCHAPTER E. ADVISORY COMMITTEES

40 TAC §§79.401 - 79.404

The Texas Department of Human Services (DHS) proposes to amend §79.401, concerning definitions; §79.402, concerning advisory committees; §79.403, concerning mandated advisory committees; and §79.404, concerning committees established by the board, in its Legal Services chapter. The purpose of the amendments is to reflect the reauthorization of DHS's advisory committees. The proposed amendments extend the following advisory committees until September 1, 2006: Advisory Committee on Assisted Living Facilities, Nursing Facility Administrators Advisory Committee, Alzheimer's Advisory Committee, Aged and Disabled Advisory Committee, Texas Works Advisory Council, and Special Nutrition Programs Advisory Committee. In the case of the Home and Community Support Services Council, the abolition date that is currently August 31, 2003, is extended to September 1, 2006. The proposed amendments also move several advisory committees from §79.403 to §79.404 and vice versa to correctly reflect the committees' statutory basis, delete references to advisory committees that have been abolished, and conform rule language to current usage and statutes. Other changes are made to §79.401 and §79.402 to conform rule language to current statutes and delete a reference to automatic abolishment.

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 the reauthorization of DHS's advisory committees, allowing them to continue to provide the agency with advice in each committee's area of expertise and having the agency's rules on advisory committees conform to current statutes. There will be no adverse economic effect on small businesses, micro businesses, or other businesses as a result of enforcing or administering the sections, because the proposed amendments deal only with advisory committees, which are internal functions of DHS. 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 Sharon Venza at (512) 438-3113 in DHS Legal Services. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-304, 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, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs; under the Health and Safety Code, Chapters 142, 242, and 247, which authorizes DHS to regulate certain providers of services; and under the Government Code, Chapter 2110, which regulates state agency advisory committees.

The amendments implement the Human Resources Code, §§22.001-22.038 and §33.026; the Health and Safety Code, §142.015, §142.016, §242.303, and §247.006; and the Texas Government Code, §§2110.001-2110.008.

§79.401. Definitions.

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

(1) Advisory committee--A committee, council, commission, task force, or other entity with multiple members that has as its primary function advising a state agency in the executive branch of state government [~~that:~~]

[~~(A) is not a state agency;~~]

[~~(B) is created by or under state law; and~~]

[~~(C) has as its primary function advising a state agency~~].

(2) Board--The Texas [~~State~~] Board of Human Services.

§79.402. Advisory Committees.

(a) General responsibilities, requirements, and exceptions. Each committee may review and comment on proposed rule sections affecting that committee's special area of interest. At committee meetings, the presiding officer will report the committee's comments to the Texas Department of Human Services (DHS) staff supporting the committee, who will pass this information on to the board. In an emergency situation, DHS [~~the department~~] may bypass a committee, but DHS [~~the department~~] must submit the emergency rule sections to the committee during the first committee meeting after the emergency adoption.

(b) General structure.

(1)-(5) (No change.)

[~~(6) An advisory committee is automatically abolished on the fourth anniversary of the date of its creation, unless statute or the board establishes a different date.~~]

(6) [~~(7)~~] The presiding officer of an advisory committee is selected from advisory committee members, unless a different procedure for selection is prescribed by other law.

§79.403. Mandated Advisory Committees.

(a) Aged and Disabled Advisory Committee [~~Advisory Committee on Child Care Programs~~].

(1) Legal base. The committee's legal base is the Human Resource Code, §22.010 [~~(HRC), §44.061~~].

(2) Responsibilities. The committee advises DHS about developing policy, programs, and budget for the purpose of affecting immediate and long-range plans for services to the aged and persons with disabilities who are in institutional or community-based care.[~~:~~]

[~~(A) advises the Board and department in developing coordinated state policies for the use of federal and state funds in child care programs;~~]

[~~(B) reviews child care policies and programs for compliance with applicable guidelines and advises the Board and department concerning the results of its review;~~]

[~~(C) assists the department in holding biennial public hearings concerning state and federal child care programs to elicit public response and recommendations regarding the quality, accessibility, and affordability of child care services. Hearings must be held in at least three separate geographical regions of the state and may be held in conjunction with other public hearings concerning child care held by the department;~~]

[~~(D) reports annually its findings and recommendations to the Board.~~]

(3) Structure.

(A) The committee has members consisting of advocates for the aged and people with disabilities, providers, and others with knowledge or interest in the program [~~20 members representing the general public; parents, guardians, or custodians of children in child care; child care advocacy groups; operators and providers of child care programs and services representing rural and urban communities; profit and nonprofit providers of child care services representing rural and urban communities; experts in early childhood development and education; experts in child health and nutrition and other child care professionals~~].

(B) Committee members serve four-year rotating terms, with one-fourth of the membership rotating off service each year [~~Representatives of state agencies with an interest or role in state child care programs serve as ex-officio members. Ex-officio members serve as long as the Board directs them to do so~~].

[~~(C) Committee members serve two-year terms set by statute. Terms are rotating with one-half of the membership rotating off service each year. Members may be considered for reappointment to one additional term.~~]

(4) Abolishment date. The abolishment date is September 1, 2006 [~~1996~~].

(b) Advisory Committee on Assisted Living [~~Personal Care~~] Facilities.

(1) Legal base. The committee's legal base is the Health and Safety Code, §247.006 [~~§247.051~~].

(2) Responsibilities. The committee advises DHS [~~the department~~] on standards for licensing assisted living [~~personal care~~] facilities.

(3) Structure.

(A) (No change.)

(B) The commissioner of human services appoints two [~~one~~] staff members [~~member~~] from DHS [~~the department~~] to serve as [~~a~~] non-voting members [~~member~~]. In appointing staff members, the commissioner will appoint one member as a representative of long-term care policy and one member as a representative of long-term care regulation.

(C) (No change.)

(4) Abolishment date. The abolishment date is September 1, 2006 [~~August 31, 2001~~].

[~~(c) Advisory Committee on Fire Safety Standards.~~]

[~~(1) Legal base. The committee's legal base is the Health and Safety Code, §242.039.~~]

[~~(2) Responsibilities. The committee advises the department on development of rules regarding the applicability of municipal ordinances and regulations to the remodeling and renovation of existing structures to be used as health care facilities licensed under the Health and Safety Code, Chapter 242.~~]

[~~(3) Structure.~~]

[~~(A) The committee has 12 members as follows: two municipal fire marshals; four individuals representing the nursing home industry; the commissioner of human services or designee; one building official from a municipality that has adopted the Uniform~~

Building Code; one building official from a municipality that has adopted the Standard Building Code; one architect licensed under state law; one member of the Texas Board of Human Services; and one state Medicaid director or designee.]

[(B) Committee members serve four-year rotating terms, with three members rotating off service each year.]

[(4) Abolishment date. The abolishment date is September 1, 1996.]

[(5) Reimbursement. Members of the committee are not entitled to receive reimbursement for travel, meals, lodging, and any other expenses.]

(c) [(d)] Nursing Facility Administrators Advisory Committee.

(1) Legal base. The committee's legal base is the Health and Safety Code, §242.303.

(2) Responsibilities. The committee:

(A) advises the board on the licensing of nursing facility administrators, including the content of applications for licensure and of the examination administered to license applicants;

(B) reviews and recommends rules and minimum standards of conduct for the practice of nursing facility administration; and

(C) reviews all complaints against administrators and makes recommendations to DHS [the department] regarding disciplinary actions.

(3) Structure.

(A) The committee has nine members appointed by the governor consisting of:

(i) three licensed nursing facility administrators, at least one of whom must represent a not-for- profit nursing facility;

(ii) one physician with experience in geriatrics who is not employed by a nursing facility;

(iii) one registered nurse with experience in geriatrics who is not employed by a nursing facility;

(iv) one social worker with experience in geriatrics who is not employed by a nursing facility; and

(v) three public members with experience working with the chronically ill and infirm as provided by 42 U.S.C. Section 1396g.

(B) Committee members serve for staggered terms of six years, with the terms of three members expiring on February 1 of each odd-numbered year.

(C) Vacancies on the committee will be filled in the same manner in which the position was originally filled and will be filled by a person who meets the qualifications of the vacated position.

(4) Abolishment date. The abolishment date is September 1, 2006 [August 31, 2001].

(5) Reimbursement. Members of the committee receive no compensation but are entitled to reimbursement for actual and necessary expenses incurred in performing their duties.

[(e) Alzheimer's Advisory Committee.]

[(1) Legal base. The committee's legal base is the Human Resources Code (HRC), §32.0246.]

[(2) Responsibilities. The committee:]

[(A) assists the department in developing and implementing a pilot program for the treatment of persons with Alzheimer's Disease; and]

[(B) reports its progress and recommendations to the Board by the conclusion of the pilot on January 15, 1999.]

[(3) Structure.]

[(A) The committee has four members representing groups advocating for Alzheimer's patients. One member represents an institution of higher learning; one member is a clinician; one member represents the Texas Department on Aging (TDoA); one member represents the Texas Department of Mental Health and Mental Retardation (MHMR); and one member represents the Texas Department of Human Services (TDHS).]

[(B) Members serve until January 15, 1999, or until such time as the report on the pilot program is presented to the Legislature.]

[(C) The committee will be called into session on an as-needed basis to advise and consult with the department regarding the pilot.]

[(4) Abolishment date. The abolishment date is January 15, 1999.]

[(5) Reimbursement. Members of the committee are not entitled to receive reimbursement for travel, meals, lodging, and any other expenses.]

(d) [(f)] Home and Community Support Services Advisory Council.

(1) Legal base. The council's legal base is Health and Safety Code, §142.015.

(2) Structure. The council has 13 members who are appointed by the governor. The council includes three consumer representatives and ten non-consumer representatives as follows:

(A) three consumer representatives;

(B) two representatives of agencies that are licensed to provide certified home health services;

(C) two representatives of agencies that are licensed to provide home health services but are not certified home health services;

(D) three representatives of agencies that are licensed to provide hospice services with one representative appointed from:

(i) a community-based non-profit provider of hospice services;

(ii) a community-based proprietary provider of hospice services; and

(iii) a hospital-based provider of hospice services; and

(E) three representatives of agencies that are licensed to provide personal assistance services.

(3) Terms of office. The term of office of each member is two years.

(A) Members serve staggered terms so that the terms of seven members will expire on January 31 of each even-numbered year and the terms of six members will expire on January 31 of each odd-numbered year.

(B) Vacancies on the council are filled in the same manner in which the position was originally filled and are filled by a person who meets the qualifications of the vacated position.

(4) Officers. The council elects [~~elect~~] a presiding officer and an assistant presiding officer from among its members at its first meeting after August 31 of each year.

(A) Each officer serves until the next regular election of officers.

(B) The presiding officer presides at all council meetings at which he or she is in attendance, calls meetings in accordance with this subsection, appoints subcommittees of the council as necessary, and causes proper reports to be made to the Texas Board of Human Services. The presiding officer may serve as an ex-officio member of any subcommittee of the council.

(C) The assistant presiding officer performs the duties of the presiding officer in case of the absence or disability of the presiding officer. In case the office of presiding officer becomes vacant, the assistant presiding officer serves until a successor is elected to complete the unexpired portion of the term of the office of presiding officer.

(D) A vacancy that occurs in the offices of presiding officer or assistant presiding officer is filled at the next council meeting.

(E) The presiding officer serves for one year but may not serve as presiding officer and/or assistant presiding officer for more than two years.

(F) The council may reference its officers by other terms, such as chairperson and vice- chairperson.

(5) Responsibilities.

(A) The council advises DHS [~~the Texas Department of Human Services~~] on licensing standards and on the implementation of Health and Safety Code, Chapter 142.

(B) As required in Health and Safety Code, §142.009(l), the council makes recommendations for a memorandum of understanding (MOU) that establishes procedures to eliminate or reduce duplication of standards or conflicts between standards and of functions in license, certification, or compliance surveys and complaint investigations. Also, in accordance with Health and Safety Code, §142.009(l), the Health and Human Services Commission (HHSC) must review the recommendation of the council relating to the MOU before considering approval. The MOU must be approved by HHSC.

(C) At each meeting of the council, DHS provides an analysis of enforcement actions taken under this chapter, including the type of enforcement action, the results of the action, and the basis for the action. The council may advise DHS on its implementation of the enforcement provisions of the Health and Safety Code, Chapter 142.

(D) The council must meet as least once a year and may meet to conduct council business at other times at the discretion of the presiding officer, any three members of the council, or DHS's commissioner.

(i) DHS staff make [~~makes~~] meeting arrangements. DHS staff contact council members to determine availability for a meeting date and place.

(ii) DHS informs each member of the council of a council meeting at least five working days before the meeting.

(iii) A simple majority of the members of the council constitutes a quorum for the purpose of transacting official business.

(iv) The council is authorized to transact official business only when in a legally constituted meeting with quorum present.

(v) The agenda for each council meeting includes an item entitled public comment under which any person may address the council on matters relating to council business. The presiding officer may establish procedures for public comment, including a time limit on each comment.

(E) The council may establish subcommittees as necessary to assist the council in carrying out its duties.

(i) The presiding officer appoints members of the council to serve on subcommittees and to act as subcommittee chairpersons. The presiding officer may also appoint nonmembers of the council to serve on subcommittees.

(ii) Subcommittees must meet when called by the subcommittee chairperson or when so directed by the council.

(iii) A subcommittee chairperson must make regular reports to the advisory council at each council meeting or in interim written reports as needed. The reports must include an executive summary or minutes of each subcommittee meeting.

(F) Members must attend council meetings as scheduled. Members must attend meetings of subcommittees to which they are [~~the member is~~] assigned.

(i) A member must notify the presiding officer or appropriate DHS staff if he or she is unable to attend a scheduled meeting.

(ii) It is grounds for removal from the council if a member fails to meet council responsibilities for a substantial part of the term for which the member is appointed because of:

(I) illness or disability;

(II) absenteeism from more than half of the council and subcommittee meetings during a calendar year; or

(III) absenteeism from at least three consecutive council meetings.

(iii) The validity of an action of the council is not affected by the fact that it is taken when a ground for removal of a member exists.

(G) The council must file an annual written report with the board.

(i) The report must list:

(I) the meeting dates of the council and any subcommittees;

(II) the attendance records of its members;

(III) a brief description of actions taken by the council;

(IV) a description of how the council has accomplished the tasks given to the council by the board;

(V) the status of any rules that [~~which~~] were recommended by the council to the board; and

(VI) anticipated activities of the council for the next year.

(ii) The report must identify the costs related to the council's existence, including the cost of agency staff time spent in support of the council's activities.

(iii) The report must cover the meetings and activities in the immediate preceding 12 months and must be filed with the board each July. The report must be signed by the presiding officer and appropriate DHS staff.

(H) The council carries out any other tasks given to the council by the board.

(6) Abolishment. The abolishment date is September 1, 2006 [~~July 1, 2003~~].

(7) Staff support. DHS provides staff support for the council.

(8) Procedures. *Roberts Rules of Order, Newly Revised*, are the basis of parliamentary decisions except where otherwise provided by law or rule.

(A) Once a quorum is established, a majority vote of the members present must approve any action taken by the council.

(B) Each member has one vote.

(C) A member may not authorize another individual to represent the member by proxy.

(D) The council must 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.

(E) DHS staff record minutes of each council meeting.

(i) A draft of the minutes approved by the presiding officer is provided to the board and each member of the council within 30 days of each meeting.

(ii) After approval by the council, the minutes must be signed by the presiding officer.

(9) Statement by members.

(A) The board, DHS, and the council are not bound in any way by any statement or action on the part of any council member except when a statement or action is in pursuit of specific instructions from the board, DHS, or council.

(B) The council and its members may not participate in legislative activity in the name of the board, DHS, or the council except with approval through DHS's legislative process. Council members are not prohibited from representing themselves or other entities in the legislative process.

(10) Reimbursement for expenses. In accordance with the requirements specified in the Government Code, Chapter 2110, a council member may receive reimbursement for the member's expenses incurred for each day the member engages in official business if authorized by the General Appropriations Act or budget execution process.

(A) No compensatory per diem is paid to council members unless required by law.

(B) A council member who is an employee of a state agency, other than DHS, may not receive reimbursement for expenses from DHS.

(C) A nonmember of the council who is appointed to serve on a subcommittee may not receive reimbursement for expenses from DHS.

(D) Each member who is to be reimbursed for expenses must submit to staff the member's receipts for expenses and any required official forms no later than 14 days after each council meeting.

(E) Requests for reimbursement of expenses must be made on official state travel vouchers prepared by DHS staff.

(e) [~~(g)~~] Texas Board of Human Services/Board of Nurse Examiners Memorandum of Understanding Advisory Committee.

(1) Legal base. The Health and Safety Code, §142.016(b), requires the Texas Board of Human Services (board) and the Board of Nurse Examiners (BNE) to jointly establish and appoint the committee.

(2) Structure.

(A) DHS and BNE appoint the advisory committee that must include at a minimum:

(i) one representative from the BNE and one representative from DHS [~~the Texas Department of Human Services (DHS)~~] to serve as co-chairmen;

(ii) one representative from the Texas Department of Mental Health and Mental Retardation;

(iii) one representative from the Texas Department of Human Services [~~Health~~];

(iv) one representative from the Texas Nurses Association;

(v) one representative from the Texas Association for Home Care, Incorporated, or its successor;

(vi) one representative from the Texas Hospice Organization, Incorporated, or its successor;

(vii) one representative of the Texas Respite Resource Network or its successor; and

(viii) two representatives of organizations such as the Personal Assistance Task Force or the Disability Consortium that advocate for clients in community-based settings.

(B) The representatives from the organizations listed in subparagraph (A)(i)-(vii) of this paragraph may serve without further approval of the board or the BNE. The representatives of organizations described in subparagraph (A)(viii) of this paragraph must be approved by the board and the BNE before serving.

(3) Terms of office. The term of office of each member is six years. Members must serve after expiration of their term until a replacement is appointed.

(A) Members are appointed for staggered terms with the terms of an equivalent number of members expiring on January 31 of each even-numbered year.

(B) If a vacancy occurs, a person is appointed to serve the unexpired portion of that term.

(4) Officers. The representatives from DHS and the BNE serve as co-chairmen of the committee.

(A) The co-chairmen preside at all committee meetings at which they are 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.

(B) In the absence of one co-chairman, the appropriate state agency designates a temporary co-chairman. The temporary co-chairman acts in full authority for the designated period of time.

(5) Responsibilities.

(A) The committee advises the board and the BNE regarding the development, modification, or renewal of a memorandum of understanding (MOU) governing the circumstances under which the

provision of health-related tasks or services do not constitute the practice of professional nursing.

(B) The committee carries out any other tasks given to the committee by the board and the BNE that are reasonable and necessary to accomplish the purpose of the MOU.

(C) The committee must meet as necessary to conduct committee business.

(i) A meeting may be called by agreement of DHS staff, BNE staff, and either the co-chairmen or at least three members of the committee.

(ii) DHS staff make meeting arrangements. DHS staff contact committee members to determine availability for a meeting date and place.

(iii) DHS staff inform [~~informs~~] each member of the committee of a committee meeting at least five working days before the meeting.

(iv) A simple majority of the members of the committee constitutes [~~constitute~~] a quorum for the purpose of transacting official business.

(v) The committee is authorized to transact official business only when in a legally constituted meeting with quorum present.

(vi) The agenda for each committee meeting includes an item entitled public comment under which any person may address the committee on matters relating to committee business. The co-chairmen may establish procedures for public comment, including a time limit on each comment.

(D) The committee may establish subcommittees as necessary to assist the committee in carrying out its duties.

(i) The co-chairmen appoints members of the committee to serve on subcommittees and to act as subcommittee chairpersons. The co-chairmen may also appoint nonmembers of the committee to serve on subcommittees.

(ii) Subcommittees must meet when called by the subcommittee chairperson or when so directed by the committee.

(iii) A subcommittee chairperson must make regular reports to the advisory committee at each committee meeting or in interim written reports as needed. The reports must include an executive summary or minutes of each subcommittee meeting.

(E) Members must attend committee meetings as scheduled. Members must attend meetings of subcommittees to which they are [~~the member is~~] assigned.

(i) A member must notify the presiding officer or appropriate DHS staff if he or she is unable to attend a scheduled meeting.

(ii) It is grounds for removal from the committee if a member fails to meet committee responsibilities for a substantial part of the term for which the member is appointed because of:

(I) illness or disability;

(II) absenteeism from more than half of the council and subcommittee meetings during a calendar year; or

(III) absenteeism from at least three consecutive council meetings.

(iii) 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.

(6) Abolishment. The abolishment date is July 1, 2003.

(7) Staff. DHS staff, in conjunction with designated BNE staff, provide support for the committee.

(8) Procedures. *Roberts Rules of Order, Newly Revised*, is the basis of parliamentary decisions except where otherwise provided by law or rule.

(A) Any action taken by the committee must be approved by a majority vote of the members present once quorum is established.

(B) Each member has one vote.

(C) A member may not authorize another individual to represent the member by proxy.

(D) The committee must 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.

(E) DHS staff record minutes of each committee meeting.

(i) A draft of the minutes approved by the co-chairmen must be provided to the board, the BNE designated staff, and each member of the committee within 30 days of each meeting.

(ii) After approval by the committee, the minutes must be signed by the co-chairmen.

(9) Responsibility of DHS and BNE. [~~The~~] DHS and the BNE annually review and renew or modify the MOU as necessary.

(10) Statement by members. The board, DHS, and the committee are 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, DHS, or committee.

(f) Special Nutrition Programs (SNP) Advisory Committee.

(1) Legal basis. The committee's legal base is the Human Resources Code, §33.026 (federal Child and Adult Care Food Program).

(2) Responsibilities.

(A) The committee advises DHS on policies, procedures, and management issues of all child nutrition and commodity distribution programs. Before adopting or changing a DHS rule section or policy relating to the federal Child and Adult Care Food Program, DHS must submit the proposed action to the DHS advisory committee on that program for comment, unless immediate action is required by federal law. If immediate action is required by federal law, DHS must submit the action for comment at the earliest possible date.

(B) The DHS advisory committee on the federal nutrition programs may:

(i) conduct public hearings in accordance with DHS procedures;

(ii) refer issues relating to the program to the board for discussion; and

(iii) recommend modifications to DHS training programs for sponsoring organizations and other persons participating in the program.

(3) Structure.

(A) The committee membership of eleven members is demographically and geographically balanced. Members represent

each of the Special Nutrition Programs and may include parents, providers, concerned citizens, and other advocates who share an interest in the programs.

(B) Representatives of state agencies and federal agencies with an interest or role in the committee's field of work serve as ex-officio members. Ex-officio members serve until they are replaced by the agency they represent.

(C) Committee members serve four-year rotating terms, with approximately one- fourth of the membership rotating off service each year.

(D) The committee meets at least four times per year.

(4) Abolishment date. The abolishment date is September 1, 2006.

§79.404. Committees Established by the Board.

(a) Alzheimer's Advisory Committee [~~Aged and Disabled Services Advisory Committee~~].

(1) (No change.)

(2) Responsibilities. The committee advises the Texas Department of Human Services (DHS) on issues involved in the treatment of persons with Alzheimer's disease, including help in identifying gaps in services and the evaluation of current processes [~~the Board and the department about developing policy, programs, and budget for the purpose of affecting immediate and long-range plans for services to the aged and persons with disabilities who are in institutional or community-based care~~].

(3) Structure.

(A) The committee has four members representing groups advocating for Alzheimer's patients. One member represents an institution of higher learning; one member is a clinician; one member represents the Texas Department on Aging; one member represents the Texas Department of Mental Health and Mental Retardation; and one member represents DHS [~~consisting of advocates for the aged and people with disabilities, providers, and others with knowledge or interest in the program~~].

(B) (No change.)

(4) Abolishment date. The abolishment date is September 1, 2006 [~~August 31, 2001~~].

(5) Reimbursement. Members of the committee are not entitled to receive reimbursement for travel, meals, lodging, and any other expenses.

(b) Texas Works [~~Client Self-Support Services~~] Advisory Council.

(1) (No change.)

(2) Responsibilities. The council advises DHS [~~the Board and the department~~] about programs administered under Texas Works [~~client self-support~~], including Temporary Assistance for Needy Families [~~Aid to Families with Dependent Children~~], Food Stamps, Medicaid, employment services, nutrition services, and teen pregnancy prevention, but is not required to review proposals previously reviewed and recommended by another advisory committee.

(3) (No change.)

(4) Abolishment date. The abolishment date is September 1, 2006 [~~August 31, 2001~~].

[~~(c) Family Violence Advisory Committee.~~]

[~~(1) Legal base. The committee's legal base is the Human Resources Code, §22.009.~~]

[~~(2) Responsibilities. The committee advises the Board and the department about family violence program services, issues, and policy.~~]

[~~(3) Structure.~~]

[~~(A) The committee has 11 regular members representing family violence providers, the legal system, law enforcement, other health and human services advocates for elderly citizens and children, and formerly battered women.~~]

[~~(B) Committee members serve four-year, rotating terms, with approximately one-fourth of the membership rotating off service each year.~~]

[~~(4) Abolishment date. The abolishment date is September 1, 1996.~~]

[~~(d) Special Nutrition Programs (SNP) Advisory Committee.~~]

[~~(1) Legal basis. The committee's legal base is the Human Resources Code, §22.009.~~]

[~~(2) Responsibilities. The committee advises the Board and DHS on policies, procedures, and management issues of all child and nutrition programs, including the child and adult care food program.~~]

[~~(3) Structure.~~]

[~~(A) The committee membership has a representative balance of SNP sponsors, contractors, and recipient agencies; providers; concerned citizens; and parents and relatives of children who participate in programs administered by SNP.~~]

[~~(B) Representatives of state agencies and federal agencies with an interest or role in the committee's field of work serve as ex-officio members. Ex-officio members serve until they are replaced by the agency they represent.~~]

[~~(C) Committee members serve four-year rotating terms, with approximately one-fourth of the membership rotating off service each year.~~]

[~~(D) The committee will meet at least four times per year.~~]

[~~(4) Abolishment date. The abolishment date is August 31, 2000.~~]

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

Filed with the Office of the Secretary of State on August 22, 2002.

TRD-200205556
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: October 6, 2002
For further information, please call: (512) 438-3734

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 65. WILDLIFE

SUBCHAPTER A. STATEWIDE HUNTING AND FISHING PROCLAMATION

DIVISION 1. GENERAL PROVISIONS

31 TAC §65.11

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.65(c)(2), the proposed amended section, submitted by the Texas Parks and Wildlife Department has been automatically withdrawn. The amended section as proposed appeared in the February 22, 2002 issue of the *Texas Register* (27 TexReg 1266).

Filed with the Office of the Secretary of State on August 26, 2002.

TRD-200205634

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the the rule (Government Code, §2001.036). If a rule is adopted without change to the text as published in the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 5. TEXAS BUILDING AND PROCUREMENT COMMISSION

CHAPTER 113. PROCUREMENT DIVISION

SUBCHAPTER H. RECYCLING MARKET DEVELOPMENT BOARD (RMDB)

1 TAC §113.137

The Texas Building and Procurement Commission adopts amendments to Title 1, T.A.C., §113.137 (relating to Identification of Recycled, Remanufactured or Environmentally Sensitive Commodities or Service for Procurements by State Agencies). 1 T.A.C., §113.137 is adopted without changes to the proposed text as published in the June 28, 2002 issue of the *Texas Register* (27 TexReg 5644). The text will not be republished.

The amended rule is adopted to establish additional First Choice commodities to comply with current statutory requirements of Texas Government Code, §2155.445 and §2155.448(a).

The amendments to 1 T.A.C., § 113.137 will designate additional First Choice commodities developed in coordination with the Recycling Market Development Board (RMDB) that will encourage the use of recycled, remanufactured, or environmentally sensitive products by state agencies.

No comments were received regarding the adoption of 1, T.A.C., §113.137.

The amendment to §113.137 are proposed under the authority of the Health and Safety Code §361.423 and the Texas Government Code, §2155.445 and §2155.448(a).

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 23, 2002.

TRD-200205580
Juliet U. King
Legal Counsel
Texas Building and Procurement Commission
Effective date: September 12, 2002
Proposal publication date: June 28, 2002
For further information, please call: (512) 463-3583

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 53. HOME INVESTMENT PARTNERSHIPS PROGRAM

10 TAC §53.63

The Texas Department of Housing and Community Affairs (the Department) adopts §53.63, without changes, as published in the July 26, 2002 issue of the *Texas Register* (27 TexReg 6594-6597), concerning the Community Housing Development Organization (CHDO) Certification, and therefore, will not be republished.

The purpose of this section is to provide a process for the certification of Community Housing Development Organizations (CHDO) to participate in the Department's HOME program.

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 codes, articles or 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 26, 2002.

TRD-200205632
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Effective date: September 15, 2002
Proposal publication date: July 26, 2002
For further information, please call: (512) 475-3726

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 20. ADMINISTRATION

SUBCHAPTER E. VEHICLE MANAGEMENT

16 TAC §20.401

The Railroad Commission of Texas (Commission) adopts an amendment to §20.401, relating to Agency Vehicles, without

changes to the version published in the July 12, 2002, issue of the *Texas Register* (27 TexReg 6163). The amendment adds new subsection (d) to prohibit a Commission employee from bidding on surplus vehicles if the employee has been involved in the inspection of the vehicle. The Commission adopts this new wording to enhance and improve its internal control stucture.

The Commission received no comments on the proposal.

The Commission adopts new §20.401 under Texas Government Code, §2171.1045, which requires the Commission to adopt rules consistent with the management plan adopted under Texas Government Code, §2171.104, relating to the assignment and use of the agency's vehicles.

Texas Government Code, §§2171.104 and 2171.1045, is affected by the adopted amendment.

Issued in Austin, Texas, on August 20, 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 20, 2002.

TRD-200205447
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Effective date: September 9, 2002
Proposal publication date: July 12, 2002
For further information, please call: (512) 475-1295

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PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) adopts new §25.43, relating to Provider of Last Resort (POLR) and amendments to §25.478, relating to Credit Requirements and Deposits; §25.480, relating to Bill Payment and Adjustments; §25.482, relating to Termination of Contract; and §25.483, relating to Disconnection of Service, with changes to the text as proposed in the *Texas Register* on June 7, 2002 (27 TexReg 4887). The commission adopts the repeal of existing §25.43, relating to Provider of Last Resort (POLR) with no changes as proposed in the *Texas Register* on June 7, 2002 (27 TexReg 4887). This order is entered into Project Number 25360, *Rulemaking Proceeding to Amend Requirements for Provider of Last Resort Service.*

New §25.43 alters the current structure for POLR service by phasing in the ability of retail electric providers (REPs) to disconnect non-paying customers. The affiliated REP will function as the POLR for non-paying customers by providing electric service at the price-to-beat (PTB), until such time as REPs may disconnect customers for nonpayment. In addition, the new section streamlines the process for selecting POLRs by prescribing bid requirements and POLR selection methods and ensuring transparency in the POLR selection process.

New §25.43 incorporates by reference three standard terms of service agreements, one for each POLR customer class. These documents have been adopted as figures appended to the rule.

Amendments to §25.478 exempt medically indigent customers, as defined in the rule, from electric service deposit requirements and allow low-income customers to pay deposits in two installments rather than one. Amendments to §25.478 also conform the provisions of the rule to the provisions of new §25.43. The amendments also eliminate more stringent deposit requirements for customers over the age of 65 and clarify that a guarantee agreement terminates when the customer whose service is guaranteed is no longer subject to the deposit requirements of the rule.

The amendments to §25.480 consist of non-substantive corrections to other rule sections as a result of amendments to §25.482 and §25.483. The amendments to §25.482 and §25.483 conform the provisions of those rules to the provisions of new §25.43. More specifically, these amendments implement the introduction of the right to disconnect for all REPs.

The commission initiated this rulemaking process on January 29, 2002. The commission hosted workshops in Austin on February 26, 2002 and April 17, 2002 to solicit input from the stakeholders. In addition, the commission conducted workshops in Dallas on March 7, 2002 and Houston on March 27, 2002 to specifically solicit comments from the low-income community. The commission voted to publish the proposed rule in the *Texas Register* at the May 23, 2002 open meeting.

A public hearing on this rulemaking was held at commission offices on July 2, 2002. Representatives from Reliant Resources, Inc. (Reliant), American Electric Power Company (AEP), Texas Legal Services Center (referred to herein along with other representatives of consumer groups as "Consumer Groups"), the Office of Public Utility Counsel (OPC), and TXU Energy Services (TXU) attended the hearing and provided comments. To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

The commission received comments on its rulemaking proposal from the Alliance for Retail Markets (ARM); Texas Legal Services Center, Texas Ratepayers' Organized to Save Energy, and Consumers Union (collectively, Consumer Groups); Barbara Alexander on behalf of Consumer Groups; Reliant Energy, Incorporated doing business as CenterPoint Energy Houston Electric (Centerpoint); Entergy Solutions Ltd., Entergy Solutions Select Ltd., and Entergy Solutions Essentials Ltd. (Entergy); Entergy Gulf States, Inc. (EGSI); Electric Reliability Council of Texas, Inc. (ERCOT); First Choice Power, Inc. (First Choice); Houston Energy Advocacy Team, a coalition of the following organizations and entities: the Better Business Bureau, Chinese Community Center, Christian Community Service Center, Harris County Social Services, Humble Area Assistance Ministries, National Hispanic Council on Aging Houston Chapter, Sheltering Arms Senior Services, St. Mary Magdalene, and United Way of the Texas Gulf Coast (HEAT); Mutual Energy CPL, LP, Mutual Energy WTU, LP, AEP Texas Commercial and Industrial Retail Limited Partnership, and POLR Power, LP, AEP-Central Power and Light Company, and AEP-West Texas Utilities Company (collectively AEP); OPC; Reliant; Republic Power, LP (Republic); Texas Industrial Energy Consumers (TIEC); and TXU Energy Retail Company, LP (TXU Energy Retail Company, LP and TXU Energy Services are referred to herein collectively as TXU).

At its May 23, 2002 open meeting, the commission requested that REPs indicate in their comments on the rule whether they would bid on POLR service under the rule as proposed or under the rule as proposed with changes made to reflect comments of individual REPs. In response to this question, Reliant commented that if the rule were to be adopted with Reliant's proposed modifications, or if the issues raised by Reliant were otherwise satisfactorily resolved, Reliant would participate in the bid process. Reliant also commented that, if the rule is adopted as proposed, Reliant would have to assess market conditions at the time of the bid process to determine whether to participate in the bid process. Subsequent to the close of the comment period in this project, TXU indicated that it would decide whether it was going to bid once the rule is finally adopted. TXU stated that there was currently too much uncertainty to definitively respond to this question. Green Mountain also indicated after the close of the comment period that it might bid on POLR service under the proposed rule but would prefer to have the option to bid on large groups of customers at the time of their transfer to POLR. For example, Green Mountain would prefer to bid for customers in the instance of a REP defaulting, rather than bidding on POLR for a term that would result in an uncertain number of customers being transferred to the service.

Comments and responses to preamble questions:

In the preamble, the commission requested that interested parties address eight issues related to the implementation and final development of the proposed rule. The parties' responses to these issues are summarized below.

1. Are there methods for ensuring POLR service to customers as contemplated under the Public Utility Regulatory Act, Texas Utilities Code Annotated (Vernon 1998, Supplement 2002) (PURA) §39.101(b)(4) and §39.106, including customers who request POLR service, other than those set forth in the proposed amendments? If so, please explain those alternatives. Please identify the pros and cons of those methods and explain how they compare to the methods proposed in terms of ease of administration.

AEP proposed to require that all affiliated REPs be assigned responsibility for providing electric service in the service territory of their affiliated transmission and distribution utilities (TDUs) at the PTB, both for non-paying customers and customers whose chosen REP can no longer serve them. In support of its proposal, AEP noted (1) there is no basis in PURA for differentiating between non-paying POLR customers and customers transferred to POLR because their chosen REP can no longer serve them; (2) splitting up POLR responsibilities to serve non-paying customers and customers whose REP can no longer serve them will be inefficient; (3) establishing an entire POLR bidding and appointment process solely for those customers whose chosen REP can no longer serve them is expensive and time- consuming for REPs and commission staff; (4) limiting the POLR rate to 125% of the PTB will not adequately compensate a POLR, hence, no eligible REP is likely to bid to be POLR; (5) the affiliated REPs have the size and experience to absorb a sudden influx of customers in the event a REP is unable to serve its customers; (6) assigning POLR responsibilities to the affiliated REP will result in lower rates for customers whose chosen REP can no longer serve them; and (7) any market concerns regarding assignment of POLR responsibilities to the affiliated REP for customers whose REP can no longer serve them are minimal.

Consumer Groups agreed with AEP that there will be so little POLR business under the proposed rule that the affiliated REP would be better off if all POLR business went to the affiliated REP. Consumer Groups also claimed that the proposed rule fails to provide reasonable POLR rates for customers for whom the market fails. Consumer Groups asserted that the commission should have a full accounting of potential costs and impacts of various strategies for providing POLR service and the impacts of disconnection policies on customers, the industry, and the commission.

Consumer Groups claimed that the proposed POLR rule almost guarantees rates that are higher than those previously approved by the commission, with no guarantee that the REPs appointed will be capable of fulfilling the duties of POLR.

Consumer Groups noted that, if the bidding process fails, the lottery process guarantees a POLR rate that is 125% of the PTB. This will result in POLR rates that are higher than the current rates. According to Consumer Groups, commission staff has been overly concerned with the affect that the POLR may have on the market if rates are too low, as reflected in the fact that the current rule provides for a "perverse" scheme whereby the POLR rate can only be set at the PTB if no other REP bids to serve as POLR at a price higher than the PTB.

Entergy disagreed with commenters who suggested that customers whose REP goes out of business should automatically move to the affiliated REP. Entergy suggested that such an approach is inconsistent with PURA, which clearly distinguishes between POLR and PTB service. Entergy emphasized that POLR service should not create an alternative competitive offering. Entergy commented that it provided alternatives for POLR service through informal comments in this project as well as in Project Number 21408, *Provider of Last Resort*. In those comments, Entergy proposed four primary changes to the POLR rule: (1) allow the POLR the right to reset POLR prices on a daily, monthly, or semi-annual basis and allow for seasonality for all customer classes; (2) allow for some type of adjustment to the POLR rate to reflect a substantial market change; (3) allow for a minimum stay for a POLR customer; and (4) allow all REPs the right to disconnect. As one alternative, Entergy suggested allowing bidders to bid an adjustment factor over the PTB, with this factor reset periodically to reflect changed market conditions. For large non-residential customers, Entergy suggested that a rate structure indexed to the market is needed to prevent gaming by large non-residential customers.

ARM commented that because POLR service is transitory, the fairest price for the energy component is the actual price of electricity at the time the customer receives POLR service. According to ARM, a different method for procuring and pricing POLR service would be to allow REPs to bid for the non- energy components of POLR service and index energy component of the POLR rate to *Platt's Megawatt Daily* or another index. ARM stated that selecting the best bid from this solicitation would give the customer a fair price, ensure cost recovery by the POLR, and be easy to administer.

First Choice recommended that the rule recognize the market value of customers of defaulting REPs and attempt to eliminate excess regulation with respect to these customers. First Choice noted that non- paying customers should constitute the vast majority of all POLR customers and that customers of defaulting REPs will represent only a small fraction of the potential POLR customer base. First Choice agreed that an affiliated REP should be permitted to serve as POLR in its affiliated TDU's service area. According to First Choice, an affiliated REP serving non-paying customers in its service area is better able to address the needs of non-paying customers in an efficient

manner. First Choice commented that it has the infrastructure in place in its service area to serve the needs of its customers.

OPC commented that the "dominant REP," or the REP with the greatest market share, should serve as POLR for customers whose REP has gone out of business and for non-paying customers. OPC explained that the dominant REP would serve as POLR at the price it charges most of its customers in the applicable rate class. Any other REP wishing to serve as POLR would be able to do so provided it submitted a bid at less than the rate charged by the dominant REP. Under OPC's dominant REP proposal, the dominant REP would serve as POLR at the PTB unless another REP submitted a bid to serve as POLR at a price less than the PTB. After the PTB period, the dominant REP would serve as POLR at its most popular price plan unless another REP bid to serve as POLR at a price lower than the dominant REP's.

Consumer Groups supported OPC's proposal. While the Consumer Groups were in favor of the commission designating the affiliated REP at the PTB as POLR in each TDU service area, they stated that there may be competitive benefits to customers under OPC's proposal and believe that it is an acceptable alternative for selecting POLR providers. In reply comments, Consumer Groups reiterated their support for OPC's dominant REP proposal, noting that it is senseless to set up a process that will result in an unnecessarily higher POLR rate when the affiliated or dominant REP can perform the service profitably at a lower cost. Further they argued that setting the rate at the PTB, which is an above market rate, should not have an adverse impact on competition.

Entergy claimed that OPC's dominant REP proposal appears to violate the legislative intent of PURA and recommended rejection of the proposal for the reasons set forth in preamble question 7.

Reliant claimed that AEP, OPC, and Consumer Groups did not address the risk associated with providing POLR service. According to Reliant, each of their proposals assumes that the risk that the POLR will face is equal to the risk faced by competitive providers or the affiliated REP. Reliant argued, however, that when a REP exits the market and transfers all of its customers to the POLR with little or no notice, the POLR will have to procure power for an unknown load at the prevailing market price for power. In addition, Reliant stated that the POLR will not know how long the customer will stay; therefore, there is no way to hedge POLR risk or attempt to purchase power at favorable prices in the forward market.

With respect to OPC's claim that the dominant REP, because of its size, is better able to cope with the risk of REP default than other providers, Reliant stated that by making this claim OPC had effectively agreed that there may be a higher risk of providing service to POLR customers. Reliant emphasized that the POLR price should be sufficient to cover the cost of POLR service without having to rely on cross subsidies from other services or from shareholders.

In response to OPC's claim that the PTB is an above-market rate, Reliant stated that the affiliated REP has a more predictable load and a rule allowing price adjustments; therefore, the affiliated REP can partially hedge the risk of providing service by buying in the forward market. Reliant noted, however, that the POLR does not have a predictable load and may not have any load at all during a given month. Reliant explained that the POLR must rely on the spot market for power to serve its customers and it is impossible to determine whether the PTB would be adequate to serve customers.

Also, Reliant commented that the release of power under contracts held by a REP when it goes out of business would not increase the supply of power in the market because overall demand would not change.

In its reply comments, TXU stated that comments of certain parties indicate a desire to move POLR service back toward an environment of fully regulated prices and mechanisms. However, TXU argued that PURA §39.001(d) and §39.106 require that POLR service be implemented in a competitive manner. TXU stated that OPC's dominant REP proposal seeks to impose a regulated rate structure on POLR service in violation of PURA.

A second alternative proposed by OPC would be to assign customers of a defaulting REP to all the other REPs eligible to serve that customer class. This proposal would only apply to the customers of a defaulting REP. Payment troubled customers would be handled as envisioned in the proposed rule by being served by the affiliated REP at the PTB. Customers assigned to a REP would be served at the REP's most popular rate plan. OPC claimed that the advantages of this proposal are that REPs can easily and inexpensively acquire new customers while reducing the risk that any one POLR could be forced to take on a large number of customers.

Consumer Groups did not support OPC's random assignment proposal. Consumer Groups expressed concern about customer confusion and the inability of the market to handle automatic random assignment. Consumer Groups recommended that, if the commission opts for random assignment, it must ensure that there is adequate notice to consumers, including a statement of their rights to switch service, and customers should be placed on a rate plan that is at or below the price of the customer's current service. They claimed that proposals by Reliant and Entergy to couple random assignment with premium pricing place the consumer at a greater disadvantage.

In support of its arguments that the PTB should be a cap on POLR rates, OPC discussed the acquisition of NewPower's customers by TXU and Reliant. OPC claimed that NewPower's default demonstrates that abandoned customers may be served at rates at or below the PTB, and that the affiliated REP can fulfill the role of POLR in its own territory at the PTB in a profitable manner. Therefore, OPC recommended that any other REP wishing to act as POLR should provide the service below the PTB.

In its reply comments, OPC stated that the purpose of POLR service is to protect consumers from interruptions in electric service due to circumstances beyond their control. OPC claimed that by virtue of the PTB provisions of PURA §39.202, the POLR rate cannot be higher than the PTB because PURA §39.202 establishes a right for every residential and commercial customer to receive PTB service, regardless of whether the customer chooses a competitive REP that fails to serve the customer.

In response to OPC's comments regarding the NewPower default, Reliant stated that its agreement with NewPower is not the same as serving as POLR because the POLR provider has no opportunity to understand the customer base to be transferred or choose whether or not to accept the customers.

TXU also stated that OPC has erroneously concluded, based on the transfer of NewPower customers, that POLR service can be provided at a price lower than the PTB. TXU emphasized that

the transfer agreements with NewPower were market-driven agreements entered into voluntarily, and that the negotiation process provided an opportunity to assess the power and other resources necessary to serve NewPower's customers. TXU also stated that the NewPower transactions demonstrate that the POLR process works as a safety net given that POLRs stood ready to serve these customers if needed. According to TXU, the fact that POLR rates would have been higher than the rates ultimately charged these customers does not prove that POLR rates are too high. TXU suggested that POLR rates must be higher than competitive rates due to the unpredictable nature of POLR service and that the commission should reject proposals that POLR service be at or below the PTB.

TXU also commented that OPC's proposal for POLR service in 2007 and beyond is problematic because a REP's most popular rate plan may be entirely inappropriate for the unanticipated customer or group of customers a POLR receives.

Reliant supported the use of a market-based monthly adjustment to the POLR price, noting that it is a significant enhancement over the current rule. However, Reliant proposed changes relating specifically to the POLR pricing methodology as discussed under preamble question 2 and subsections (k) and (l) of proposed §25.43.

TIEC commented that the competitive solicitation process in the proposed rule is the best means of ensuring POLR service to customers. TIEC noted that competitive processes are preferable to assignment of POLR responsibilities to individual REPs. TIEC explained that a POLR designated by the commission will have no incentive to control the cost or maximize the quality of such service. In addition, TIEC asserted that by tying POLR rates for large non-residential customers to prevailing generation market prices, the commission would reduce risks associated with providing POLR service to involuntary customers with little or no advanced notice. According to TIEC, this reduction in risk should be accompanied by a reduction in the risk premiums included in bids for POLR service.

TXU supported the commission's efforts to amend the POLR rule but had concerns about changing the statutory role of the POLR as it was envisioned in the current POLR rule so early in the process for fear that such an action would be construed as a market failure and create problems that do not exist in the current environment. TXU advocated selection of POLRs through a competitive bid process and recognition of the fact that POLR service is not the same as PTB service.

TXU also summarized the proposals it previously made in this project. The first required bids based on a commission-determined base price to which the POLR would add a percentage. Customers would receive price reductions from the POLR price for consistent timely payment and the base price could be adjusted using the methodology in the PTB rule. Under TXU's second proposal, a REP would submit bids offering two prices, one based on a six-month term and the other for month- to-month service. Under the fixed term proposal, customers would be required to stay through the end of the term, no matter when they were first transferred to POLR. The base price could be adjusted for changes in the market price of natural gas and purchased power in accordance with the methodology in §25.41 of this title (relating to the Price to Beat). The month-to-month offering would be based on a percentage over the term price offer. TXU indicated that while it still believes its two proposals were reasonable and consistent with the POLR statutory mechanism, it could support the proposed rule if its other proposed modifications to the rule were adopted.

OPC recommended rejecting TXU's proposed POLR structures. OPC argued that TXU's first proposal, to base POLR rates on rates reported in electricity facts labels is problematic because the facts labels will be hard to compare. Further, OPC questioned whether premium services should be included in the calculation. Third, OPC noted that a peak month is used under TXU's proposal to set the price for the entire month and, therefore, there is no need for an adder. OPC also stated that it is unlikely that the System Benefit Fund (SBF) would be able to provide the added coverage envisioned by TXU and, even if it could, there are policy implications that to be examined. OPC noted that the more money used to fund the POLR means less money for other programs, including the low-income discount.

OPC also objected to TXU's second proposal, noting that it aims to segment the POLR market by allowing POLR customers to choose between month-to-month service and minimum stay service. OPC voiced its opposition to minimum stay provisions. OPC opposed the minimum stay provisions.

ERCOT commented that implementation of the new structure contemplated in the POLR rule will involve systems issues that will need to be addressed. According to ERCOT, developing and implementing the systems required to effectuate the new structure could take six months or more.

The commission appreciates the efforts that commenters have taken to thoughtfully and thoroughly evaluate alternatives to the POLR structure envisioned in the proposed rule. After having considered the comments received, the commission finds that the structure for POLR service envisioned in the proposed rule should be adopted.

The commission disagrees with commenters who seek to have the affiliated REP or the dominant REP serve as POLR. This approach is inconsistent with PURA §39.106, which contemplates that POLR providers will be selected on a competitive basis.

Second, the commission agrees with commenters who argued that POLR service carries greater volume and price uncertainty than the PTB. The structure for POLR service established under PURA does not support the view that the costs of POLR service should be subsidized through rates paid by either PTB customers or customers of any dominant player in the market or that those rates must of necessity be at or below the PTB. Rather, POLR rates should reasonably reflect the costs and risks of POLR service in the marketplace. Nevertheless, the commission recognizes that, at this point in time, POLR service may not be fully competitive and, for that reason, has proposed caps on POLR rates. However, the commission finds that the general structure for POLR service in the proposed rule lessens the risks of POLR service under the current rule and, as a result, POLR rates should moderate over time in the competitive environment.

While the commission concludes that POLR service should be bid competitively in the marketplace, it does not find that POLR rates stand as an alternative to the PTB against which competitive REPs should compete. Rather, POLR service should be a transitory service that serves as a bridge to alternative offerings in the marketplace. Therefore, the commission rejects proposals to cap POLR rates for residential customers at the PTB. Instead, the commission has included a floor on POLR rates equal to the PTB as discussed more fully in response to preamble question 2 and subsection (l).

A number of commenters questioned the need for the development of a structure for POLR selection and rate setting in light of the proposal to allow all REPs to disconnect after 2004 and, in the interim, require all nonpaying customers to be terminated to the affiliated REP rather than the POLR. The commission recognizes that there will be few, if any, circumstances where customers of a defaulting REP will be transferred to the POLR. Experience in the market with NewPower demonstrates that a REP's customers can have value in the marketplace and the commission expects that, more often than not, a REP exiting the market will find other REPs who will willingly begin serving the exiting REP's customers. The POLR has no inherent right to acquire customers whose REPs leave the market, and cannot expect to receive customers who are transferred by their REP to an acquiring REP. However, the commission can foresee a circumstance where other players in the market would not be willing to take on an existing REP's customers. For example, the customers of an exiting REP may have long-term, below- market contracts. Other REPs in the market may not be willing or able to serve the exiting REP's customers at their below-market rates and those customers would therefore be transferred to the POLR upon their provider's exit from the market.

Commenters who raised this issue also generally failed to recognize that under PURA §39.101(b)(4), any customer is entitled to request POLR service. Thus, POLR service must be available for customers whose REP defaults, customers who request POLR service, and customers whose current provider fails to continue to provide service for reasons other than non-payment (as, for example, a customer who fails to renew its contract with its REP at the expiration of the contract term or fails to find an alternative provider). Thus, some type of POLR structure would need to be in place even if the commission did not anticipate that customers of any defaulting REP would be transferred to POLR. The commission finds that the structure for POLR selection under the proposed rules will streamline bidding for POLR service to such a degree that it will not impose any undue burden on market participants.

The commission also concurs with commenters that expressed skepticism about the practical implications of randomly assigning customers to the POLR. The commission recognizes that there are advantages to this approach. In particular, it would result in equitable allocation of POLR responsibilities among market participants and altogether eliminate any need for a specific POLR selection process. Nevertheless, the commission concludes that this alternative is unworkable for a number of reasons. First, it does not appear to comport with the legislature's intention that POLR service be awarded on a competitive basis where possible. Second, the commission has concerns that customer confusion would arise in the event that customers were randomly allocated among REPs in the market. It could be difficult for customers to determine who their provider was and what their rate would be for a number of days or even weeks after random assignment. In addition, there could be delays in billing customers who were randomly assigned. And the commission foresees problems in establishing or enforcing any pricing policies established under a random assignment process. For these reasons, the commission declines to adopt the random assignment processes recommended by various commenters.

The commission also disagrees with AEP's comments that PURA provides no basis for distinguishing between non-paying customers and customers of defaulting REPs. The commission interprets PURA §39.106 as providing a safety net to protect customers from loss of service due to aberrant market behavior. In the short-term, it is appropriate to include the more vulnerable residential customers within the scope of the safety net until the commission has had the opportunity to evaluate whether the market as a whole can fairly and equitably deal with non-paying customers. If so, there is no need to continue to afford these customers the protections of the POLR safety net because the commission would not expect aberrant behavior with respect to disconnects of non-paying customers. Further, the risk of serving non- paying customers is inherently different from the risks associated with providing safety net service to other customers and the commission has therefore treated non-paying customers as a separate class as permitted under PURA §39.106(b).

On balance, the commission finds that the POLR structure in the proposed rule is the best alternative for providing POLR service at the current time. As discussed more fully in response to preamble question 5, the commission finds that it should move to a system where non-paying customers are disconnected rather than being transferred to the POLR. The POLR rate floors and caps adopted in the rule will ensure that POLR service does not become a competitive offering in the marketplace while also ensuring that there is some rate protection for customers in the absence of a fully competitive market for POLR service.

In response to comments from affiliated REPs expressing interest in serving as POLR in the service area of their affiliated transmission and distribution utility (TDU), the commission has revised the POLR eligibility requirements to permit the affiliated REP to bid for POLR service in the service area of its affiliated TDU at the PTB. The commission has also revised the provisions of the rule concerning the format of bids to include the option for any bidder to bid the PTB.

The issues raised by ERCOT have been the subject of discussion between market participants and ERCOT. The commission understands that a proposal has been developed for implementing the provisions of the rule in the timelines specified herein. The commission directs market participants and ERCOT to take the steps necessary to implement the rule as specified herein.

2. Instead of requiring the POLR rate to automatically fluctuate if prices move either up or down by more than 5.0%, would it be more appropriate to structure POLR service in a manner similar to price-to- beat service, where the provider would have the discretion of when (or whether) to adjust the rate, in accordance with the gas price formula outlined in the rule? Would the additional rate stability provided by such a structure be an added benefit to consumers and/or POLRs? Are there other methods for adjusting the price of POLR service that should be considered by the commission? If so, what are those methods and the benefits to customers and/or POLR providers?

AEP stated that it makes little sense to establish a complex POLR pricing scheme if it is uncertain whether one is even needed. AEP suggested that it is more reasonable and logical to require the affiliated REP, who is statutorily required to charge the PTB, to provide electric service to non-paying customers as well as customers whose REP is no longer providing service.

ARM commented that the more flexibility allowed the POLR to adjust energy rates, the lower the risk premium the POLR has to build into its rate. ARM supported a variable POLR rate that would provide automatic adjustments for all energy price fluctuations and urged the commission to adopt such a proposal. In

the alternative, ARM proposed reducing the 5.0% threshold to 2.5%.

Consumer Groups commented that the pricing proposal will not likely result in rates that are substantially different from the current POLR rates. They stated that the downward adjustment to the energy charge is the only portion of the proposed methodology that provides any benefit to consumers. Consumer Groups also argued that the floating nature of the price adjustment does not comply with the statutory requirement of a fixed rate. They supported OPC's proposal to peg the POLR rates for each TDU service area territory to the corresponding PTB rate.

In reply comments, Reliant cited case law that supports the view that a fixed formula rate, such as the one in the proposed rule, is equivalent to a fixed rate. Reliant supported the notion of monthly price adjustments but proposed modifications, such as revisions to the energy price adjustment methodology and the inclusion of a price floor and seasonality in the rate structure. These modifications are addressed in more detail under §25.43(k) and (l) below.

In reply comments Entergy disagreed with Consumer Groups that POLR rates should be capped at the PTB. Entergy stated that such a pricing mechanism clearly ignores the risks and uncertainties inherent in serving a potentially large number of customers whose REP fails to perform, because the POLR must be ready to obtain services in the spot market or maintain reserve standby capacity.

Entergy stated that a monthly market-based adjustment is more appropriate than the current PTB fuel-factor adjustment methodology. Entergy stated that POLRs need to be able to adjust the energy component of the price as quickly as possible to maintain financial integrity and market stability. Entergy commented that although a PTB fuel factor adjustment mechanism may provide some rate stability for a short period of time, such stability does not outweigh the benefits of a more frequent adjustment. Entergy also voiced a concern that delays in implementing an adjustment may place undue pricing pressures on POLR providers.

Reliant agreed with Entergy's concerns about whether the energy charge adjustment mechanism contained in the POLR rule will function as expected and will provide the price adjustments needed to allow POLRs to respond to changes in market energy prices.

First Choice stated that although it believes there are problems with the PTB fuel factor adjustments, this type of methodology is preferable to the use of the monthly adjustments contemplated under the proposed rule. First Choice suggested that a monthly rate adjustment similar to the old purchased cost recovery factor (PCRF) might be an acceptable adjustment methodology. First Choice stated that monthly adjustments should be treated as a monthly update and not as a traditional filing.

OPC strongly opposed changing the methodology for allowing changes in POLR prices. It stated that allowing POLR rates to adjust in the same manner as the PTB would result in a negative outcome for consumers. Since there is no obligation to reduce the fuel component of the rate, OPC stated that using the same methodology for POLR rate adjustments as PTB rate adjustments would result in higher POLR rates.

In reply comments, OPC disagreed with parties that recommended that POLR rates should be indexed above the applicable PTB. OPC stated that there is no justification for POLR rates to be calculated in such a manner; the PTB cases resulted in profitable rates and there is no reason for ratepayers to pay more.

TXU recommended two changes to the proposed rule. First, it recommended that the POLR be given the option to exercise the price adjustment mechanism proposed in the rule at its discretion. Second, TXU commented that the rule should not force the adjusted POLR price to go below 110% of the PTB. TXU stated that frequent price changes are likely to be a source of continued confusion and expensive to administer. TXU also stated that if the POLR rate falls below the PTB, POLR service will become a competitive offering in the market which is not what the legislature intended.

The commission disagrees with commenters who suggest that price adjustments should be solely at the discretion of the POLR provider. The commission proposed mechanisms to allow the POLR rate to adjust to market price changes in response to concerns that POLR rates under the existing POLR rule must of necessity be set high because there is no mechanism for rates to adjust during the term of the POLR contract. Therefore, the commission finds that the adjustment mechanisms it has proposed and adopts herein will help moderate POLR rates.

In response to TXU, the commission finds that leaving the decision about whether to adjust rates downward to the discretion of the POLR conflicts with the commission's goal of moderating POLR rates. This energy charge adjustment mechanism is intended to provide timely adjustments to the POLR rate. Upward adjustments will ensure that the POLR is able to recover its costs during periods when electricity prices are likely to be high. Conversely, downward adjustments will benefit customers by reducing the rate when electricity prices are lower. If the decision of whether to change the energy charge is left solely to the POLR's discretion, it is possible that customers will not see benefits from this mechanism in terms of lower rates when natural gas prices fall.

The commission also disagrees with Consumer Groups' arguments that the proposed rate structure is impermissible because it is not a fixed rate. As noted by Reliant, courts have previously determined that a fixed formula rate is in fact a fixed rate. For example, the court in *City of Norfolk v. Virginia Electric & Power Co.*, 197 Va. 505, 90 S.E.2d 140, 148-149 (1955) stated: "The proposed escalator clause is nothing more or less than a fixed rule under which future rates to be charged the public are determined. It is simply an addition of a mathematical formula to the filed schedules of the Company under which the rates and charges fluctuate as the wholesale cost of gas to the Company fluctuates. Hence, the resulting rates under the escalator clause are as firmly fixed as if they were stated in terms of money." In adopting Senate Bill 7 (SB7) 76th Legislature (1999 Texas General Laws 2543), the legislature clearly recognized the need to allow rates to adjust based on fuel costs. For example, PURA §39.202(l) contemplates adjustment of the PTB periodically as needed to reflect changes in fuel and purchased energy charges. The commission does not believe that in specifying that the POLR rate should be a fixed rate the legislature intended to preclude adjustment of the rate to reflect changes in the price of fuel or purchased energy. Allowing the energy charge to adjust based on the price of gas will also help moderate the risks of POLR service therefore moderating POLR rates to the ultimate advantage of customers.

With respect to ARM's recommendation that the triggering percentage change in gas price be reduced to 2.5% from 5.0%, the commission notes that ARM has not provided any rationale for

this change. The 5.0% adjustment trigger is closer to the PTB adjustment trigger approved by the commission in §25.41 (relating to Price to Beat). In addition, a 5.0% trigger will result in more rate stability than the 2.5% trigger recommended by ARM. Therefore, the commission retains the 5.0% trigger for adjustments to the energy charge component of rates for residential and small non-residential customers.

As discussed more fully in response to preamble question 1 and subsections (k) nd (l), the commission finds that the floor for the POLR rate for residential and small non- residential customers should be 100% of the PTB.

3. Is the use of the average market clearing price for energy (MCPE) as the base for the POLR rate for large non-residential customers appropriate, or should some other market index, such as *Platt's MegaWatt Daily* be used? Is an index such as *Platt's MegaWatt Daily* that is developed as a survey of trades susceptible to manipulation?

AEP explained that any pricing mechanism used to calculate the base for the POLR rate for large non-residential customers should include the following elements: (1) a rate based upon a natural gas- based index multiplied by an agreed upon heat rate; (2) a rate that can be adjusted to reflect changing market conditions; and (3) the MCPE (settling every 15 minutes) must be aggregated into some type of weighted average because not all customers subject to this rate have telemetry.

ARM commented that it supports the use of *Platt's Megawatt Daily*. ARM reasoned that the balancing energy market is intended to represent the costs of balancing the system due to scheduling error; it is not the spot market. ARM stated that unless ERCOT's balanced schedule requirement is relaxed or eliminated, REPs will not be able to guarantee purchases at the MCPE.

AEP, in its reply comments, agreed with ARM that an index such as *Platt's Megawatt Daily* should be used as the base for the POLR rate for large non-residential customers because it is more representative of what POLR is-a month-ahead or day-ahead obligation to serve. MCPE, according to AEP, is more appropriate for hourly activities. AEP stated that an index based on *Platt's Megawatt Daily* will be easier to implement because it is a standard, unshaped product that can be tracked and is administratively less burdensome.

Entergy commented that at this time, the MCPE is probably an appropriate base for the POLR rate for large non-residential customers relative to *Platt's MegaWatt Daily*. According to Entergy, *Platt's MegaWatt Daily* may be subject to inaccuracies due to the very nature of its construction. Entergy stated that the MCPE, on the other hand, reflects actual trading volumes and prices in the ERCOT market and is a better indication of market-based energy costs for the large non-residential customers.

First Choice commented that using the MCPE as the cost basis for energy presents two problems. First, smaller REPs may not have the ability to capture the same pricing as larger players. Second, the wholesale block price does not truly reflect the costs of shaping the energy to the customers' actual usage patterns. First Choice noted that trades would not be susceptible to manipulation using indices such as *Platt's MegaWatt Daily*, but any index would not necessarily reflect the true costs for serving these customers.

Reliant supported the use of a market-based price indicator but stated that either the MCPE or *Platt's Megawatt Daily* could be used for this purpose.

TIEC also supported the commission's proposal to use the ERCOT MCPE as the base for the POLR rate for large non-residential customers. TIEC stated that POLR providers cannot arrange forward power purchases due to their inability to forecast their future loads because customers will likely take POLR service involuntarily and for a short period of time. Therefore, TIEC asserted, POLRs in ERCOT will rely on the ERCOT balancing energy market to procure the bulk of their supplies. Since the MCPE reflects the cost of balancing energy in ERCOT, TIEC claimed that it is reasonable to use the MCPE as the basis for the large non-residential rate because it constitutes the actual cost of providing the service. TIEC also commented that use of the ERCOT MCPE is preferable to market indices, such as those developed by *Platt's Megawatt Daily*, which suffer from a lack of underlying liquidity in many reporting periods, particularly during off-peak hours. TIEC also commented that there is no need for a demand charge and no need for a floor for the MCPE.

TXU commented that the energy pricing structure for the large non-residential customers should include an energy charge that may be seasonally differentiated similar to the large non-residential POLR price structure in 2002. This structure would produce a simple comparison for bid purposes of three elements: a monthly customer charge, a demand charge billed using the customer's highest kW recorded in the previous 12 months, and an energy charge for two seasons. The seasonal pricing would be based on the period from November through May for off-peak energy consumption and the period from June through October for on-peak consumption. Bills for these customers would also include charges passed through by the REP serving as POLR such as non-bypassable charges from the transmission and distribution utilities. TXU commented that adjustments should be allowed to the energy portion of the large non-residential POLR price under the same mechanism described in TXU's response to preamble question 2. TXU also commented that if the commission elects to utilize the MCPE bid methodology on pricing for large non-residential POLR customers, no explicit dollar values should be placed on a price floor. Instead, each REP bidding for that service should be allowed to reflect in its bid any price floor it advocates. Also, in the event the commission decides to choose the MCPE bid methodology, TXU recommended adding language to subsection (k)(2)(C)(iv), which defines the bid elements for the large non-residential customer class.

The commission agrees with Entergy, Reliant, and TIEC. *Platt's Megawatt Daily* is more likely to be susceptible to errors than the MCPE because it is comprised of a survey of trades in which traders could report mistaken or inflated or deflated prices, or not report trades at all. Use of the MCPE as an index for pricing for large non-residential customers is therefore more appropriate than use of *Platt's Megawatt Daily*. In submitting bids for the large non- residential customer class, REPs can bid a percentage above the MCPE as necessary to reflect the risk they believe lies in use of the MCPE as an energy index. The commission declines to adopt the pricing methodology recommended by TXU. The commission expects to moderate POLR rates by ensuring that rates can be adjusted to reflect changes in the cost of power in the market, and TXU's proposal does not include such a rate moderation mechanism.

4. Are the provisions of the Terms of Service (Agreements), in particular the provisions concerning limitation of liability, appropriate for POLR service? If not, what additional or alternative provisions are appropriate and why?

First Choice commented that the provisions of the Terms of Service Agreements (TOSA) are appropriate. TXU, Reliant, TIEC, Entergy, and AEP proposed various changes to the TOSA, as discussed below.

Limitation of liability

Entergy commented that language in the TOSA concerning limitation of liability and indemnity should exempt the POLR from liability associated with any fluctuations, interruptions, or irregularities in basic firm service. Entergy explained that the POLR has no control over these issues, which are associated with the generation, transmission, and distribution of electricity. Reliant also noted that some provisions in the limitation of liability section address issues related to the failure of electric delivery facilities that are not appropriate for POLR service because the POLR will not own, operate, or exert any direct control over these types of facilities. As a result, Reliant asserted, the POLR should have no liability with respect to the cost of damages related to these facilities. Reliant proposed language that would clarify that certain events and circumstances out of the control of the POLR may result in service fluctuations, interruptions, or irregularities. Reliant's proposed language also addressed the POLR's liability for damages resulting from its own negligence (i.e., to limit liability to direct, actual damages only and to specify that such damages shall be the sole and exclusive remedy and that all other damages or remedies at law or in equity are waived).

Entergy also recommended language to limit the POLR's liabilities not excused by reason of force majeure or otherwise to direct, actual damages. Moreover, Entergy suggested language to limit the POLR's liability for any damages or injury caused by the electricity on the customer's side of the meter after delivery to the customer. This limitation would include claims arising from the POLR's negligence.

In its response to preamble question 6, AEP also proposed a new limitation of liability provision to the TOSA for accidental or inadvertent disconnection of service. Under AEP's proposal, the POLR would not be liable for consequential, incidental, punitive, exemplary, or indirect damages, penalties of any nature, or loss of profits, revenue, or production capacity.

TIEC emphasized, however, that no limitation of liability for the POLR's own acts should apply. According to TIEC, if a POLR disconnects a customer wrongfully, whether by negligence, gross negligence, or intentionally, it should be liable for full damages. TIEC noted that the current limitation in the pro-forma tariff for retail delivery service only exempts REPs from liability occasioned by the TDU or ERCOT, which the REPs do not control. TIEC suggested that a similar limitation of liability should apply in the case of POLR service. In addition, TIEC recommended rejecting Reliant's, Entergy's, and AEP's suggestion to extend the POLR's limitation to only direct damages, even in the case of gross negligence or intentional misconduct. Consumer Groups agreed with TIEC.

Reliant disagreed with TIEC that the POLR should have no limitation of liability. Reliant pointed out that there is no basis to subject the POLR to less protection than was afforded the integrated utility prior to competition.

TXU indicated that the limitation of liability language in the TOSA is reasonable for POLR service.

The commission agrees with commenters who expressed support for a relatively broad limitation of liability for the POLR. The POLR provides a regulated service at a regulated rate. Because of the nature of POLR service, the commission finds it is appropriate to generally limit the POLR's liability in much the same fashion as liability of bundled utilities was limited prior to the onset of retail competition. Without this limitation, higher POLR rates would likely result. Further, the commission has reviewed the terms of service filed by REPs with the commission as required by §25.475(c) of this title (relating to Information Disclosures to Residential and Small Commercial Customers). These terms of service statements generally limit a REP's liability in the same fashion as the commission has done in the TOSA. The commission finds that the liability of the POLR should not exceed general industry standards for liability. The commission has therefore revised the TOSA to include a broad limitation of POLR liability consistent with limitations in the regulated environment and with current industry standards.

Centerpoint indicated that non-performance or performance of the TDU should not be listed as an event of force majeure and, therefore, recommended deleting the reference to TDUs in this section of the TOSA. Centerpoint explained that the TDU should not be held liable if the REP's request is incorrect or unauthorized. Entergy recommended adding terrorism to the list of force majeure events.

The commission agrees with Entergy that terrorism should be added to the list of force majeure events, and amends the TOSA accordingly. The commission disagrees with Centerpoint, however, that non-performance or performance of the TDU should be removed from the list of force majeure events. The action or inaction of the TDU is not in the POLR's control; therefore, it is appropriate to leave this language in the TOSA. This language does not in and of itself impose any liability on the TDU.

Entergy recommended deleting the first paragraph in Section 11 of the TOSA, related to the description of basic firm service, because it is redundant.

The commission disagrees that this paragraph is redundant and, therefore, declines to delete it.

EGSI commented that the proposed rule should not result in any changes to the rights and obligations to TDUs.

The commission agrees. The commission finds that the TOSA as adopted do not impact the rights and obligations of the TDUs. No change was made in response to this comment.

POLR charges and fees

Entergy challenged the commission's ability to establish non-recurring fees, such as the fee for processing a collection letter, for the POLR as set out in the proposed TOSA. Entergy argued that PURA does not explicitly authorize the commission to pre-determine the level of such fees.

The commission disagrees with Entergy that it lacks authority to approve non- recurring fees for POLR service. PURA §39.106 provides that the POLR shall offer a standard retail service for each class of customers designated by the commission at a fixed, non-discountable rate approved by the commission. The non-recurring fees are a key element of the standard retail service package and rates charged by the POLR, which must be

approved by the commission. Therefore, the commission declines to remove these fees from the TOSA.

OPC opposed the disparities in the proposed service charges for residential and small non-residential customers. OPC noted that it could see no reason for the collection letter charge to be $30 for small non- residential customers and $15 for residential customers. OPC suggested that both charges should be $15 or less because such letters cost no more to issue to either customer. OPC also argued that there is no justification for a disconnection reminder notification charge to a small non- residential customer that is twice what a residential customer is charged. According to OPC, the charges to both classes of customers should be $5 or less.

The commission agrees with OPC that the collection letter charge and disconnection reminder charge should be the same for all customers because the service provided is not differentiated by electricity usage. The commission also finds that it is reasonable for all customers to pay the charge applicable to residential customers, to the extent any such customer is assessed these non- recurring fees. The commission has revised the TOSA accordingly.

TXU proposed language to make the monthly energy charge adjustment in the TOSA optional for the POLR, as discussed previously under preamble question 2.

As discussed previously, the commission declines to make the energy charge adjustment optional.

TXU also recommended new POLR processing fees, which would apply in addition to TDU charges, for the disconnection ($25), equipment testing and monitoring ($25), guardlight/security lighting ($10), meter re-read ($10), and tampering of electric service ($50). In addition, TXU proposed two new fees in the amount of $5.00 each for using a credit/debit card and for the POLR mailing a certified letter to the customer. TXU also proposed assessing late fees on late payments or delinquent balances of residential customers (i.e., not only for delinquent deferred payment arrangements but for all accounts).

TXU did not explain the rationale for these additional fees and the commission finds no reason to include them in the TOSA. Moreover, §25.480(c) and (j) of this title do not permit the POLR to charge late fees to residential customers, except those on deferred payment arrangements. Therefore, the commission declines to make TXU's proposed change to the residential TOSA. In addition, the commission has eliminated the late fee provision for small non-residential customers with usage below 50 kW consistent with §25.480(c).

In addition, TXU suggested that the energy charge component of the guardlight/security lighting charge include the customer charge, estimated non-bypassable charges, applicable taxes, service charges, and other fees and costs as permitted by governmental or regulatory authorities.

The commission finds that the rate for guard/security lighting will be 125% of the applicable PTB. The commission does not find that a customer charge is appropriate given that guard/security lighting will likely be only one component of a customer's bill and allowing recovery of a customer charge for guard/security lighting may result in double recovery of customer charges.

In the large non-residential TOSA, TXU recommended adding a $100 per hour charge to set up the special bill form, in addition to the $25 per Electric Service Identifier (ESI ID) charge in the proposed TOSA. TXU also suggested that the $25 per ESI ID charge apply on a monthly basis rather than a one- time charge. In addition, TXU proposed language that states that the form setup and manual data entry cannot be guaranteed complete within the 16-day due date period and that the customer is still required to pay on or before the due date. Reliant proposed omitting the provisions for special bill forms from all of the TOSA. Reliant noted that this service is for manually prepared bills requested by the customer. According to Reliant, such special provisions are inappropriate given the objective to standardize the terms and conditions for POLR service.

The commission agrees with Reliant and amends the TOSA to delete the provisions for special bill forms.

Entergy commented that the TOSA for non-residential customers with a demand of 50 kW or more and large non-residential customers should contain a provision that allows the POLR to pass through gross-receipts tax as a separate non-bypassable charge.

The commission concludes that no change to TOSA is needed because the TOSA for large non- residential customers already allows the POLR to pass through the gross-receipts tax as a non-bypassable charge. For small non-residential customers, this pass-through is also addressed in the TOSA where the POLR rate is established by bid. Where the POLR rate for small non-residential customers is established by lottery, no pass-through is appropriate because non-bypassable charges are already reflected in the PTB rate used as the basis for setting the rate for small non-residential customers.

Entergy also commented that, for all customer classes other than the residential class, a minimum contract demand should be defined as: "the greater of the highest quantity of demand (in kW) as measured by the TDU during any 15 or 30 minute interval or other interval as provided by the TDU during a billing cycle or the highest such quantity of demand during the previous 12 months." Entergy noted that this definition would require the customer to maintain a certain level of usage and allow the POLR to plan for supply and calculate a minimum payment for the number of days the customer is with the POLR. For customers without a demand meter, Entergy proposed calculating billing demands based on one kW for a certain kWh or fraction thereof, specific to each TDU service area.

Reliant and TXU recommended deleting the section in the TOSA for large non- residential customers that states that non-demand metered customers will be billed a demand charge based on an assumed ten kW monthly. Reliant explained that this provision is not applicable to customers over one MW, which are all demand metered. Reliant also suggested that the TOSA for the large non- residential customer class specify how demand will be determined for billing purposes. Reliant proposed that demand be based on a customer's highest peak demand for a 15-minute interval for the previous 12 months.

The commission disagrees that demand should be based on a customer's highest peak demand over a 15-minute period interval or other interval during the previous 12 months. Such a ratcheted structure is not appropriate for POLR service, which is intended to be short-term and transitional in nature. The commission finds that the demand charge should be based on the highest billing demand in any interval within the billing period. The TOSA for large and small non-residential customers have been revised to specify the period over which the customer's demand will be determined. The commission agrees with Reliant

and TXU that it is not necessary to include in the large non-residential TOSA the language stating that non-demand metered customers will be billed a demand charge based on an assumed ten kilowatts monthly and has revised the large non-residential TOSA accordingly.

Other terms of service

AEP commented that the proposed TOSA provisions allowing a customer who has applied for or is currently enrolled in LITE UP Texas to pay the initial deposit in two installments is unworkable and unreasonable. AEP explained that the POLR has no way of knowing that any particular customer dropped to POLR is enrolled in the low-income discount program. AEP also pointed out that, depending on when a customer is dropped to POLR, it may take more than a month before the POLR receives notification from the Low-Income Discount Administrator (LIDA) that the customer qualifies for the discount. Moreover, AEP asserted that allowing such customers an additional 40 days to pay their deposits in full only increases the POLR's financial risk without adequately compensating the POLR.

The commission disagrees with AEP that this provision of the TOSA is unworkable and unreasonable. First, the customer, not the POLR, has the burden of demonstrating that the customer has applied for, or is enrolled in, the low-income discount program. The commission notes, however, that the allocation of this responsibility to the customer is not reflected in §25.478(f) of this title and has revised that provision to clearly allocate to the customer the responsibility for demonstrating the customer's eligibility for this benefit. Second, requiring the full deposit to be paid within 40 days is reasonable and adequately protects the POLR for credit risk posed by low-income customers because the amount of the deposit (i.e., two months of service) and the installment due dates correlate with the length of time that the POLR will have served the customer. It should also be noted that a relatively small percentage of customers are low-income customers.

In the security and billing section of the residential TOSA, TXU proposed adding a condition for demonstrating satisfactory credit (i.e., the customer did not have service disconnected for non-payment). In addition, TXU proposed language that specifies that a residential customer may be deemed as having established satisfactory credit if the customer possesses a satisfactory credit rating obtained through an accredited credit reporting agency. TXU also suggested adding language that specifies that the POLR may not require a deposit if the customer is able to provide a credit reference letter that outlines the conditions for demonstrating satisfactory credit.

In proposed §25.478(a)(3)(A)(iv), the commission deleted the credit requirement that a customer did not have service disconnected for non-payment. This provision was unnecessary because, before a customer could be disconnected for non-payment, it would have been delinquent in making a payment. Delinquency in payment is a circumstance that is already addressed in the rule. Therefore, it is not appropriate to include this condition in the TOSA. The language proposed by TXU related to a satisfactory credit rating is consistent with §25.478(a)(3)(B) and, therefore, the commission finds it appropriate to include this language in the residential TOSA. The commission also agrees with TXU that a credit reference letter would be an appropriate means for the customer to demonstrate that the customer has met the credit requirements, and revises the TOSA accordingly.

In section 2(a) of the residential TOSA, TXU proposed allowing the POLRs (or the POLR) to provide notification to the guarantor of the customer's account if the customer defaults. In section 2(a)(13), TXU also suggested a clarification that the customer must not have more than two delinquent payments within the last 12 months in order to terminate the guarantee agreement.

The commission finds that the proposed changes are reasonable and amends the TOSA accordingly.

In section 2(b) of the residential TOSA, TXU suggested that the initial pay- in-advance billing should include charges for the two *highest* months average consumption during the prior year. In addition, TXU proposed deleting two sentences in section 2(b)(2) of the residential and small non- residential TOSA, which state that the initial pay-in-advance statement will not include the average cost per kWh or the monthly customer charge but that subsequent billing statements will include these charges based on actual consumption. In the large non-residential TOSA, TXU suggested that, once there is an established customer history of three months usage (instead of six months), the POLR may revise and adjust the pay-in-advance amount. Moreover, TXU's proposed language specifies that the POLR may adjust the pay-in-advance amount if at any time the sum of the customer's two highest monthly bills exceeds the pay-in-advance amount.

The commission disagrees with TXU that the initial pay-in-advance billing for residential customers should be based on the two highest months average consumption. Pursuant to §25.478(f)(3), the POLR may not collect a total deposit from a residential customer that exceeds an amount equivalent to one-sixth of the estimated annual billing or the two subsequent months. TXU's proposal could exceed this amount. Therefore, the commission declines to make the proposed change. The commission finds the remaining changes recommended by TXU are reasonable and amends the TOSA to include the proposed language.

TXU also recommended that deposits be based on the two highest months consumption within the most recent 12 months for the small non-residential below 50 kW class, the three highest months consumption for small non-residential 50 kW to 1 MW class, and the two or three highest months consumption for the large non-residential class. In addition, TXU suggested that the cash deposit for the non-residential classes be based on not only the customer's historical kWh energy and kW demand data but also the customer's monthly customer charge, estimated non-bypassable charges, taxes, service charges and other fees. For the small non-residential TOSA, TXU also recommended that all bills under the pay-in-advance option, including the initial bill, include the monthly customer charge, demand and energy charges, and an estimate of two months' non-bypassable charges, applicable fees, taxes and other costs as permitted by governmental or regulatory authorities. This proposed change would be consistent with this provision in the large non-residential TOSA.

The commission agrees with TXU that security provided by small non- residential customers should include customer and non-bypassable charges as proposed by TXU. The commission also concurs with TXU's recommendations concerning the period for determining the deposit amount, except that the commission disagrees with TXU's proposal to use either a two or a three month period for establishing the deposit for large non-residential customers. The commission finds that the deposit requirements should be certain and TXU's proposal could lead to ambiguity. The commission has revised the TOSA consistent with its responses to TXU's comments.

Consumer Groups questioned whether pay-in-advance under the TOSA is optional at the discretion of the customer or the POLR provider.

The POLR has the ability to determine whether or not to offer a pay-in- advance option. If the POLR offers a pay-in-advance option, it is within the customer's discretion to utilize the pay-in-advance option or post a deposit. The residential TOSA has been revised to include the option language found in the small non-residential TOSA

TXU recommended replacing the term deposit with "cash deposit," as it is used throughout the TOSA for all classes.

The commission finds that TXU's proposed clarification to use the term cash deposit is appropriate and amends the TOSA accordingly.

In the large non-residential TOSA, TXU proposed adding a statement in section 2(a), pertaining to cash deposits, that a late payment fee of 5.0% will be assessed on the 17th day after the bill issuance for all unpaid balances. TXU also suggested modifying section 2(a)(4) to indicate that interest will accrue on cash deposits if there are no late payments or additional fees or penalties apply. TXU's proposed language also provided that interest will only be paid on the cash deposit. In addition, TXU recommended revising section 2(a)(5) to specify that the large non-residential customer can satisfy the security requirements by providing the POLR with an irrevocable letter of credit or surety bond in the amount of the required cash deposit. TXU also suggested that the POLR provider must approve the surety bond. Finally, TXU recommended revising section 2(a)(7) of the TOSA to state that, if service is terminated prior to the regularly scheduled meter read date, the energy usage for the final bill may be calculated using out-of-cycle meter readings and will include all charges defined in section 1, pertaining to price for basic service.

The commission agrees that TXU's proposed revision regarding late fees improves the clarity of the TOSA for large non-residential customers and amends the TOSA accordingly. With respect to the interest on the cash deposit, the commission disagrees with TXU that the proposed language is appropriate. The commission finds that TXU's proposed language regarding the irrevocable letter of credit or surety bond is reasonable and includes this language in the large non- residential TOSA. The commission also finds that TXU's proposed changes to section 2(a)(7) regarding calculation of the customer's final bill are reasonable and amends the TOSA accordingly.

Reliant proposed reducing the notice of disconnection for large non- residential customers from ten days to five days. In addition, Reliant recommended revising the TOSA for large non-residential customers to provide five days rather than ten days to pay any required deposit. Reliant explained that large non-residential customers have much larger loads than other customers and, therefore, the POLR's bad debt exposure from large non-residential customers is substantially greater than for small non- residential customers.

The commission disagrees with Reliant that the notice of disconnection for large non-residential customers should be reduced to five days. This is not adequate notice for any customer, given that a customer may not actually receive the notice in the mail for several days. The commission, therefore, declines to make the proposed change.

TIEC requested that the disconnection of service provisions of the TOSA should state that notice must be received by the customer, not merely sent by the POLR, before a disconnection can be authorized. Consumer Groups agreed. However, Reliant argued that such a requirement is neither reasonable nor customary. Reliant explained that the commercial billing standard counts the number of days required for notice from the date of distribution, not receipt.

The commission agrees with Reliant that it is not the POLR's responsibility to determine when the customer received the notice and, therefore, declines to make the change suggested by TIEC.

TIEC indicated that the requirements regarding possible disconnection due to a dangerous or hazardous condition are duplicative of TDU tariff requirements, which contain a more thorough development of issues relative to large non-residential customers. TIEC suggested that the TOSA should make all of these provisions subject to the TDU tariffs. In addition, TIEC recommended clarifying the TOSA to reflect that disconnections must be pursuant to the commission's customer protection rules. TIEC noted that the TOSA may inadvertently raise ambiguities if only part of the requirements of the commission's rules is referenced. AEP disagreed with TIEC's proposal that the TOSA provisions regarding possible disconnection due to a dangerous or hazardous condition should be subject to the TDU tariff to the extent that it ignores the commission's customer protection rules and the ERCOT protocols for exchange of information between customers, REPs, and the TDU. AEP stated that it was improper to disrupt the existing framework and suggested that any discussion on this issue should occur in a separate proceeding where all affected parties, most notably TDUs, will have notice and an opportunity to participate. AEP also suggested modifying language in section 4(a) of the TOSA to clarify that a customer can be disconnected for non-payment ten days after a disconnect notice is issued, as provided in the customer protection rules. TXU proposed adding language to section 4(d) of the TOSA to indicate that service may be disconnected without notice if a dangerous or hazardous condition exists, if the service has been connected without proper authority or for reasons prescribed in the commission's rules.

The commission disagrees with TIEC that it is necessary to reference the TDU tariffs in the TOSA. The relevance of the TDU tariffs is limited given that REPs, not consumers, are the TDU's customers. Further, the limitation of liability provisions of the TOSA incorporate appropriate language indicating that the POLR is not responsible for service delivery. Further, including this language would go beyond the requirements for terms of service statements in §25.475(c) of this title. The commission agrees with AEP that section 4(a) should be clarified and amends the TOSA to specify that a customer can be disconnected for non-payment ten days after a disconnection notice is issued.

In response to TXU, the commission finds that the proposed change is consistent with §25.483(c) (relating to Disconnection of Service without Prior Notice) which allows disconnection without notice in the event of a dangerous or hazardous condition or if the customer's service has been connected without proper authority. The commission, therefore, modifies the TOSA to reflect TXU's proposed change.

TXU proposed adding the following statements to the disconnection section of the large non- residential TOSA: 1) service may be disconnected for failure to pay cash deposit as well as pay-in-advance; and 2) upon receipt of all amounts and charges owed,

service may not be reconnected immediately and is dependent on TDU scheduling.

The commission finds that TXU's proposed statements pertaining to disconnection are reasonable and amends the TOSA accordingly.

Reliant also requested that the TOSA be revised to include a covenant that the customer shall not enter into any agreement to explicitly or implicitly use POLR service to engage in arbitrage activities. The remedy for breach of this covenant should be the immediate termination of service. According to Reliant, the POLR should also have the right to seek damages for any such breach.

The commission finds that the covenant proposed by Reliant is neither necessary nor appropriate to include in the TOSA. The new POLR rate structure, which includes a monthly energy charge adjustment and price floor for residential and small-non-residential classes, should adequately protect against arbitrage activities in these classes. Moreover, the structure of the POLR rate for the large non-residential class should protect the POLR because it is related to the market price for energy.

TIEC commented that language in the TOSA goes beyond what is necessary to protect the POLR from commercial risks. In particular, TIEC recommended striking the provision on page 5 that allows the POLR to bill customers for court costs, legal fees, and other costs associated with the collection of delinquent amounts and miscellaneous legal costs associated with maintaining the account. TIEC claimed that the cost of disputes should be borne by the individual parties.

The commission disagrees. First, the TOSA simply states that the POLR provider reserves the right to charge for the fees and costs listed; it does not definitively authorize the POLR to recover such fees and costs. Further, such provisions are generally consistent with the provisions of the Texas Civil Practice and Remedies Code, Chapter 38, which allow recovery of attorney's fees for non-payment of services or in a suit on a sworn account.

In addition, TIEC commented that it is unreasonable to require customers to pay disputed amounts to the POLR while a dispute is pending resolution. TIEC recommended revising this provision in the TOSA and the rules accordingly. Reliant agreed with TIEC that no customer should face disconnection over the non-payment of a disputed portion of a bill, provided the customer pays the undisputed portion. However, Reliant disagreed that the POLR could only disconnect for non-payment of the disputed portion after final independent adjudication of the dispute. According to Reliant, the rule reasonably requires a POLR to investigate and communicate the results when a bill is in dispute before terminating service, and no independent arbiter is necessary. In the TOSA for the small non- residential below 50 kW class, TXU proposed adding language stating that the entire invoiced amount is due on the 16th day after issuance of the bill and, if the customer gives timely notice of a dispute, both parties shall pursue diligent, good faith efforts to resolve the dispute. This language states that, following the resolution of the dispute, any amount due to the customer shall be returned within ten business days, with no interest or fees paid by the POLR on the refund. TXU also suggested that no interest or fess be paid by the POLR on such a refund for the large non-residential class.

The commission concludes that it is inappropriate to revisit this issue in the context of this rulemaking. Commission rules allow a customer to withhold only the disputed portion of the bill pending informal resolution. However, the commission did revise the TOSA to clearly reflect this aspect of the commission's rules.

AEP suggested revising section 9 concerning bill payment methods to clarify that acceptance of cash in payment of a bill through an agent is an option only if that service is offered by the POLR. AEP and TXU proposed clarifying that if, within the last 12 months, the customer has had two or more personal checks returned for insufficient funds, the POLR will require all further payments to be by cash, cashier's check, money order, or debit/credit card. AEP and TXU also recommended that if the customer's payment by debit or credit card has been declined two or more times within the past 12 months, the POLR will require that future payments be made by cash, cashier's check, or money order.

The commission agrees with AEP and TXU and revises the TOSA accordingly.

The commission also notes that, in response to comments from First Choice concerning the provisions of subsection (f) that identify four TOSA even though there are three customer classes, the commission has combined the two small non-residential TOSA into one document. Two TOSA for the small non-residential class were initially developed because small non- residential customers with demand of 50 kW or more can waive certain customer protections. However, in light of the effort to standardize the TOSA, the commission has determined that the TOSA should not include provisions for waiver and has revised the TOSA accordingly.

5. The proposed amendments to §25.483 extend the right to disconnect to any REP, including the POLR, for large non-residential customers. In addition, the proposed amendments provide that until January 1, 2005, both the POLR and the may disconnect residential and small non- residential customers for non-payment. The right of the affiliated REP to disconnect is part of the proposal for the affiliated REP to provide POLR service at the applicable price-to-beat rates and terms to residential and small non- residential customers whose service is terminated by a competitive REP for non- payment. After January 1, 2005, any REP or the POLR may disconnect residential and small non-residential customers, unless prior to that date the commission determines that authorizing all REPs to disconnect would be injurious to the market or would be likely result in unlawful disconnections. Is this an appropriate approach to transition to a system where all REPs have the right to disconnect customers and bear the responsibility associated with that right? What are the potential short- and long-term implications for customers, REPs, transmission and distribution utilities, and the Electric Reliability Council of Texas (ERCOT)? Does two years provide adequate time to transition to this system or is another period of time more appropriate? Should the commission's goal be to transition to this type of system?

ARM, Entergy, First Choice, HEAT, Republic, Reliant, TIEC, and TXU supported the proposal to transition to a system where all REPs are able to disconnect residential and small commercial customers for nonpayment. Republic stated that new market entrants should be afforded the same protections against mounting uncollectibles as affiliated REPs and POLRs. According to Republic, this is particularly important for small REPs whose POLR responsibilities become disproportionately large compared to the REP's customer base. First Choice stated that uncollectibles have significantly increased since the opening of the competitive market. First Choice claimed that

the right to disconnect is an effective tool to manage bad-debt expenses and will benefit the overall market by allowing REPs to offer lower rates. HEAT stated that low-income customers, due to the daily struggle to meet critical needs, do not make payments because the bill is due, but make payments to avoid disconnection of service. HEAT stated that a transfer to POLR only delays inevitable disconnection at a higher cost to the customer, the energy assistance provider, and the company. Therefore, HEAT supported transitioning to a system where all REPs may disconnect because it would force customers and electric providers to take responsibility for electric service and encourage REPs and customers to work together on payment arrangements. This solution is preferable to one that allows REPs to transfer the burden of non-paying customers to other providers. First Choice stated that the proposal to allow affiliated REPs to disconnect upon adoption of the rule and delay disconnection authority for competitive REPs until January 1, 2005 is an acceptable compromise.

ARM and TIEC generally agreed with the approach in the proposed rule. ARM did, however, caution that existing contracts should be grandfathered. ARM stated that without the specific right to disconnect written into a contract with a large non-residential customer, a REP may be left without a remedy in the event the customer defaults. TIEC stated that the commission must balance this policy objective with the need to place parameters on the customer's exposure to disconnection; otherwise it would unreasonably shift risks away from suppliers to customers. In order to achieve this balance, TIEC proposed that 1) REPs only be allowed to authorize disconnection in cases of undisputed bills; 2) any bilateral contracts that prohibit a REP from disconnecting be honored, as long as the contract precedes the effective date of the proposed rule amendments; and 3) customers must receive adequate notice from the TDU and/or ERCOT before disconnection is permitted. TIEC also proposed that such notice period should be ten days from the date of customer receipt in order to protect customers against an erroneous disconnection request submitted by the REP.

AEP commented that only the affiliated REP and the POLR should have the right to disconnect residential and small commercial customers. AEP argued that giving all REPs the authority to disconnect would confuse customers. Entergy, on the other hand, stated that giving only the affiliated REPs the right to disconnect for nonpayment would create customer confusion as to which REPs may only terminate and which REPs may disconnect.

Consumer Groups and OPC opposed the provision that would allow all REPs to disconnect residential and small commercial customers for nonpayment after January 1, 2005. OPC argued that this proposal contradicts the purpose of having a POLR and the legislative intent of PURA §39.106. OPC urged that the provision be eliminated and revisited once retail competition has taken hold in Texas. OPC and the Consumer Groups reiterated that this issue was fully debated in the development of §25.483 of this title.

Consumer Groups, through their expert Barbara Alexander, argued that every state has linked the obligation to provide POLR or default service with the right to disconnect for nonpayment, but no state allows competitive REPs the right to disconnect. Therefore, according to Consumer Groups, allowing the affiliated REP, who has an obligation to serve at a regulated rate, to disconnect customers for nonpayment is consistent with the practice in other states but allowing competitive REPs to disconnect is not. Consumer Groups claimed that a competitive market will naturally impose a stricter collection discipline because competitive REPs are unable to recoup bad debt expenses, whereas the affiliated REP's rates include collection costs and bad debt expenses. Consumer Groups cited the deregulation of the gas utility market in Georgia as the example of a situation where allowing competitive marketers to disconnect lead to massive billing errors, increased customer complaints, and vast increases in disconnections. In addition, Consumer Groups argued that the commission would not be able to investigate disconnection disputes or enforce customer protection for wrongful disconnection. Consumer Groups claimed the Georgia experience revealed that retailers often disconnected service even when customers disputed late or erroneous bills. Moreover, Consumer Groups stated that the original reasons why the commission did not extend disconnection rights to REPs remain applicable and relevant today and that there is nothing in this record to suggest that these policy considerations should be changed. In addition, Consumer Groups argued the proposed changes to the POLR rule that would have nonpaying customers transferred to the affiliated REP at the PTB rate have no rational or logical connection with the proposal to allow all REPs to disconnect residential and small commercial customers for nonpayment in 2005. Finally, Consumer Groups stated that allowing REPs to disconnect is inconsistent with the commission's statutory obligation to protect the public health. Therefore, the commission should not focus on whether the "market" would be "injured," rather it should focus on the public interest.

Entergy and Reliant disagreed with Consumer Groups. Entergy stated that the commission did determine that the policy for allowing or disallowing REPs to disconnect is ripe for reconsideration when it published the proposed rule. Again, Entergy stressed that all REPs should be given the right to disconnect non-paying customers to create stability in the market and eliminate customer confusion as to which REPs may disconnect for non-payment. Both Entergy and Reliant also disagreed with Consumer Groups' assessment of the applicability of the experience in the Georgia market to the Texas market, stating that Consumer Groups simply provide no evidence and are unable to make a concrete connection between the Texas and Georgia customer protection rules to support the position that the proposed revisions will result in a "customer service disaster." Entergy argued that the Texas deregulated market, with its attendant rules and the commission's market oversight role do provide adequate protection. Reliant stated that Consumer Groups operate from a false premise that REPs will aggressively and recklessly disconnect customers and emphasized that it is in a REP's interest to build its customer base, not disconnect service. However, as Reliant stated, customers who simply do not pay their bills should be disconnected, for no provider of any service, regulated or unregulated, can survive offering its services without compensation. Finally, Entergy and TXU emphasized that the commission should give considerable weight to comments supporting disconnection rights made by HEAT because it is a coalition of entities that works directly with low-income electric customers on a daily basis.

Consumer Groups, in their reply comments, reiterated their position that competitive REPs should not be given the right to disconnect. Consumer Groups claimed that their consultant, "a nationally known expert," demonstrated in her initial comments that the proposed disconnection rule is inconsistent with best practices in other states. Consumer Groups posited that the Texas

deregulation scheme, especially with a "free-for-all" disconnection policy, would make payment troubled customers subject to predatory pricing and market practices. Consumer Groups argued that commission rules protecting customers under these circumstances are meaningless because the commission is ineffective in disciplining the market and ensuring REP compliance with any rules. In addition, Consumer Groups claimed the rule provides inadequate enforcement of disconnection provisions and recommended that at a minimum the rule should include strong mandatory penalties for any and all customer protection rule violations. In short, the commission's inability to control market abuse today portends further more serious market abuses in the future, and for this reason alone, according to Consumer Groups, any decision to grant disconnection rights to all REPs should be delayed indefinitely. Should the commission choose to address disconnection rights within the context of the rule then the rule should be amended to indicate that the commission will merely revisit the issue in 2005, without a specified outcome. Consumer Groups further recommended that the commission publicize on a quarterly basis the top ten REPs with the highest number of complaints, and the concomitant commission action regarding these complaints. Finally, Consumer Groups argued that any changes in the disconnection process should be based on a full accounting of the costs, benefits and impacts of various strategies for providing POLR service, rather than the opinions of parties with varying financial interests in the outcome of the POLR rulemaking process.

In reference to the technical aspects of such a policy, First Choice stated that the right to disconnect for non-payment would limit market workarounds. As far as First Choice was concerned, the infrastructure to handle disconnections and reconnections already exists in the affiliated REP companies. AEP, however, asserted that allowing all REPs to disconnect would complicate the disconnection process and could result in improper disconnections. Consumer Groups, again drawing on the experience in Georgia, contended that the TDUs will be unable to timely disconnect and reconnect customers. According to Consumer Groups, only in a regulated environment can a utility structure its field visits and disconnection activities to effectively support reconnection activities.

Consumer Groups replied that changes in disconnection procedures will impact ERCOT, TDUs, and the REPs, and questioned whether the policy would be technically implementable in light of the current system repair and recovery efforts.

In reference to the time frame for the implementation of a disconnection policy for all REPs, First Choice and TXU stated that the proposed transition period before allowing competitive REPs the right to disconnect for non-payment is adequate. However, TXU recommended that the rule clearly specify that the right of all REPs to disconnect shall start on a specific date rather than deferring the final decision to a later commission determination. Entergy and Republic proposed moving the date for allowing all REPs to disconnect up one year to January 1, 2004, the same date that new market entrants will be eligible to serve as POLR. Entergy stated that the proposed transition period of two years is too long and that a policy allowing all REPs to disconnect for nonpayment should be implemented as soon as possible. OPC stated that there is no reason to make a decision today about such an important issue that would not even take effect for over two years.

Based on discussions with staff of the Georgia Public Service Commission (Georgia PSC) and the February 5, 2002 Blue Ribbon Natural Gas Task Force's *Final Report to Governor Roy E. Barnes and the General Assembly of the State of Georgia*, the commission agrees with Entergy and Reliant that the Georgia deregulation experience is not analogous to the Texas experience. The increase in disconnections and resulting customer complaints in Georgia was the result of a chain of events unrelated to a competitive marketer's right to disconnect. Under Georgia law, once five marketers had been certified to participate in the market, all customers of the former incumbent utility, Atlanta Gas and Light Company (AGLC), had to be randomly assigned to retail providers on a load ratio share basis and AGLC would exit the retail market. Originally, it was anticipated that AGLC's exit from the retail market would take several years; however, this event occurred in only about eleven months. The retail marketers' billing systems were not equipped to handle such a large influx of customers in such a short period of time, and as a result, customer billing was delayed. Subsequently, Georgia experienced an exceptionally cold winter and a simultaneous spike in gas prices. In order to protect the health and safety of Georgia gas customers, the Georgia Public Service Commission (PSC) imposed a ten-week moratorium on disconnections. When the moratorium was lifted, gas customers had not only accrued winter gas consumption debt at exceptionally high prices, but also owed the marketers for gas consumption for the pre-winter period when the billing systems were being adjusted. Customers received extremely high bills and naturally questioned the accuracy of their bills and filed complaints with the Georgia PSC. A substantial number of customers were disconnected after failure to pay bills accrued prior to and during the disconnect moratorium and, due to a then-existing "hard" disconnect policy in Georgia, many of those customers were unable to be timely reconnected. An investigation by the Georgia PSC, however, revealed that the marketers generally did not bill incorrectly. Nor did marketers disconnect customers in violation of the Georgia PSC's customer protection rules. In fact, staff of the Georgia PSC reports that disconnections in Georgia have actually declined since the onset of retail competition.

The Georgia PSC and legislature were, however, concerned about the ability of customers, particularly low-income customers, to pay their accumulated debt and stay on the system. In response, the Georgia legislature devised a two-tiered regulated rate for disadvantaged customers. The first tier is a below-market rate for low-income and elderly customers established through a bid process. To help keep the rates for first tier customers low, uncollectible balances are guaranteed by a system benefit charge. Customers placed on the tier-one regulated rate are given a fresh start in that as long as they pay the regulated provider they are guaranteed service, regardless whether they have a debt to another marketer. All customers who are disconnected by their marketer for nonpayment, including tier-one customers, may access the tier-two regulated rate. The tier-two rate is substantially above market and the tier-two marketer may disconnect a customer five days after payment is due (the disconnection notice is issued simultaneous with the bill).

In conclusion, available information indicates that Georgia did not face a "customer service disaster" caused by the competitive marketers' right to disconnect for nonpayment. Rather, the issue facing Georgia was that of customers burdened by large, accumulated bills due to delays in billing, a winter moratorium, and spikes in the price of natural gas. Competitive marketers in

Georgia continue to be allowed to disconnect customers for nonpayment. The Georgia PSC reports that the disconnection rates today are lower than they were in the regulated market. The commission therefore finds that there is nothing in the Georgia experience that suggests that allowing all REPs to disconnect is *per se* injurious to the market or not in the public interest. However, experience in Georgia indicates that retail systems failures, such as inability to bill customers, may impact customers' abilities to pay their bills. Market participants in Texas have experienced their own difficulties in billing customers, but the commission finds that progress is being made in addressing this problem. The commission also concludes that delaying disconnect authority for competitive REPs serving residential customers will ensure adequate time to address systems issues that could have an impact on customer disconnections.

The original decision by the commission to disallow disconnection of service for nonpayment was in part based on what was occurring in Georgia during the time of the rulemaking in 1999. As discussed, the prevailing arguments made in 1999 are not substantiated by the information that is now available. Further, the commission finds that the current POLR structure fosters irresponsible bill payment behavior because it defers the consequences of non-payment, to the ultimate detriment of both the consumer and the REP. It is for this reason that the commission finds this issue to be ripe for reconsideration.

Limiting the REPs' response to non-payment to termination of contracts does foster irresponsible market behavior by customers, creates customer confusion as to who has the right to disconnect, places greater uncollectible debt on the REPs, and therefore raises rates in the long run. Conversely, allowing REPs to disconnect customers for nonpayment will create a greater incentive for customers to pay their bills on time and prevent REPs from passing the burden of bad credit customers on to other providers. The commission notes that HEAT, representing assistance providers serving low- income customers, stated that delaying disconnection of customers by having them transferred to the POLR only leads to inevitable disconnection at a higher cost to the customer and the company. The commission further notes §25.482(f) and §25.483(i) protect the health and safety of electric customers during periods of extreme weather, and §25.483(g) ensures continued electric service for individuals suffering from a serious illness. The commission therefore finds that it is in the best interest of a stable market to allow all REPs to disconnect residential and small commercial customers for nonpayment, assuming that retail systems are adequate and in the absence of a demonstrated pattern of behavior on the part of REPs to ignore commission rules. The commission intends that the period prior to the commencement of full disconnect authority for all REPs will allow an opportunity to fully assess the status of retail systems and the behavior of REPs and to allow the market to mature. Staff will conduct an analysis of the market and reports required in §25.43(q) to determine whether extant conditions indicate that giving competitive REPs disconnection authority would be contrary to the public interest. The commission will make an affirmative decision whether to allow all REPs to disconnect customers for nonpayment by October 1, 2004 and may delay implementation of the policy until a later date. The fact that the commission will make this affirmative decision sometime prior to October 1, 2004, should in no way be construed as an indication that the policy itself is subject to discussion. The commission fully supports the policy of giving all REPs the right to disconnect customers for nonpayment and fully expects all REPs to initiate system changes to accommodate such a policy.

The commission agrees with commenters that recommended acceleration of the policy allowing all REPs to disconnect, in the absence of an adverse showing under §25.43(b). The commission finds that January 1, 2004 is too early to implement this policy. However, the commission concurs that the date should be moved up to avoid complications associated with overlaying this new policy on top of the switch in POLR providers that will occur at the end of 2004 and the beginning of 2005. Therefore, the commission has accelerated the date for implementation of this policy to October 1, 2004, or another date set by the commission.

With regard to the request by Consumer Groups that the commission publicize on a quarterly basis the top ten REPs with the highest number of complaints, and the concomitant commission action regarding these complaints, the commission finds this information is already accessible on the commission website under Customer Assistance. In reference to Consumer Groups' and TIEC's requests that the commission place parameters on customers' exposure to disconnection, the commission finds that such parameters are already in place §25.483 of this title. In addition, in reference to Consumer Groups' comment that the rule should include penalties for violation of disconnection rules, the commission finds that PURA Chapter 15 Subchapter B gives the commission sufficient authority to assess penalties for any infraction of commission rules, including the customer protection provisions.

With respect to comments by TIEC and ARM concerning grandfathering the disconnect provisions of existing contracts between REPs and large non-residential customers, proposed subsection (b)(4) included such grandfathering language for contracts executed prior to June 1, 2002. The commission agrees that the grandfathering period should be extended in order to ensure adequate notice to REPs and their customers of the new requirements. The commission finds that it would be most expedient to set the end-date of the grandfathering period to September 24, 2002, the date that transfers on non-paying customers to POLR will cease. The rule has been revised accordingly.

OPC stated that REPs have argued in the past that they need disconnect authority in order to manage uncollectible accounts, and will make use of this power for that purpose in the future. According to OPC, the use of the threat of disconnection as a collection tool was rejected by the commission. OPC reminded the commission that, at the time the customer protection rules were adopted, the commission increased the amount of the deposit in order to alleviate the REPs' concerns. Therefore, if the commission is to allow all REPs to disconnect residential and small commercial customers, the maximum deposit allowed should be reduced to one month's usage. OPC also argued that if the commission determines that the affiliated REP should function as the POLR for non-paying customers with the authority to disconnect, the affiliated REP should first be required to place the non-paying customer in its POLR function prior to disconnecting that customer.

Reliant responded that OPC's efforts to reduce the deposit amount should be rejected. Reliant argued that the deposit guidelines are virtually the same as those that were in place prior to the development of the current customer protection rules; therefore, it is incorrect to argue that deposit requirements were increased as a response to REP requests for disconnect authority. Reliant also disagreed that an affiliated REP should

be required to drop its customer to POLR prior to disconnection for nonpayment. Reliant argued that such a requirement would unreasonably delay eventual disconnection. Reliant further noted that customers who are faced with disconnection will generally make payment to avoid disconnection, as demonstrated by the fact that while 13.8% of total customers receive a disconnect notice, only 1.0% are in fact disconnected. Reliant agreed with HEAT that the current POLR structure fosters irresponsible payment behavior.

The commission agrees with Reliant that the maximum deposit criteria are virtually the same as they were in the regulated market. The commission further notes that the deletion of §25.478(a)(3)(A)(iv) regarding credit requirements, the addition of new §25.478(a)(3)(E)(ii) that waives deposits for the medically indigent, and revisions to §25.478(f) that allow low-income customers to make deposits in installments has created greater flexibility for needy customers to meet credit and deposit requirements. The commission therefore finds OPC's proposed revision unnecessary. As discussed above, the commission also finds that delaying disconnection only leads to higher unpaid bills, making it more difficult for customers to pay their debts. Such an outcome adversely affects the credit of customers and unnecessarily increases uncollectibles for REPs.

Entergy proposed a "hard-disconnect" policy. Entergy not only supported the right to disconnect for all REPs, but also argued that the rule should be revised to preclude customers from initiating service with one REP to avoid paying amounts lawfully due to another REP. Entergy argued that such a policy would bring stability to the market, reduce uncollectibles, credit risk and risk mitigation, and thereby reduce not only rates in general, but the POLR rate as well. According to Entergy, customers would be shielded from abusive market practices through the commission's customer protection rules.

Consumer Groups replied that the REPs requested a "hard-disconnect" policy in the original 1999 customer protection rulemaking, and that this repeated request is indicative of their unwillingness to work with payment troubled customers and their desire to develop a sub-prime market.

PURA §39.001(a) states that electric services and their prices should be determined by customer choices and the normal forces of competition. Nonpayment for services is one of the normal risks of a competitive environment. Holding a customer captive to a particular company as a result of nonpayment would inhibit the normal forces of competition and impair customer choice. In addition to disconnection, companies have other tools to mitigate the risk of nonpayment, such as alternative payment arrangements, deposits, and credit investigations. The commission therefore finds that the current tools are sufficient for dealing with this issue.

6. Under the commission's existing rules, the POLR is the only entity authorized to request that a transmission and distribution utility disconnect a customer, except when a customer with a peak demand of 50 kilowatts or above waives the applicable rule provisions through written agreement with its REP pursuant to §25.471(a)(4), relating to General Provisions of Customer Protection Rules. What are the potential market and rate implications associated with the POLR serving this function in the market? Is this consistent with the goals for a competitive market? Is it appropriate for the POLR to bear the financial risk associated with accidental, inadvertent, or wrongful disconnection of customers, rather than all REPs bearing this risk on behalf of their customers? Do proposed new §25.43 and the proposed amendments to §25.482 and §25.483 remedy this situation by phasing in the ability of all REPs to disconnect customers, as discussed in Preamble Question 5?

Centerpoint did not specifically address preamble question 6, but did comment that TDUs should be allowed to rely on the appropriateness of a REP's request to disconnect, and that a TDU should not be held liable for an incorrect or unauthorized request from a REP.

Consumer Groups opposed allowing all REPs the ability to disconnect for non- payment beginning in 2005. Consumer Groups commented that POLR policy should not focus on competitive concerns, but rather the POLR as a safety net providing continuing access to affordable electric service if the market fails.

Entergy supported moving toward a system whereby all REPs have the ability to disconnect for non- payment, and further suggested reducing the transition period to this system to one year. Entergy further commented that a REP that initiates a request to disconnect service for non- payment bears the risks associated with wrongful disconnection.

First Choice commented that allowing only the POLR to disconnect for non- payment contributes to the creation of market inefficiencies resulting in overall higher prices. First Choice commented that in a truly competitive environment, each REP would have the ability to disconnect customers for non- payment of service. First Choice stated that it is appropriate that the POLR bear the financial risk associated with accidental, inadvertent, or wrongful disconnection of customers.

HEAT commented in favor of extending the right of disconnection to affiliated REPs, as well as the proposal to allow all REPs the right to disconnect for non-payment in 2005.

OPC commented that it is opposed to giving all REPs the right to disconnect. OPC noted that granting only a POLR the ability to disconnect leaves that ability with an entity over which the commission has greater regulatory authority (as opposed to REPs). OPC further commented that the commission should not look at the ability to disconnect in terms of financial risk to the POLR versus all REPs, but rather whether customers are afforded equal protection.

Reliant commented that allowing all REPs to disconnect is consistent with the goals of a competitive market. Reliant also commented that commission action will not completely eliminate the financial risk of mistaken or inadvertent disconnection, even when addressed by an exculpatory clause approved by the commission. Reliant further commented that POLR prices must reflect this financial risk.

Republic did not comment on the appropriateness of the POLR bearing the financial risk associated with accidental, inadvertent, or wrongful disconnection of customers. Republic commented that authorizing the affiliated REP to disconnect POLR customers for non-payment provides some incentive for the affiliated REP to serve as the POLR. Republic did comment in support of all REPs being afforded the right to disconnect customers for non-payment of service, suggesting that this right be effective no later than January 1, 2004, one year earlier than proposed.

TIEC commented that REPs should be authorized to disconnect customers for non-payment of only undisputed bills. TIEC further argued that giving REPs the right to disconnect without changing the limitation of liability provisions in existing agreements creates unnecessary risks.

TXU stated that commission rules provide appropriate measures to deal with customer delinquency in the competitive market. TXU also asserted that pricing POLR service above other prevailing prices compensates the POLR for the additional credit risk of serving customers transferred to the POLR for non-payment of service, and provides an incentive for customers to pay their bills promptly. Further, TXU commented that forcing an explicit cap or ceiling on POLR prices is not a correct approach, whether for customers transferred to the POLR for non-payment of service or for a REP that has defaulted. TXU added that the financial risk inherent in the right of disconnection is a business risk that must be managed in pursuing the collection of debts. Finally, TXU commented that the proposed two- year transition period provides a reasonable period for REPs to develop systems and processes to manage disconnection of service.

TIEC, in response to comments from other parties, emphasized that allowing all REPs to disconnect adds inherent risk to the market, and if approved, the commission must ensure customers are protected. TIEC commented that REPs for large non-residential customers and the contracting parties, not the commission, should assign the risks of accidental or unauthorized disconnection. TIEC further stated that there must be incentives for the POLR to exercise due diligence in disconnecting any customer. TIEC proposed that the grandfather provision must apply to existing contracts entered into prior to adoption of the rule, not June 1. TIEC also emphasized the need for an effective notice period prior to disconnection, proposing a period of ten days. In addition, TIEC reiterated its request that REPs be allowed to request disconnection for non-payment of charges, not for wires-related reasons. TIEC also suggested that the commission not add general exculpatory language for competitive REPs, adding that the market will assign the risks of negligent disconnections more appropriately.

Reliant responded to TIEC's comments in support of prohibiting disconnection for non-payment of a disputed portion of a bill. Reliant opposed disconnection for non-payment of a disputed portion only after independent adjudication of the dispute, stating an independent arbiter is unnecessary and would subject the POLR to timely and costly litigation.

The commission had anticipated comments in response to this question that addressed whether the current market structure, where only the POLR is authorized to disconnect, inappropriately shifts risk, and therefore costs, from REPs to the POLR. The commission had questioned whether such risk and cost shifting may occur because, as the POLR is currently structured, only the POLR can disconnect and therefore the REP is shielded from the risk of inadvertent disconnections. However, responses to this preamble question did not address the issue the commission had intended to present. Rather, they duplicated responses received in response to preamble questions 4 and 5. Therefore, readers are referred to the commission's responses to preamble questions 4 and 5.

7. The proposed POLR rule provides for selection of POLRs through competitive bid and lottery processes. In lieu of these processes, would it be a better practice to automatically assign customers of a defaulting REP to other REPs who serve the same customer class in the same transmission and distribution utility (TDU) service territory? Under the automatic assignment process:

(a) If a REP defaults, individual customers of the defaulting REP would be automatically and randomly assigned to all other REPs who meet the proposed eligibility requirements and provide retail service to the same customer class in the same TDU service territory.

(b) Upon being assigned a customer, the new REP would automatically place the customer on the most popular (highest number of subscribers) rate plan offered by the REP to the customer class in the same TDU service territory.

(c) The REP may market its rate plan to the customer, but unless the customer affirmatively chooses to subscribe to a rate plan, the customer may choose to leave the REP as soon as the switching process allows.

AEP opposed this proposal. AEP commented that this process would be incredibly complicated and fraught with disaster. AEP claimed that given the problems being experienced now with switches and customer move-ins/move-outs, randomly assigning customers among REPs would lead to complications and confusion among REPs and customers, not to mention the varying POLR rates that would inevitably result.

ARM supported such a proposal but noted that the larger commercial and industrial customers generally have individual rates and these customers could be assigned to REPs that serve those classes on variable rates until they sign a contract.

Consumer Groups preferred assignment of customers of a defaulting REP to the dominant REP as proposed by OPC. Consumer Groups claimed that the market is not yet mature enough for random assignment of customers to multiple REPs. In the situation of a defaulting REP, Consumer Groups recommended that extra care should be taken to ensure that customers know their rights and are treated fairly. Consumer Groups commented that assignment to the most popular price plan is the best proxy for ensuring that consumers receive the most competitive rate available. Consumer Groups also opposed the ability of the REP to market to new customers because it would allow REPs to take advantage of vulnerable customers.

First Choice commented that recent market events show that customers of REPs exiting the market have value and therefore there is no need to establish a POLR selection process for those customers.

OPC stated that this proposal has merit because it would lead to a POLR rate below 125% of the PTB and would reduce the risk to a single POLR. Further, OPC stated that REPs could acquire customers without having to incur marketing expenses.

In its reply comments, AEP noted that First Choice and OPC had both recognized the inefficiency inherent in establishing an entire procedure for bidding and appointment of a POLR for customers whose REP can no longer serve them. Shell's exit from the Texas market and the Enron and NewPower bankruptcies demonstrated that competitive REPs will find value in customers of failed REPs and the customers of such failed REPs will likely never be transferred to POLR service. As a result, there is no need to establish an assignment process or a POLR for customers of defaulting REPs.

Reliant stated that it could support the concept of a "pool" of REPs providing POLR service provided that the pricing structure appropriately compensated each REP for the risk of providing POLR service. In comments filed earlier in this project, Reliant proposed a similar approach to POLR structure but the pricing differed from that set forth in this comment in that it advocated a price equal to the highest PTB plus a commission determined adder and a cost recovery mechanism. According to Reliant, the use of each REP's most popular price plan would not necessarily

compensate a REP for its costs and risk associated with POLR service.

TIEC opposed a process of random assignment because it would damage the competitive market by increasing the risks associated with market participation for all REPs. Under this approach, TIEC argued, any REP would be exposed to the risk of serving a large amount of load with little or no notice. TIEC claimed that it could also harm the market by leading all REPs to increase their prices to compensate for the added risks associated with these POLR responsibilities. Moreover, TIEC stated this approach would drive smaller REPs out of the Texas market if they were unable to absorb the added risks and create additional barriers to market entry for new REPs.

TXU commented that the proposal would add confusion to the market, increase the complexity of ERCOT systems, and limit the ability of REPs to predict customer gains. TXU commented that a proposal such as this should not be adopted without further evaluation of the system changes needed for its implementation.

Comments received in response to this question duplicate issues concerning random assignment of customers addressed in responses to preamble question 1. The commission declines to adopt this approach to POLR selection for the reasons discussed in response to comments on preamble question 1.

8. Under the automatic assignment process, should an equivalent number of customers be assigned to all eligible REPs, or should the number of customers a REP is assigned be dependent upon the REP's current market share of customers in that class and TDU territory? Is there a better basis for determining the apportionment of customers to the REPs? Should they be eligible to be assigned customers under this process? What are specific advantages and disadvantages of the automatic assignment process in comparison to the proposed competitive bid and lottery processes?

AEP commented that the only advantage of random assignment is that it would more fairly apportion the POLR obligation among the various players active in the market. However, AEP argued that this advantage would be greatly outweighed by the confusion and complexity of an automatic assignment process.

Consumer Groups reiterated their preference that customers be assigned to the affiliated REP at the PTB.

OPC commented that the commission might want to provide REPs the alternative of taking on more than their market share of customers whose REP has defaulted.

Comments received in response to this question duplicate issues concerning random assignment of customers addressed in responses to preamble question 1. The commission declines to adopt this approach to POLR selection for the reasons discussed in response to comments on preamble question 1.

General Comments

HEAT stressed the importance of educating customers about the POLR, particularly in terms of the timeline of POLR transfer, the POLR rate structure, the abandoned bad debt at the REP, how a customer may be reconnected with the previous REP, and the associated costs. Entergy also recommended that the commission augment its customer education campaign to provide market participants the opportunity to understand and adjust to the new disconnection policy. Consumer Groups responded that the scant customer education provided by the commission has left the customers confused regarding the new market structure, particularly the POLR, and the proposed revised POLR structure will only increase future customer confusion.

The commission agrees that the new POLR and disconnection provisions should be an integral part of the customer education campaign under PURA §39.903.

§25.43. General Comments

ARM stated that the commission should adopt policies that provide incentives for customers to leave POLR service by contracting with other REPs. ARM commented that two policies should govern POLR service: (1) POLR service should be provided at a fair price to customers; and (2) the POLR provider should recover its costs and earn a return for providing POLR service. ARM also commented that POLR service should be set at market rates and that no REP should be required to provide below-cost service. Further, ARM asserted that if POLR service is required to be provided at a static price, management of POLR risk becomes difficult because of uncertainty concerning the volume of customers transferred to the POLR. According to ARM, this risk is the impetus behind the comparatively high rates for POLR service. ARM stated that the proposed rule creates greater flexibility in changing the POLR rate based on market conditions and this added flexibility improves the ability of the POLR to manage the risk of selling at a static price.

The issues raised by ARM were generally addressed in the commission's response to comments on preamble question 1. No change was made in response to ARM's comments.

TXU recommended adding the word "default" before POLR service throughout the rule to clarify the difference between a non-paying customer terminated to the affiliated REP versus customers that lose their REP for other reasons and thus receive service from the "default" POLR.

The commission appreciates TXU's desire to ensure that there is a clear distinction in commission rules between the affiliated REP serving non-paying customers at the PTB and the POLR selected under this section providing service to customers who are no longer receiving service from their provider for reasons other than non-payment. However, the commission finds that this distinction is apparent in the provisions of subsection (b) and has not made the change suggested by TXU.

§25.43 (b), Application

Entergy suggested that the word "terminated" in paragraph (2) be changed to "disconnected" in order to clearly state the ability of the affiliated REP's to disconnect customers for non-payment.

The commission disagrees with Entergy's suggestion. The word "terminated" is appropriate in paragraph (2) because competitive REPs will be required to terminate non-paying residential and small non-residential customers to the affiliated REP until October 1, 2004.

Entergy stated that customers disconnected for non-payment should not have the ability to choose an alternate provider as a means of escaping their financial obligation to the disconnecting REP. In order to mitigate the risk associated with increased write-offs, Entergy proposed adding language to this provision that prohibits a customer from choosing POLR service in situations where the customer has been disconnected for non-payment by the affiliated REP.

As discussed more fully in response to comments concerning preamble question 5, the commission declines to adopt Entergy's proposal.

First Choice proposed additional language to distinguish between customers who transferred to the POLR due to a defaulting REP, and those who were dropped to the POLR for nonpayment.

The commission disagrees with First Choice's recommendations because similar language can be found in subsection (b)(2). This language makes it clear that the affiliated REP serving as POLR for non-paying customers is not subject to the provisions of the rule except where specifically stated.

The commission has added language to subsection (b) to clarify that First Choice is deemed to be the affiliated REP for customers in the Sharyland Utilities, LP service area because First Choice is functioning as the default provider for those customers in the absence of an affiliated REP.

§25.43(c), Definitions

TXU recommended adding definitions of "billing cycle" and "billing month." These definitions support other changes recommended by TXU concerning the period over which an energy price adjustment is applied.

The commission agrees with TXU's proposal to clarify that energy price adjustments will apply during a billing cycle, which may or may not correspond with a calendar month. Therefore, the commission adopts the additional definitions of "billing cycle" and "billing month" recommended by TXU.

TXU recommended that the definition of "provider of last resort (POLR)" revised to make a more clear distinction between service at the PTB for non-paying customers versus POLR service for other customers.

The commission agrees and has made the requested change.

§25.43(e), Standards of service

ARM suggested that subsection (e)(2)(C) be altered because the POLR should not offer term-based rates. ARM explained that consistent with the idea that POLR is a transitory service, customers should never be required to remain for any term; incentives for a customer to remain on POLR service should not exist.

The commission generally believes that incentives to remain on POLR service should not exist. However, the commission believes that level payment plans are needed by some customers to effectively manage their electric bills. Customers on POLR service should not be denied the use of this management tool. No change was made in response to ARM's comment.

§25.43 (f), Customer information

First Choice suggested deleting language in §25.43(f)(1) that provides for two different terms of service agreements for the small non-residential class, one for small non- residential customers with usage between below 50 kW and one for small non-residential customers with usage between 50kW to 1 MW. First Choice commented that a POLR will not know which profile a small residential customer fits, making a bifurcated term of service agreement unfeasible.

The POLR should have sufficient information to perform a calculation to determine whether a small non-residential customer has usage above or below 50 kW. However, the commission finds that requiring the POLR to make this determination could prove unduly burdensome to the POLR. Therefore, the commission has combined the TOSA for both sets of small non-residential customers into one TOSA. The commission notes that small non-residential customers with usage of 50 kW and above can waive certain customer protection requirements. However, the commission is standardizing provisions for TOSA for all customer classes and has chosen not to include any specific waivers as previously discussed. The commission has also clarified subsection (f)(2) by specifying that the TOSA must be updated in accordance with the provisions of §25.475(d) of this title (relating to Information Disclosure to Residential and Small Commercial Customers).

Reliant commented that due to the proposed monthly adjustments to POLR prices, initial information provided to POLR customers should not specify a specific rate in monetary terms but should explain the methodology under which prices will be developed and a range of prices that could be charged. Reliant further suggested that actual pricing information be included via invoice messaging in the customer's monthly bill.

The commission generally agrees and notes that the proposed TOSA effectively include the language recommended by Reliant. No change was made in response to this comment.

HEAT suggested providing customers with information containing examples to educate them about what happens to customers who fail to pay their electric bills. Specific examples suggested by HEAT include the time frame for being transferred to POLR, explanation of the differences in rates, handling of balances remaining with the REP, the process to be reconnected to a REP, and the basic costs of reconnection.

The commission understands HEAT's recommendation to be directed toward the commission's customer education efforts. The commission appreciates HEAT's input and will endeavor to make customers aware of the consequences of non-payment and the process for disconnection through its customer education efforts.

The commission also notes that, in lieu of adopting the TOSA by reference, they have been adopted as figures appended to this rule. This approach to adoption of the TOSA will benefit the public because the TOSA will be published in the Texas Administrative Code.

§25.43 (g), General description of POLR selection process

AEP, in responding to comments filed by OPC, noted that no affiliated REP affirmatively committed to bidding on POLR service. AEP, therefore, suggested changes to paragraph (2) to provide for commission appointment of the affiliated REP to serve as the POLR at the price to beat if no eligible bids are submitted.

This commission disagrees. The commission finds that it is appropriate to begin development of a structure for POLR selection that will survive beyond the expiration of the PTB. Requiring that the affiliated REP be the default POLR provider would not further the development of a comprehensive POLR selection process.

TXU commented that staggered two-year terms for POLR service are not necessary. TXU suggested deleting language outlining the staggered terms for the Oncor, TNMP and WTU POLR areas versus the Reliant and CPL POLR areas.

The commission agrees and has eliminated provisions for staggered two year terms. All POLRs will be selected for two year terms beginning in odd-numbered years.

§25.43 (h), REP eligibility to serve as POLR

TXU suggested that subsection (h)(2)(F), which provides that a REP is ineligible to serve as POLR if its only customers are its own affiliates, be deleted. TXU commented that the language is confusing and provides no discernable benefit to customers or the market.

The commission disagrees. The purpose of this provision is to exempt a REP from the requirement to serve as POLR if its only customers are its own affiliates. The commission does not believe such REPs will be equipped to serve non-affiliated customers and therefore should be exempt from POLR service. The commission finds that only a limited number of large non- residential REPs will meet this requirement.

TXU proposed additional language under §25.43(h)(2)(D) that would clarify that a REP assuming the price to beat responsibilities of an affiliated REP would have the same POLR responsibilities as the affiliated REP.

The commission agrees that an entity assuming the PTB responsibilities of an affiliated REP should assume the POLR responsibilities of the affiliated REP. The commission has revised the rule to address this issue.

TXU, in responding to comments from Republic regarding the time period from when a REP enters the market until eligibility to serve as a POLR begins, sought to clarify that a REP currently serving customers in Texas is not precluded from serving as a POLR. TXU suggested modifying §25.43(h)(2) to state that a REP certified by the commission after the effective date of the rule is ineligible to provide POLR service until it meets the criteria spelled out in §25.43(h)(2).

The commission generally disagrees with TXU. The provisions of §25.43(h)(2) were intended to ensure that a REP that has been in the market for less than 18 months not serve as POLR. Generally, the commission finds that it is appropriate to allow a period of time to pass before any such REP is appointed POLR so as to allow that REP to develop a customer base without the added burden of managing POLR service and to ensure that the commission has some type of track record with that REP. However, the commission finds that this requirement should not apply in the case where a new REP acquires an affiliated REP or any other REP that has been in the market for 18 months or more. The final rule incorporates language to address this issue.

First Choice suggested deleting language in §25.43(h)(2)(B) which defines a REP's eligibility to serve as POLR by reference to the peak load in Texas for a particular customer class. First Choice stated that peak load information by customer class is not available.

The commission agrees that determining peak load for particular customer classes in Texas could be problematic because data required to make the calculation may not be readily available. To address this issue, the commission has determined that eligibility to serve should be based on a comparison of the REP's annual megawatt hour sales for a customer class nationwide to the annual megawatt hour sales for the same class in areas of Texas where customer choice is in effect. The rule has been revised to include a definition of "load ratio" that expresses this relationship between megawatt hour sales nationwide and in Texas. The specific provisions of the rule that measure a REP's load nationwide compared to its load in Texas have been revised to reference the load ratio comparison rather than the total peak load comparison found in the proposed rule.

First Choice suggested deleting language in §25.43(h)(2)(C) referring to information available to the commission. First Choice suggested language stating that a REP would be ineligible to serve as POLR if it is not reasonably expected to be able to meet the criteria. First Choice commented on the proposed change by citing the explanation for the proposed deletion in §25.43(h)(2)(B), that peak load information by customer class is not available.

The commission agrees and has made the change recommended by First Choice.

TIEC suggested modifying §25.43(h)(2) to remedy perceived ambiguities in subparts (E) and (F). TIEC suggested deleting subpart (E), and replacing it with language excluding any REP from POLR service for a particular customer class that is solely certified to serve individual customers under Option 2 of the REP certification rule.

The commission disagrees. REPs certified under Option 2 are REPs who are certified to serve only specific customers with load above one megawatt. Such REPs may have a substantial customer base and be able to serve as POLR for the large non-residential customer class even though they are certified only as Option 2 REPs. The commission does not believe that these REPs should be shielded from POLR service merely by virtue of the alternative under which they have chosen to provide POLR service if they can meet the other eligibility requirements of the rule. Such REPs would, however, be required to expand their certification if they are selected as POLR. The commission agrees, however, that REPs whose customers are limited to their own affiliates should not be required to provide POLR service and has exempted these REPs from the requirement to serve as POLR. No change was made in response to this comment.

OPC suggested deleting language in §25.43(h)(2) restricting an affiliated REP from serving as the POLR within the boundaries of its affiliated TDU. OPC commented that it recommends this change to maintain consistency with PURA and to allow the commission the greatest flexibility in designating POLR providers.

The commission generally agrees that an affiliated REP should be allowed to bid for POLR service at the PTB and has revised the rule accordingly. The commission does not agree that an affiliated REP should be subject to selection by lottery as the POLR for customers in the service area of its TDU because the affiliated REP would be unable to charge the rate specified in the rule for POLRs selected by lottery.

Reliant commented that the proposed lottery process for POLR providers should take into account the size of the service territory a POLR may be assigned. Reliant suggested that a REP not be required to serve more than 33% of a customer class within ERCOT.

The commission has been told by Reliant that its primary concern is to ensure that a REP not be required to serve as POLR for the same customer class in both the Centerpoint and Oncor service areas. The commission acknowledges that these two service areas are the largest in the state and together comprise the majority of the customers in the state. The commission agrees that a single REP should not be required to take on the burden of serving as POLR in both of these areas at the same time, though a REP could voluntarily seek to obtain service in both of these areas if it so chose. New subsection (j)(2) has been added to provide that a REP that has been selected by either bid or lottery to serve as POLR in the Centerpoint POLR area shall not be

eligible for lottery selection as POLR for the Oncor POLR area and vice versa.

Entergy suggested changes to §25.43(h) to provide a specific date by which the commission shall determine the eligibility of certified REPs to serve as a POLR. Entergy suggested language stating that the commission determines the eligibility of REPs no later than June 30 of each year beginning in 2003. Entergy commented that this change will provide REPs with sufficient time to evaluate their ability to serve as a POLR. Entergy suggested additional language to §25.43(h)(1), §25.43(h)(2)(B), §25.43(h)(2)(D), and §25.43(h)(2)(E) clarifying that only retail affiliates of the REP providing retail service in Texas be included in the commission's determination of eligibility. Entergy also suggested additional language to §25.43(h)(3) proposing that the commission publish the names of all eligible REPs for POLR service no later than June 30 of each year and that the commission notify each certified REP of its eligibility to serve as a POLR.

The commission notes that for the first two years of POLR service, the rule specifies that only affiliated REPs are eligible to serve as POLR. This requirement reflects the fact that affiliated REPs currently have the most experience in the Texas market and the greatest wherewithal to manage an additional influx of customers. In addition, the commission has determined that insufficient time exists to identify other REPs eligible for POLR service in the manner specified in the rule for the POLR term beginning in 2003. The commission does not believe it is necessary to set a deadline for itself in designating entities eligible to serve as POLR in the future. All REPs should have a fairly firm notion of whether they are eligible for POLR service during a given upcoming term or not. Nevertheless, the commission commits to timely publication of the list of eligible REPs in order to facilitate the POLR selection process.

Entergy further suggested including language in §25.43(h)(3) specifying that if a REP is certified to serve only as a POLR REP, that POLR's other retail affiliates will be excluded from the list of REPs eligible to serve as POLR. AEP commented in favor of Entergy's proposed change to §25.43(h)(3).

The commission disagrees. The commission does not believe that it is necessary or appropriate to effectively limit to one the number of affiliated REPs who are eligible for POLR service. The commission agrees, however, that a REP certified to provide POLR service only for an affiliate should be ineligible for POLR service and has revised the rule accordingly.

Entergy also stated that only information related to those affiliates of the REP providing retail electric service in the Texas deregulated market should be involved in the determination of the REP's eligibility to serve as POLR. Entergy questioned whether the commission has authority to request REP information about activities in other states.

The commission disagrees. The purpose of this provision is to ensure that REPs have sufficient size to provide the safety net POLR service. A REP's activities in other states are directly relevant to this inquiry, and a REP with significant size outside of Texas should not be shielded from POLR service merely because it has not recruited a significant number of customers in Texas. PURA §39.106 provides that the commission shall determine the criteria for selection of the POLR. The commission finds that the criteria concerning the level of load served nationwide by the REP is relevant to the REP's ability to serve as POLR in Texas and therefore it is within the commission's authority to request information concerning the level of load served by a REP outside of Texas in assessing whether this criteria is met.

§25.43(i), Bid process

ERCOT requested that the commission clarify how a "designated POLR area" is defined in subsection (i). ERCOT stated that the ERCOT systems were developed to recognize designated POLR areas by zip code; however, some POLRs share service in a single zip code. ERCOT suggested that the POLR areas should be divided by TDU areas rather than zip codes.

The commission finds that ERCOT's concern is addressed in proposed subsection (c)(4) (subsection (c)(7) on adoption) which defines POLR areas to be the service areas of TDUs.

Entergy suggested deleting the word "initially" from subsection (i) so that it is clear that the competitive process is the preferred method of selecting the POLR. Entergy also suggested that the commission provide notice of the bid process to each eligible REP.

The commission agrees that the competitive bid process is the preferred method of selecting the POLR. However, the commission finds that the word "initially" is necessary in this subsection to clarify that the competitive bid process will be utilized before a POLR is selected by lottery. The commission also finds that bid invitations published in the *Texas Register* will provide each eligible REP sufficient notice of the POLR bid process. The commission therefore declines to adopt Entergy's suggested revisions.

Entergy recommended a clarifying language change to subsection (i) to indicate that a "qualified" bidder may submit multiple bids.

The commission declines to add the word "qualified" to subsections (i)(3)(A) and (i)(6)(A) because bids received from unqualified bidders will not be considered pursuant to subsection (i)(6)(B)(i). However, the commission has revised subsection (i)(3)(A) of the rule in a manner that should address Entergy's concern that a REP is not precluded from submitting multiple bids for POLR service.

TXU suggested that subsection (i)(3)(C) be modified to permit all eligible bidders to indicate their preference of POLR areas, not just the small REPs.

The commission seeks to encourage small REP participation in the competitive bid process. However, the commission recognizes that the burdens of POLR service will be greater for the REPs having less than a 5.0% load ratio, as defined in the rule. To minimize the risk of a smaller REP defaulting on its POLR obligation, the commission has determined that REPs having less than a 5.0% load ratio are not permitted to serve as POLR in more that one POLR area. The commission therefore concludes that it is appropriate for a small REP submitting multiple bids to provide a statement indicating a preference for the POLR area it wishes to serve. The commission does not believe a similar statement is necessary for other bidders. No change was made in response to this comment.

TXU proposed that subsection (i)(5)(C) should be revised to allow interested persons 25 calendar days after the submission deadline specified in the bid invitation to reply to comments received on the bids. In reply, OPC recommended that if the commission adopted TXU's suggestion to extend the time period for filing reply comments concerning bids, then the commission

should also extend the time period for filing initial comments from 10 to 15 calendar days.

The commission finds that 15 calendar days provides an adequate time period for interested parties to submit reply comments.

First Choice proposed that subsections (i)(5)(B) and (i)(5)(C) should be eliminated because First Choice could not envision a scenario in which the commission could reasonably cancel a bid opening without actually opening the bids.

The commission disagrees with First Choice's pronouncement that the commission would never have occasion to cancel a bid opening. The commission notes that a bid opening might be cancelled if the bid invitation contains a material error or a procedural irregularity has occurred. For example, in the event that the commission determines after bids have been received but before the bids are opened that the bid invitation was not properly published, the commission has the option under subsection (i)(5)(B) to return the unopened bids and republish the bid invitation for POLR service. The commission observes that subsection (i)(5)(C) sets forth the procedure for interested persons to file comments and reply comments to the bids received by the commission. The commission finds that the procedure outlined in subsection (i)(5)(C) is necessary to facilitate public comment on the bids received. No change was made in response to this comment.

First Choice and Entergy recommended deletion of the first sentence of subsection (i)(6)(A). Entergy also suggested that language should be added in subsection (i)(6)(A) to clarify that tie bids occur when bidders bid for the same customer class in the same POLR area. In addition, Entergy suggested the deletion of the last sentence of subsection (i)(6)(A).

The commission finds that the first sentence of subsection (i)(6)(A) is necessary to clarify that it will not evaluate any bid on the basis of price if the bid has been rejected pursuant to subsection (i)(6)(B). Furthermore, the commission finds that it is necessary to have a procedure in place if a small REP submits multiple bids but does not provide a statement indicating a preference for POLR service territories or the preferences submitted are irreconcilable. The commission finds that the additional language proposed by Entergy regarding tie bids is not necessary because the rule sets forth a procedure whereby only bids for the same customer class in the same POLR area are evaluated against each other. However, the commission has revised subsection (i)(6)(A) of the rule to clarify the bid evaluation procedure.

Reliant and OPC sought clarification regarding the commission's discretion to reject all bids pursuant to subsection (i)(8) when it has received at least one bid that meets the parameters set forth in subsection (i)(6).

The commission finds that its authority in subsection (i)(8) to reject all bids is necessary to protect the integrity of competitive bid process. For instance, the commission might exercise this authority to prevent one bidder from gaining a competitive advantage, or a perceived competitive advantage, over another bidder in the event that it is discovered after the bids have been opened that the bid invitation contained a significant error or a procedural irregularity had occurred. No change to subsection (i)(8) has been made.

§25.43(j), Lottery

TXU suggested that the percentage stated in subsection (j)(1)(B) should be changed to make lottery eligibility the same as eligibility to be POLR. First Choice proposed that the criteria of peak load for a particular customer class in subsection (j)(1)(B) be revised because peak load information will not be available on the basis of customer class.

The commission observes that subsection (j)(1)(B) provides a criteria by which certified REPs will be excluded from the lottery process. As stated in response to §25.43(i), the commission recognizes that the responsibilities for POLR service will be greater for small REPs as compared to REPs with a load ratio equal to or greater than 5.0%. The commission is concerned that if a small REP serves as POLR in more than one service area, it may not be able to satisfactorily fulfill its POLR obligations in those areas. The commission therefore concludes that it is appropriate to exclude a small REP from lottery candidacy if it will be serving as POLR for that customer class in another area during the upcoming term and has revised subsection (j)(1)(B) accordingly. As stated in response to (h)(2)(B), the determination of the relative amount of load served by a REP has been revised to reference the REP's load ratio, which is determined based on the REP's megawatt-hour sales to a particular customer class.

§25.43 (k), POLR rate

Entergy supported the provisions of the proposed rule that provide that the POLR rate for each customer class consist of non-bypassable charges, a monthly customer charge, an energy charge, and a demand charge for small and large non-residential customers.

The commission appreciates Energy's comment. No change was made in response to this comment.

TXU recommended that the POLR be allowed to adjust its rate(s) to reflect changes in any commission-approved electric delivery company tariffs, changes in charges from the Independent System Operator, legislatively mandated changes in non-bypassable charges and any other charges mandated by tax or regulatory authorities. TXU stated that such an addition would mitigate the risks associated with serving POLR customers at a price that does not allow adjustments and would reflect future changes in the regulated wires charges that may occur after the POLR begins its term.

The commission does not believe the change requested by TXU is necessary. The types of charges enumerated by TXU above are non-bypassable charges. The proposed rule specifically provides that the POLR rate shall include non-bypassable charges. The only elements of a POLR bid are a monthly customer charge, an energy charge, and for small and large non-residential customers, a demand charge. Non-bypassable charges are not intended to be covered by bids but are instead intended to flow through to the POLR customer. The rule structure therefore allows flow through of increases in non-bypassable charges such as those described by TXU. No change was made in response to this comment.

TIEC supported the commission's proposed method for establishing the energy charge for the large non-residential class and did not object to the imposition of a customer charge, provided that the bidder can justify the charge based on its underlying billing and other administrative costs. However, TIEC opposed the inclusion of a demand charge in the pricing structure for POLR service. TIEC stated that most large non-residential POLR customers default to the POLR provider involuntarily and stay with that provider for a short period of time. TIEC explained

that, because of this short stay, providers have little or no ability or need to forecast their loads and contract for generation capacity to meet these power requirements. TIEC stated that there is therefore no need to allocate costs between different customers with different load factors. Further, TIEC suggested that since a POLR's generation cost structure for large non-residential customers will contain no fixed, capacity-related costs, there is no justification for including a demand charge in the pricing structure. TIEC also stated that a demand charge would obligate a customer to pay a full monthly demand charge even if the customer were to stay on POLR service for less than a month, essentially creating a minimum term for POLR service.

In its reply comments, Reliant disagreed with TIEC's position concerning the need for a demand charge for large non-residential customers. Reliant commented that a demand charge is needed to prevent customers from switching to and from POLR service on the basis of price. Reliant emphasized that POLR service was not intended to function as an arbitrage tool. And, even with a demand charge, Reliant stated that there is nothing that prevents a large non-residential customer from leaving POLR service at any time. Reliant also proposed imposition of a monthly customer charge for the non- residential class equal to $2897, the monthly customer charge established for StarEn Power in PUC Docket Number 24190, *Petition to Appoint Provider of Last Resort Pursuant to PURA 39.106 for Residential and Small Non-Residential Customers in the Entergy, TXU East-DFW, and TXU West-DFW Service Areas and for Large Non-Residential Customers in the Reliant North, Reliant South, CPL Gulf Coast, CPL Valley, WTU, and SWEPCO Service Areas.*

The commission disagrees that a demand charge is unwarranted. As Reliant has noted, the absence of a demand charge for large non-residential customer may encourage use of the POLR to arbitrage prices. Further, the commission disagrees with TIEC that a demand charge indirectly imposes a term on a POLR customer. Nothing in the proposal to include a demand charge requires that a customer stay with the POLR for any length of time. Further, the commission expects that the demand charge will be prorated based on the number of days within a month that a customer receives POLR service as was historically the case with regulated utilities. The TOSA for large non- residential customers has been revised to clarify that the demand charge will be prorated for customers taking POLR service for a period of less than one month.

The commission agrees that a customer charge should be applied when POLR service is awarded by lottery. The commission finds that the figure suggested by Reliant is reasonable and has revised subsection (k)(4) accordingly.

TXU recommended that the energy charge component of the rate for large non- residential customers be a specific price bid for on and off-peak seasonal periods in lieu of the proposal to set the energy charge at a percentage over the energy reference price. TXU proposed that changes to the energy component be at the option of the POLR.

While the commission agrees that there should be seasonality to the energy component of the POLR rate, the commission disagrees with TXU's proposal to completely do away with the energy reference price structure of the proposed rule. No change was made in response to this comment.

Reliant commented that there should be a price floor for the MCPE component of the energy charge adjustment for large non-residential customers because of the potential for the MCPE to fall very low or even become negative. Reliant recommended that an MCPE floor of $7.25/megawatt per interval be established. Reliant indicated that this floor was based on the lowest off-peak price reported by *Platt's Megawatt Daily* over the last five years.

TIEC responded that the MCPE does not go negative often, and when it does it reflects the cost of having generation back down. TIEC argued that negative balancing energy should flow to the benefit of the customer that has been transferred to the POLR and faces substantial energy risk, which could be very high. TIEC also indicated that, on an interval basis, Reliant's proposed MCPE floor would result in a per megawatt hour price of $43.50 per MWh. TIEC commented that in contrast, the weighted average balancing energy price has been as low as $18.00 per MWh and in the South Zone has been even lower. Reliant subsequently told the commission that, while the basis for its recommendation was prices in ERCOT during 15-minute intervals, it intended its $7.25 MCPE floor to be applied on a megawatt-hour basis.

The commission understands Reliant's concern about the potential for the MCPE to go negative. In that circumstance, the adjusted price could be negative (or require refunds to the customer) even when the POLR has acquired energy on the spot market to serve the customer and has not relied on the balancing energy market. TIEC's reply to Reliant's comment suggests that TIEC believes that the POLR will rely on balancing energy to serve large non-residential customers, which is not currently permissible under the ERCOT Protocols. This approach to serving POLR customers may become an option in the future if ERCOT moves to a relaxed balanced schedule requirement, but presently it is not an option. Nevertheless, the commission does not see a need to impose the floor requested by Reliant for POLR service bids. Rather, REPs bidding for POLR service can include a floor in their bids if they so choose. This approach allows the market to assess the risks of the MCPE going negative. The commission agrees, however, that a floor should apply in situations where the POLR is selected by lottery. The commission finds the MCPE floor suggested by Reliant, on a megawatt-hour basis, is reasonable given that it is based on the lowest off-peak price reported by *Platt's Megawatt Daily* in the last five years. The rule has been revised accordingly.

AEP stated, in its comments to preamble question 1, that providing service to residential and small non-residential customers whose chosen REPs can no longer serve them is extremely unpredictable and risky. AEP explained that it will be impossible for a POLR to know how much power it must purchase to serve its customers, if any. As a result, AEP argued, it will be highly expensive for a POLR to make arrangements to purchase power for POLR customers. AEP commented that capping the POLR rate at 125% of the PTB will not adequately compensate a POLR for the power it may have to purchase if a REP is unable to service its customers and those customers are transferred to POLR.

Consumer Groups stated that allowing POLR to be set at 125% of PTB could result in POLR rates for residential customers being higher than they are under the current rules. Consumer Groups disagreed with suggestions that POLR rates should be higher rather than lower to encourage customers to leave the POLR and re-enter the competitive market. Consumer Groups commented that the residential POLR rate should be set at the PTB and that the affiliated REP or dominant REP should be appointed as the

POLR. Consumer Groups stated that the PTB is an above-market rate and therefore would be a profitable POLR rate. Consumer Groups stated that the affiliated REP or dominant REP would be better able to serve as POLR because their large load enables them to better absorb load growth.

Entergy commented that the POLR rule should provide potential bidders the flexibility to structure their bids so that the price to provide POLR service is commensurate with the risks associated with providing such service. Entergy stated that price caps conflict with this objective, and should be removed from the proposed rule. Entergy pointed out that there are POLR providers currently in place that were designated by the commission in accordance with the procedures contained in the current rule. POLR rules, rates, and terms of service were negotiated in good faith and approved by the commission and Entergy stated that this approach should be maintained in the rule.

Republic commented that the incorporation of the 125% cap/premium will go a long way toward reducing the risk that a POLR selected by bid or lottery will have to provide POLR service at noncompensatory rates. Republic stated that reducing the risk should also encourage participation in the bid process, and strongly supported this provision.

In reply comments, TXU stated that the commission should reject comments by parties recommending that the POLR price be set at or below the PTB. TXU commented that, if implemented, this would seriously and adversely affect the ability of competitive REPs to compete in the market. TXU stated that to the extent POLR service is not priced to allow the POLR to recover its costs, it becomes an artificially low, competitively priced option in the market and not simply a safety-net for customers.

Reliant, First Choice and TXU proposed adding an energy price floor to ensure the POLR rate does not fall below the PTB. They indicated that, without a price floor, the monthly energy price adjustment could result in the POLR rate dropping below the PTB due to decreases in natural gas prices. Noting that this is a critical addition to the proposed rule, Reliant recommended a price floor of 105% of the PTB. TXU proposed that the POLR rate not go below 110% of the PTB. First Choice suggested making the energy component of the PTB the price floor for the energy component of the POLR rate. Entergy supported Reliant's and TXU's proposals for a price floor. OPC disagreed that the POLR rate should be indexed above the PTB.

The commission agrees that POLR service as contemplated in the proposed rule carries with it volume and commodity price uncertainty that is peculiar to POLR service. The commission therefore disagrees with commenters who suggest that the PTB should be a ceiling on POLR service. Nevertheless, the commission finds that the fuel price adjustment methodologies included in the proposed rule avoid much of the risk associated with the initial POLR rule that required a static price for the term of the POLR contract. In the commission's view, this reduced risk should help moderate prices bid for POLR service both in the short term, in comparison to rates established where POLR prices were locked in for longer periods, and in the longer term as power markets become more liquid.

However, the commission finds that some upper limits on POLR rates are appropriate given that POLR service is likely to remain less than fully competitive in the near-term. Therefore, the commission declines to remove the rate cap as recommended by ARM and Entergy.

The commission shares the concern expressed by Consumer Groups that POLR providers could take advantage of provisions that allowed adjustments in the energy component of the PTB by not reducing the POLR rate when commodity costs fall. The commission therefore has retained the requirement that the energy component of the POLR rate be adjusted whenever the gas price index changes by 5.0% or more, either up or down.

The commission also agrees with commenters that POLR service is not intended to function as a competitive alternative. POLR service is intended to be transitional in nature until customers procure service from a competitive provider. Therefore, the commission finds that a floor on the POLR rate is appropriate and that floor should be equal to the PTB. A PTB price floor on the POLR rate has been added to the rule.

The commission rejects Entergy's proposal that a process for negotiating POLR rates, terms, and conditions should be maintained. The commission used that process to establish POLR service for 2002 and found it to be administratively unwieldy and problematic in terms of inclusion of interested persons in the negotiating process.

Finally, in situations where POLR service is awarded by lottery, the commission finds that the 25% premium is consistent with, and more moderate than, premiums for POLR service that the commission has seen in prior bids. Further, the 25% premium is within the range of increments above the PTB currently being charged for POLR service. The commission therefore believes the lottery price of 125% of the PTB is reasonable.

With respect to the provisions of the proposed rule concerning evaluation of bids at standard usage levels, Entergy pointed out that average usage levels for residential and small non-residential customers may vary among TDU service territories. Entergy proposed revised rule language that would require evaluation of bids based on usage levels specific to each POLR area.

The commission agrees that standard usage levels will likely vary from service area to service area. However, the commission does not believe, and Entergy provided no evidence to suggest, that differences in standard usage levels across TDU service territories are likely to have any significant impact on the bid evaluation. No change was made in response to this comment.

Reliant stated that for the small and large non-residential classes, the rule should specify a single measurement point for determining whether or not a bid is between the proposed bid cap and bid floor, if any. Reliant commented that the proposed usage levels for evaluating small and large non-residential bids could cause the bid to be above the bid cap at one usage level but below the cap at another. Reliant proposed that the small non-residential class should be evaluated at 35kW of demand and a 55% load factor and the large non-residential class should be evaluated at two megawatts of demand and a 55% load factor.

The commission agrees that having two evaluation points will complicate the process of bid evaluation. The commission concludes that the bid evaluations should be based on single usage levels that are the approximate mid-point of the usage levels proposed. The rule has been revised accordingly.

Reliant also recommended that the POLR rate design follow the PTB rate design in each service territory to ensure that the POLR bid price does not fall above the bid cap proposed in the rule or the rate floor, if any, for any range of usage characteristics. Reliant provided an example: if the benchmark PTB price has two

energy blocks, where usage for 0 to 500 kWh is one price per kWh and usage above 500 kWh is at another price, the POLR price should have the same block structure. Over the range of usage characteristics, the POLR price can fall between a 60% discount to the PTB at low load factors to greater than a 50% premium over the PTB at high load factors. Such an outcome is not in the public interest because it creates the potential for POLR service to be a competitive alternative for some customers.

The commission understands Reliant's concern is that, if the PTB is based on an inverted block structure (available only to residential customers), certain customers might find POLR rates more attractive than PTB rates and select POLR service in lieu of PTB service. The commission finds that this outcome is possible but unlikely because few, if any, customers under an inverted block structure rate would be expected to select POLR pricing rather than PTB pricing or another competitive offering because residential customers, those to whom an inverted block structure is available, are typically slow to switch providers. The commission will examine this issue further if it appears that large numbers of customers on an inverted block structure rate are selecting POLR service to take advantage of more attractive pricing. At this time, however, the commission declines to make any changes to the rule to address this issue.

Reliant also commented that since the POLR energy price is calculated as a percentage of the PTB, any adjustments in the PTB should result in a corresponding adjustment to the POLR energy price.

The commission generally agrees with Reliant that the floor for POLR rates established by bid should change when the PTB changes and that the POLR rate for POLRs selected by lottery, set at 125% of the PTB, should also change when the underlying PTB changes. Subsection (k)(4) already reflects this idea for POLR rates applicable when the POLR is set by lottery because it specifies that the rate shall be 125% of the applicable standard PTB; the commission interprets this language to mean the PTB rate in effect from time to time. When the bid price is established through bidding, comparisons to the PTB after the initial bid evaluation are irrelevant except when the awarded bid is a PTB bid. In that event, the POLR rate would adjust if and when the PTB rate adjusts. No change was made in response to this comment.

ARM noted that subsection (k)(4) places certain caps on POLR rates. ARM stated that it disapproves of artificial influences on retail rates and that capped rates distort the market. ARM stated that POLR rates should be market-based.

The commission agrees with ARM's goal that POLR rates be market-based. However, for the reasons discussed in response to comments on preamble question 1 and this subsection, the commission has elected to retain a cap on POLR rates.

Entergy suggested the deletion of the 125% of PTB rate cap for providers chosen by lottery. It suggested that instead the rate should be a negotiated rate that includes an energy charge, non-bypassable charges and a fixed monthly customer charge for residential customers and a fixed monthly demand charge for small non-residential customers. Entergy also proposed that the POLR rate structure for large non-residential customers when the POLR is selected by lottery consist of an adjustable energy charge, non-bypassable charges, and a fixed monthly demand charge. Entergy suggested elimination of the energy charge cap of 150% of the energy reference price and commented that POLR rates for POLRs selected by lottery should be negotiated.

TXU also supported establishing the POLR rate when the POLR is selected by lottery through negotiation.

The commission disagrees. As previously discussed, the commission intends to avoid negotiation of POLR rates in the future. A negotiation process for setting POLR rates is problematic both from the standpoint of resources required to negotiate the rate and because of issues about public participation in the process. The commission finds that the lottery process incorporated in the proposed rule is necessary to ensure that the POLR process is streamlined and predictable for all affected interests. Moreover, the commission finds that POLR rates for situations where the POLR is selected by lottery must be specified in the rule.

The commission sees some merit in Entergy's suggestion that the lottery POLR rate for large non- residential customers should include a fixed monthly demand charge; however, the record is devoid of any discussion as to the appropriate demand charge. Therefore, the commission is not in a position to include a demand charge in the lottery POLR rate. As discussed above, the lottery POLR rate does include a customer charge and specifically provides for pass through of non- bypassable charges. No change was made in response to this comment.

TXU recommended including language in subsection (k)(4)(A) that specifically authorizes that the rate specified for residential and small non-residential customers when the POLR is selected by lottery (125% of the PTB) be subject to adjustment in the event of changes in non- bypassable charges or gas prices during the term of POLR service.

The commission disagrees. The PTB rate on which the rate for POLRs selected by lottery is based is an all-in rate that includes non-bypassable charges and a fuel factor based on forward NYMEX prices. The rule provides a substantial premium above the PTB rate to account for the additional risk faced by the POLR provider as well as any lag in the PTB fuel factor. The commission does not believe that adjustments to the PTB over and above the percentage specified in the rule are warranted.

Entergy suggested deletion of the good cause adjustment to POLR rates and instead recommended a failed bid process that is consistent with the existing POLR rule, i.e., the commission should investigate why the bidding process was unsuccessful and re-bid the service with modifications, or appoint any eligible REP serving a customer class in a POLR area to become the POLR for that customer class in that area. It also suggested the addition of the option for the commission to negotiate the POLR rates if the bid process failed.

OPC suggested the deletion of the good cause exception and stated that the commission has the right to make adjustments for cases of financial difficulty. OPC commented that this proposed language seems to give the commission the right to raise POLR rates for reasons other than fuel costs without a contested case proceeding.

Reliant supported the inclusion of a financial integrity clause in the proposed rule as it is imperative that the POLR has the ability to seek relief should the POLR price fall below the cost of providing service. However, Reliant commented that additional clarification is needed with regard to the process by which a POLR requests and receives relief. Specifically, for the financial integrity provision to function as intended, Reliant stated that the POLR must be able to receive immediate relief through an interim pricing process. Reliant proposed that a POLR have the right to place emergency prices into effect if the market implied heat rate for a period of five consecutive trading days exceeds the POLR

energy price's implied heat rate for the same period of five consecutive trading days. For the purpose of calculating the implied heat rate, Reliant suggested using the *Platt's Megawatt Daily* 1 x 16 index for the applicable POLR service territory and the *Gas Daily* index for the Houston Ship Channel. Reliant explained that emergency prices would stay in effect until the market implied heat rate for a period of five consecutive trading days dropped below the POLR energy price's implied heat rate for the same period of five consecutive trading days.

Reliant also commented that if customers are voluntarily selecting POLR service, there is a strong indication that the POLR prices are more favorable than other competitive offerings and that the POLR price is below the true cost of providing service. Therefore, Reliant proposed that if the total number of large non-residential customers electing POLR service for reasons other than the default or exit from the market of their previous provider numbers more than five at any time or if the total POLR load from customers electing POLR service for this same reason exceeds ten megawatts at any time, the POLR should have the right to place interim prices into effect pending a financial integrity review.

Reliant claimed that the POLR will still be exposed to price risk from customers dropped to POLR due to REPs who have failed or otherwise left the market. Reliant contended that this would occur when the bilateral energy market used to serve load is behaving differently than the balancing energy market represented by the MCPE. Reliant argued that the financial impact on the POLR could be significant given the size of the large non-residential load. Reliant therefore proposed that the POLR should be allowed to place emergency prices into effect when the ERCOT Forward Assessment as reported in *Platt's Megawatt Daily* is greater than the POLR energy price for the large non-residential customers for a period of five consecutive trading days. The ERCOT Forward Assessment is for Sellers Choice, which currently means it is for delivery into the South Zone. To account for the basis difference between the South Zone and other ERCOT zones, Reliant proposed using the preceding capacity auction from the time of the emergency price relief to adjust the zonal energy basis differences. For each zone with a baseload capacity auction price, Reliant proposed applying the percent difference between the zone that is included in the emergency price relief request and the South Zone to the ERCOT Forward Assessment.

As discussed previously in the context of comments by Entergy and TXU that POLR rates be negotiated if the bid process is unsuccessful, the commission finds that Entergy's suggested negotiation process is practically unworkable. One of the primary purposes of this rule is to streamline the process for POLR selection as well as ensure an opportunity for public participation in that process. No change was made in response to Entergy's comments.

The commission generally disagrees with Reliant that a complex process for interim rate relief should be incorporated into the rule. The commission has made an effort in this rule to better tie POLR rates to market rates for energy than was done in the original POLR rule. Particularly for large non- residential customers, the rule's mechanisms for following the market price of power should address to a substantial degree concerns about rates that are inadequate to recover the POLR's costs. The commission is aware, however, of the potential for price spikes in the market to have a substantial effect on the POLR's net revenues and understands the need for timely action in certain circumstances. The commission has therefore revised the rule to include a provision allowing an interim POLR rate increase upon a showing of good cause and with at least three days notice and opportunity for hearing. To further expedite the process of obtaining interim rate relief, the commission will develop an interim rate relief filing package upon the conclusion of this docket that identifies the types of information that would have to be provided to the commission in support of a request for a change in POLR rates, whether on an interim or permanent basis.

In response to OPC's comments, notice and opportunity to request a hearing would be required before a good cause exception could be granted. No change was made in response to this comment.

TXU commented that the option of rebid should be an alternative if the commission and a POLR cannot reach a mutually agreeable POLR rate adjustment.

The commission does not believe the language recommended by TXU is necessary. First, it contemplates a private negotiation process between the commission and the POLR provider. Such a provision would be inconsistent with the commission's efforts in this rule to include an avenue for public participation in the POLR rate-setting process. Further, the commission may decide to rebid the service based on circumstances unrelated to its ability to negotiate an agreement as to a rate adjustment with the POLR. No change was made in response to this comment.

§25.43(l), Adjustments to energy charge component of residential and small non- residential POLR rates.

Entergy and Reliant recommended that the monthly adjustment to the energy charge in subsection (l) apply to not only POLRs selected by competitive bid but also POLRs selected by lottery. TXU also suggested changing the title of subsection (l) so that the monthly adjustment mechanism applies to all customer classes.

The commission disagrees insofar as the comments relate to residential and small non-residential customers. The PTB rate against which the POLR rate multiplier will be applied is an all-in rate with a fuel factor that can be adjusted based on changes in the price of gas and purchased power. Thus, there is no need for the POLR rate to fluctuate with gas prices. In the case of large non-residential customers, the energy charge adjusts with the market. No change was made in response to this comment.

TXU recommended changes to subsections (l)(1) and (l)(3) and the corresponding TOSA to allow the POLR to select the timing of rate adjustments resulting from the gas price index. These changes would implement TXU's proposal to make the price adjustment discretionary for the POLR, as discussed above under preamble question 4. TXU also suggested revising subsection (l)(1) to institute the rate adjustments based on a customer's billing cycle, rather than the calendar month.

As discussed previously under preamble questions 2 through 4, the commission disagrees with TXU that the monthly adjustment should be at the option of the POLR. This mechanism is intended to provide timely adjustments to the POLR rate. Upward adjustments will ensure that the POLR is able to recover its costs during periods when electricity prices are likely to be high. Conversely, downward adjustments will benefit customers by reducing the rate when electricity prices are lower. If the decision of whether

to change to energy charge is left solely to the POLR's discretion, customers may not fully realize the benefits associated with this mechanism.

With respect to the timing of the rate adjustments, the commission agrees with TXU that the new rates should become effective based on a customer's billing cycle, rather than the calendar month and has accepted the changes recommended by TXU to accomplish this result.

In subsection (l)(2), Reliant proposed using the single-month NYMEX forward natural gas price, as opposed to 12-month NYMEX forward natural gas price, because it will more closely track a POLR's procurement practices. Reliant explained that POLRs are likely to buy on a month-to-month basis and would not buy twelve months forward for each month of the POLR contract term. Entergy generally agreed with Reliant, noting that the 12-month NYMEX forward natural gas prices will not accurately reflect the short-term price volatility that a POLR will encounter.

The commission agrees with Reliant and Entergy that single-month NYMEX forward natural gas prices should be used for calculating the monthly energy charge adjustment. Reference to single-month forward prices will avoid masking volatility in prices incurred by the POLR and will likely be much more reflective of prices that will be incurred during the following month than an index going out 11 months further. The commission has adopted the changes proposed by Reliant. The commission has also revised this section to clarify that the energy charge adjustment calculation should be made one month in advance of the applicable month, and notice of the charge should be filed with the commission at least 15 days prior to the beginning of the applicable month.

Reliant recommended adding a seasonal multiplier to the energy price to reflect seasonal differences in power prices. Reliant asserted that the energy cost for serving a temporary customer over a one or two-month period will generally not be reflected in an annual price, such as the POLR bid price. Based on *Platt's Megawatt Daily's* peak price in ERCOT and the Henry Hub *Natural Gas Daily* prices, Reliant calculated the seasonal multiplier to be 120% of the monthly energy price in the summer (i.e., June through September) and 90% of the monthly energy price in the off-peak periods (i.e., October through May).

The commission disagrees that a seasonal multiplier is required. The proposed rule allows a REP to bid seasonal energy prices and the commission has adopted the proposal to use one-month rather than 12- month forward gas prices in setting POLR rates. The commission does not believe that the additional pricing mechanisms requested by Reliant are necessary. To the contrary, they may unreasonably inflate POLR prices. No change was made in response to this comment.

Entergy recommended changing the time period used to calculate the energy charge from a five-day average to a ten-day average of NYMEX natural gas prices in subsection (l)(2). Entergy noted that this change would be consistent with the PTB fuel factor adjustment methodology in §25.41(g) of this title.

The commission disagrees with Entergy that the monthly rate adjustment should be based on a ten- day average of NYMEX natural gas prices. The time period included in the PTB rule is intended to provide an indication of the stability of NYMEX prices for the PTB rate adjustments authorized for the affiliated REP. However, the affiliated REP is allowed to adjust its prices only twice a year; under the rule as adopted, the energy component of POLR rates will be adjusted at least monthly. The more frequent adjustments for POLR rates and the compressed time period over which those adjustments will be calculated does not warrant use of a ten-day average. No change was made in response to this comment.

Entergy proposed deleting subsection (l)(3), which requires POLRs to refund customers who are overcharged due to miscalculations of the monthly energy charge adjustment. Entergy explained that it may be administratively burdensome to identify all customers who may have been overcharged.

The commission disagrees with Entergy. The commission finds that this requirement gives the POLR strong incentives to accurately set POLR rates based on the rule's adjustment mechanism due to the heavy burden associated with making refunds directly to customers who were overcharged. If the POLR accurately prices its product as authorized under the rule, no additional burden will befall the POLR.

§25.43 (m), Marketing to POLR customers

Consumer Groups suggested eliminating the proposal to allow the POLR to market other services to its customers. They argued that such a system would provide an advantage to the company and a potential disadvantage to the consumer. Consumer Groups asserted that the POLR can take advantage of its access to customer information to market plans to the consumer, which may maximize REP revenue but not necessarily maximize consumer value. Consumer Groups stated that if the commission permits the POLR to market services, it should also lower the maximum rate for POLR service, to offset value derived by the REP through marketing to pre-screened customers delivered directly to them. In addition, they proposed that the POLR be required to follow a commission-approved script to ensure that the POLR does not engage in discriminatory or deceptive marketing practices.

Consumer Groups specifically objected to TXU's new business unit that targets Houston area customers with "a high-priced alternative to POLR service".

Reliant and TXU disagreed with Consumer Groups' position that the POLR should either not be allowed to market its competitive services or should be required to reduce the POLR price to offset the value derived by the POLR's REP marketing. Reliant stated that the rule allows marketing by the POLR but also requires the POLR to make available a list of customers taking POLR service. According to Reliant, these provisions benefit customers and are in the public interest.

TXU also argued that Consumer Groups' recommendation to eliminate the provision allowing the POLR to market its REP services would disadvantage the customer. TXU stated that to the extent a REP understands the kinds of customers that require POLR service and can offer products and services that are attractive to them, customers will benefit by having such competitive options available. According to TXU, a marketing opportunity also provides an incentive for a REP to assume POLR responsibilities and thus may encourage more POLR bids.

The commission generally disagrees with Consumer Groups that the POLR should not be permitted to market alternative plans of its REP to customers. The commission intends that POLR service be transitory in nature and allowing the POLR to market alternative plans to its customers will help move customers out of POLR service more quickly. In addition, the commission finds this option can have business benefits to the POLR that should

help moderate POLR prices. By requiring that a list of POLR customers be made available to other REPs, the commission has allowed the opportunity for other REPs to also target their services to POLR customers. Further, the commission finds that Consumer Groups' concerns should be mitigated by the provisions of the rule that provide that non-paying customers will not be transferred to the POLR selected under the provisions of this rule.

TXU Energy recommended deletion of the provisions of subsection (m) requiring ERCOT to release information concerning POLR customers because such release may violate the customer's rights. ERCOT indicated that it has the ability to release ESI ID information but does not have customer-specific information (such as customer name, billing address, and billing status).

The commission agrees with ERCOT and has revised the rule to require the POLR to provide the specified information to REPs serving that customer class on a quarterly basis.

With respect to TXU's comments, the commission notes that the provision as written ensures that only information that is already authorized for release under §25.472 of this title may be included in a published list of POLR customers. The purpose of distributing this list is to enable REPs to more easily target POLR customers and to facilitate the transition of those customers out of POLR service. The provisions of subsection (m) have been revised to clarify that the POLR need not comply with the provisions of §25.472(a)(2) of this title prior to release of a list of its customers. The commission notes, however, that any REP marketing to POLR customers is obligated, prior to contacting a specific customer, to ensure that the customer is not on the commission's "Do Not Call List" program.

§25.43 (n), Transition of customers to POLR service

AEP commented that customers should be transferred to the new provider of POLR service in January on a read-cycle basis similar to the January 2002 conversion of customers to PTB service and that the rule should explain whether the commission's rule on transfer of customers applies when POLR customers are being transitioned to a new POLR. In addition, AEP stated a defined schedule or estimated timeline for accomplishment of the transition from the current POLR to the new POLR provider must be included in the rule in order to give REPs sufficient time to prepare for customer transfers, including activities such as overall coordination among market participants, customer notification, and arrangements for power supply.

Centerpoint commented that in order for this section to comport with the current ERCOT protocols and the realities of the Texas market, subsection (n)(1) of this section should be revised to state that POLR service for a requesting customer must be initiated according to the ERCOT protocols for switches. ERCOT agreed with this comment.

Consumer Groups commented that a major oversight of the proposed rule is that it fails to provide a bridge for customers who are served by the POLR on December 31, 2002, when the POLR would change. Consumer Groups recommended that the commission not adopt the proposed rule until it establishes a mechanism to transfer existing POLR customers to another provider as of January 1, 2003. Consumer Groups stated that customers sent to POLR because of payment problems should be transferred to the affiliated REP, as the POLR will no longer be authorized to serve these customers. Consumer Groups asserted that without this protection, affiliated REPs may terminate existing customers in November and December with the intent of the customer never being served by the affiliated REP at the PTB because of double deposit requirements and unpaid balances.

Reliant commented that existing POLR customers should have a choice of staying with the POLR, transferring to the new POLR (for customers who were placed on POLR service due to nonpayment), or selecting a new competitive retailer. Reliant proposed that customers who transfer to the new POLR do so over the course of the billing cycle on each customer's meter read date, similar to the process employed at the start of competition.

TXU commented that the proposed rule fails to address how customers will transition to a new provider after the current POLR service provider contracts/terms end at midnight on December 31, 2002 and recommended a new provision allowing POLR customers to remain with their existing "2002" POLR provider. The "2002" POLR would offer customers the option of either receiving service at a new rate under a new Terms of Service or being transferred to the POLR. If service is offered under a new Terms of Service document with changes in material terms, in accordance with Substantive Rule §25.475(d)(1), customers would be entitled to 45-days notice before their Terms of Service could be changed and service under the 2002 POLR rate discontinued. TXU stated if the customer becomes delinquent in paying for electric service, the proposed POLR rule provisions would apply. Residential and small non-residential customers would be terminated to the affiliated REP for non-payment and large non-residential customers would receive disconnection notices for non-payment by the 2002 POLR provider.

Regarding subsection (n)(3), TXU recommended that the POLR be allowed to pass on costs associated with switching non-residential customers by requesting out-of-cycle meter reads. Regarding subsection (n)(6), TXU commented that its recommended language to explicitly cover the transition period between 2002 and 2003 will also cover similar scenarios in later years as the POLRs change every two years.

The commission agrees with all commenters that a more structured POLR transition process is required. However, the commission disagrees with Consumer Groups that all existing POLR customers should be transferred to the affiliated REP. The overwhelming majority of customers on POLR service were terminated to the POLR by the affiliated REP for non-payment. If these customers are forced back to the affiliated REP, they would be placed in the untenable position of paying both a deposit and the past-due amounts owed the affiliated REP in a very short time. Customers who cannot meet these financial obligations face disconnection of service, even though they may not have had outstanding balances with the POLR. In addition, forcing customers from the POLR to the affiliated REP is inconsistent with the notion of customer choice. The commission has determined that customers should no longer be transferred to the POLR for nonpayment after September 23, 2002, the earliest time this provision can be implemented. Given this date, it is likely that customers on POLR service at the end of the year will have a deposit outstanding with the POLR and will have established at least a fairly good payment history with the POLR. Otherwise, these customers would in all likelihood have already been disconnected by the POLR. Therefore, these customers may have some value in the marketplace. In lieu of forcing these customers back to the affiliated REP, the commission concludes that they should be given an opportunity to switch to another provider before the end of the POLR term and, if they fail to do so, they will be served by a competitive affiliate of the outgoing POLR at a rate determined by that provider. In the event that

the outgoing POLR found no value in these customers, it could terminate them to the incoming POLR. The rate would not be a POLR rate subject to regulation by the commission. In lieu of the notice required for a transfer of customers between REPs in §25.474(m) of this title (relating to Selection of Change of Retail Electric Provider), notice of transfer to a competitive affiliate of the POLR at the end of the POLR term shall be provided in accordance with the provisions of this rule. To minimize the deposit burden on a customer transferred to the incoming POLR, either at the customer's initiative or the initiative of the outgoing POLR, the customer would be allowed to pay the deposit that would otherwise be required in within ten days of transfer to the new POLR in two installments over a period of 40 days.

In future years, the customers remaining on POLR service at the end of the POLR term are likely to have more value than the customers remaining on POLR at the end of this year because future POLR customers will not have the same credit issues that most POLR customers have today. As an inducement to REPs to bid for POLR service and to minimize the burden on customers of having to select a new provider at the end of the POLR term, the commission concludes that the transition plan discussed in the previous paragraph should apply at the end of each POLR term. Subsection (o) of the rule regarding termination of POLR status has been revised to include a new paragraph that addresses the transition at the end of the POLR term consistent with this discussion. These provisions are also reflected in the terms of service agreements as a new section entitled, End of POLR Term.

The commission has revised subsection (n)(2) to clarify that a REP that intends to terminate a customer to the POLR for reasons other than non-payment is required to contact the POLR and direct the POLR to initiate a customer switch. The revision is necessary to reflect that fact that the REP serving a customer, and not ERCOT or the POLR, will know when that REP no longer intends to serve that customer.

The commission also notes that the provisions of §25.483(b) of this title have been revised to advance the effective date of provisions regarding the ability of REPs serving large non-residential customers to disconnect to September 24, 2002. This change is necessary to avoid the confusion that would result from having two different dates for affiliated REPs to begin disconnecting non-paying customers.

Entergy recommended including language to more clearly define the POLR's responsibilities during the transition of customers to POLR service. Specifically, in subsection (n)(1), Entergy proposed that POLR service for a requesting customer be initiated when the customer switchover to the POLR is complete, rather than when the customer makes arrangements for POLR service. In subsection (n)(4), Entergy proposed clarifying that the POLR is responsible for serving a customer once the POLR is notified by the applicable independent organization.

The commission agrees with Entergy that subsection (n)(1) should be clarified with regard to the initiation of POLR service for a requesting customer. However, rather than adopting Entergy's suggested language, the commission finds the rule should state that the initiation of POLR service for a requesting customer shall be conducted in accordance with §25.474. This should eliminate ambiguities with respect to timing of the switch process and should ensure consistency among the commission's rules. The commission amends subsection (n)(1) to reflect this decision.

With regard to Entergy's proposed change to subsection (n)(4), the commission does not believe this change is necessary and declines to change the rule.

§25.43(o), Termination of POLR status

TXU recommended deleting language precluding appointment of a REP serving only its own affiliates to replace a POLR who has defaulted on its obligations or whose POLR status has been revoked. TXU claimed that this language did not clarify language in the remainder of the paragraph.

The commission disagrees. The purpose of this language is to ensure that a REP ineligible to serve as POLR under subsection (h)(2)(F) is not designated to replace a POLR whose status has been terminated for reasons other than the expiration of the POLR term. No change was made in response to this comment.

§25.43 (p), Electric cooperative delegation of authority

TXU stated that in order to have a viable competitive market, REPs need to have as many of the rules standardized as possible and recommended language to ensure that REPs serving as POLR in electric cooperatives' service areas are required to follow only one set of rules.

The commission agrees with TXU that standardization is important, but may not be of overriding importance in certain circumstances. The proposed rule provides an opportunity for notice and comment concerning an electric cooperative's proposal to delegate its POLR selection process to the commission. In the context of this notice and comment process, interested persons will have an opportunity to address their concerns about a particular cooperative's delegation proposal. The commission does not believe that it is necessary at this time to adopt the language proposed by TXU. No change was made in response to this comment.

§25.43 (q), Reporting requirements

Entergy strongly opposed the language in this section (q) stating that the information reported to the commission pursuant to this section may not be filed under a claim of confidentiality and the information will be made publicly available. Entergy commented that the commission should not deny REP's their due process right to protect competitively sensitive information and that publication of REP-specific information including the number of customers disconnected, the number of customers transferred to the affiliated REP for non-payment, number of customers from which a deposit was required, and number of customers disconnected and/or terminated that are eligible for the low-income rate reduction program serves no useful purpose to the market in general. Entergy stated that it did not object to providing such information to staff subject to confidentiality considerations but disagreed that REP-specific information should be made publicly available.

TXU commented that information reported should be treated confidentially with only aggregate level data provided publicly. TXU also commented that the reporting requirements should apply to all REPs with disconnect authority and noted that, with this change, certain reporting requirements are redundant. TXU also stated that it failed to understand the value of reporting the number of days a customer received POLR service and recommended deleting this requirement.

AEP strongly agreed with the comments of Entergy and TXU that the specific information required of affiliated REPs and POLRs

be filed on a confidential basis. AEP also supported TXU's proposal that such information be made public only after the data had been aggregated in such a manner that no REP- specific information can be identified. Like Entergy, AEP questioned the relevance and purpose of publication of REP-specific information and stated that the case has not been made or valid reasons given for requiring this information. AEP commented that mere inquisitiveness is not a sufficient reason for requiring affiliated REPs and POLRs to undergo this burdensome process and AEP urged staff to reconsider the need for each of the categories of information requested.

First Choice commented that quarterly reporting is very burdensome for REPs and that annual reporting should be sufficient to accomplish the commission's goals. AEP agreed with First Choice.

The commission has been told by TXU and Entergy that their comments were directed to the proposed disclosure of data required of affiliated REPs under proposed subsection (q)(1). The commission finds that this data can be made public on an aggregated, rather than on an individual affiliated REP basis. The commission finds, however, that reporting data required of POLRs selected under the provisions of the new POLR rule is necessary to facilitate competitive pricing of POLR service. Further, the commission does not believe that such information is competitively sensitive because POLR service is effectively a regulated service. Therefore, disclosure of specific information associated with serving POLR customers in a specific area will not disclose competitively sensitive information. Rather, it will facilitate competitive bidding by POLR providers because certain information concerning the costs of POLR service will be made widely available. In addition, disclosure of the information required to be filed by POLRs under the rule will aid the public in better understanding the risks and rewards of POLR service.

However, the commission understands that language in the proposed rule specifically prohibiting a party from filing reports under claim of confidentiality may be problematic. The commission has therefore revised the rule to clarify that it intends that information provided under subsection (q)(2) and (3) will be made publicly available. In addition, a new paragraph (5) has been added that sets forth the steps that a reporting entity must follow to substantiate a claim of confidentiality and identifies the manner in which the commission may respond to any such claim.

With respect to First Choice's comments, the commission disagrees that quarterly reporting is unduly burdensome. The commission finds that the public interest in understanding the state of POLR service and affiliated REP service to non-paying customers warrants relatively frequent reporting. No change was made in response to this comment.

§25.478. Credit Requirements and Deposits.

§25.478(a), Credit requirements for permanent residential customers

AEP and TXU advocated for the reinstatement of §25.478(a)(3)(A)(iv), which would allow the REP to charge a deposit if a customer has had service disconnected for nonpayment at any time in the past.

The commission finds that this provision is too onerous in that a customer potentially would be punished for payment behavior that occurred in excess of a year in the past. Customers should be rewarded for improved payment behavior, not punished for past indiscretions. The commission declines to reinstate the provision.

HEAT supported proposed new subsection (a)(3)(E)(ii) that will waive deposit requirements for low- income, medically indigent customers. HEAT stated that the waiver will ensure continued access to electric service for home-bound and bedridden customers, who are unable to travel to a cooling center. HEAT stressed that this waiver is not intended for all low-income customers, but limited to medically indigent customers only. HEAT offered an application form for deposit waiver for commission consideration. HEAT further suggested that the waiver be applied to TXU and Assurance Energy's pay- in-advance option.

The commission appreciates HEAT's comments. In response to HEAT's comments concerning the "pay-in-advance" option, the commission does not believe a change to the proposed rule is necessary. Pay-in-advance may be offered by the POLR at its discretion; however, if pay-in- advance is offered, the customer has a choice between making a deposit or enrolling in the pay-in-advance program and the POLR has the obligation to inform the customer of both options. In the case of medically indigent customers, the commission does not believe that an informed customer would be likely to chose the pay- in-advance option when he or she could avoid providing security altogether by selecting the deposit alternative. No change was made in response to this comment.

AEP questioned the need to create a new category of customers, i.e. medically indigent, who would be deemed to have satisfactory credit, and stated that this would place an additional administrative burden on the REP. AEP noted that if a customer cannot meet satisfactory credit requirements because of a medical condition, the customer would be protected from disconnection by §25.483(g). Both First Choice and AEP stated that the definition of physician is too broad within this context and could be subject to manipulation and fraud. If the commission chooses to implement this proposed rule revision, AEP recommended that the term physician be limited to a medical doctor and that the phrase "activities of daily living" be clearly defined. TXU recommended that home care providers who certify a customer as not being able to perform three or more activities of daily living should be registered or state certified. In addition, AEP recommended that that a customer be certified as medically indigent on an annual basis. In the alternative, AEP proposed that the Low-Income Discount Administrator be the centralized administrator of the certification process, with the financial support of the System Benefit Fund. Entergy, in addition to having customers certify their medically indigent status annually, recommended that the customer provide the information in writing prior to initiating a switch request. Entergy supported AEP's comment to limit the term physician to a medical doctor.

Consumer Groups supported the HEAT proposal regarding deposit waivers for the medically indigent. However, Consumer Groups recommended that the proposed income level be raised from 150% to 200% of the federal poverty income guidelines, so as to include participants of the Children's Health Insurance Program (CHIP). In addition, Consumer Groups recommended that the income certification be performed by any government assistance provider, rather than energy assistance providers only. Further, Consumer Groups responded that the form developed by HEAT satisfactorily addresses the concerns regarding the burden of the certification process and the definition of medically indigent expressed by TXU, Entergy and AEP.

The commission finds that waiving deposits for the medically indigent is consistent with its obligation to protect the health and safety of electric consumers. The commission also finds that the income eligibility for deposit waiver included in the proposed rule is reasonable and declines to accept Consumer Groups' recommendation. The commission agrees that both the definition of "activities of daily living" and the identities of persons who may make an assessment of a customer's ability to perform those activities should be clarified. The commission adopts the definition of activities of daily living in 22 TAC §218.2. This rule defines activities of daily living to include activities such as bathing, dressing, grooming, routine hair and skin care, and meal preparation. The person who may certify a customer's ability to perform activities of daily living should be a licensed professional such as a medical doctor, nurse, social worker, or therapist or an employee of an agency certified to provide home health services pursuant to the Social Security Act, Title XVIII, 42 U.S.C. §1395 *et seq*. The commission emphasizes that certified home health services providers may not perform a certification as to whether a person is ill or disabled for the purposes of §25.483(h). The commission finds that §25.483(h) ensures full customer access to electricity regardless of the customer's ability to pay for consumed energy, and the certification of such a condition should therefore be held to a higher standard. Customers who meet the deposit waiver requirements should be certified annually. The commission has revised the rule accordingly. In reference to Consumer Groups' request that REPs should be required to ascertain whether a customer is eligible for the deposit waiver, the commission finds that this is overly burdensome. Instead, the commission finds that this information should be included in the "Your Rights as a Customer" brochure. In reference to AEP's comments suggesting that the Low-Income Discount Administrator be responsible for the certification process using monies from the System Benefit Fund, the commission disagrees. PURA does not authorize expenditure of System Benefit monies for purposes of certifying individuals as medically indigent.

In response to Entergy's suggestion that a customer's status as medically indigent be disclosed prior to the initiation of a switch request, the commission disagrees. The commission can conceive of no legitimate purpose for such a requirement and reminds Entergy that discrimination against customers on the basis of income is specifically prohibited by PURA §39.101(c)

§25.478(d), Additional deposits by existing customers

In reference to subsection (d) TXU recommended language that would allow the affiliated REP and POLR to charge an additional deposit if a disconnection notice has been issued within the previous 12 months, rather than limiting the section to termination notices only.

The affiliated REP and POLR will not be issuing termination notices, but will issue disconnection notices. The commission has clarified the rule.

TXU also commented that a REP should be allowed to request an additional deposit at any time, not only during the first 12 months of service.

A customer's payment behavior may change over time. While the commission finds that customers should not be unduly punished for payment behavior in excess of 12 months in the past, the commission also believes that REPs should be able to respond to adverse changes in payment behavior. The commission finds that a REP should be able to charge an additional deposit if the customer has received a termination or disconnection notice within the last 12 months. The commission has revised the rule accordingly.

In further reference to subsection (d), TXU recommended language that would clarify that the time period for paying a deposit is based on calendar days.

The commission finds that this comment is outside the scope of this rulemaking. No change was made in response to this comment.

In addition, TXU recommended that the verbiage in subsection (d)(4) be changed from "usage payment" to "bill" to clarify that the customer may be receiving a bill that may include a previous month's amount and therefore would not be for the current usage only.

The commission finds that the current bill may include past due balances and has changed the term "usage payment" to "bill."

§25.478(f), Amount of deposit

HEAT supported proposed revisions subsection (f) that will allow a qualifying low-income customer to make a deposit in two installments for it will alleviate some of the financial strain on low-income customers and help maintain electric service. Consumer Groups advocated a more lenient approach whereby a low-income customer may pay a deposit over a three to six month period if the customer expresses an inability to meet the two-month payment period. In addition, Consumer Groups recommended that the REP should have the obligation to ascertain whether the customer is eligible for the special deposit provision, rather than requiring the customer to provide information to the REP when applying for POLR service.

The commission finds that allowing low-income customers to pay deposits in installments is consistent with its obligation to protect the health and safety of electric consumers. The period over which the installments may be made should not exceed the ratio of the amount of the maximum allowable deposit to the debt the customers may incur during that time. As the deposit may not exceed one-sixth of the customer's annual energy bill or the estimated bill for the two subsequent months, the commission finds that allowing a customer to make installment payments over two billing cycles is sufficient and appropriate. In reference to Consumer Groups request that REPs should be required to ascertain whether a customer is eligible for the low-income deposit provision, the commission finds that such a requirement would be overly burdensome. The commission declines to make any revisions to this section.

In reference to §25.478(f)(4)(B), TXU again requested that the number of days be clarified as referencing 40 calendar days. TXU also recommended that verbiage referencing "no sooner" be replaced with "no less" in order to resolve the timing notification contradiction in the language in this proposed section. In addition, TXU recommended the insertion of the word "deposit" before "installment."

The commission finds that the TXU's comment concerning the manner in which days will be counted is outside the scope of this rulemaking. The commission also finds that replacing "no sooner" with "no less" will resolve the timing notification contradiction, and that it is appropriate to insert the word "deposit" before "installment." The commission has revised the rule accordingly.

§25.478(k), Refunding deposits and voiding letters of guarantee

TXU recommended deletion of subsection (k)(3) in order to make the guarantee process for assuring credit worthiness of customers more efficient.

TXU failed to explain the rationale behind its proposed change and the commission can find none. No change was made in response to this comment.

§25.480. Bill Payment and Adjustments.

TXU recommended that subsection (j)(7) refer to both the affiliated REP and the POLR, rather than only the POLR, to clarify that both entities have the right to disconnect.

The commission finds TXU's suggestion to be consistent with the intent of the rule to allow affiliated REPs the right to disconnect and has revised the section accordingly.

TXU recommended that subsection (k)(1)(C) be revised to eliminate the option that would allow the REP to transfer the deposit to the customer's new REP. TXU stated that the within the current market structure, REPs do not necessarily communicate with each other, and the REP is not necessarily aware of who the customer has chosen as a provider.

The commission finds that this comment is outside the intended scope of this rulemaking and therefore declines to make the change requested by TXU.

§25.482. Termination of Contract.

§25.482(a), Applicability

TXU commented that proposed new subsection (a) concerning applicability be deleted. TXU was concerned that the language as proposed would not allow a REP to end its relationship with a customer if at the end of a term a new agreement for service could not be reached with a customer. TXU commented that the remaining redline changes it had proposed were intended to be consistent with the concept that "Termination of Contract" can be exercised by a REP, regardless of whether that REP has disconnection authority.

The commission agrees that the language in the rule as proposed was overly broad because it would have prohibited an affiliated REP, which will have disconnect authority over its non-paying customers as of the effective date of the rule, from terminating a customer to POLR for reasons other than non- payment. However, rather than deleting the provision as TXU recommended, the commission modified it to address TXU's concerns.

§25.482(b), Termination policy

Reliant commented that an addition be made to subsection (b) to require a non-paying customer that is dropped from a competitive REP to the affiliated REP to pay any outstanding balance owed to the affiliated REP to continue receiving service. This would place the customer in a similar position as under regulation, when the rules did not require reconnection of a customer until the customer paid or made arrangements to pay its previous unpaid bill amounts.

The commission disagrees that the change requested by Reliant is needed. Section 25.483 of this title provides that a customer may be disconnected for failure to pay an amount owed to a provider. Therefore, upon ten days notice, the affiliated REP can disconnect any non- paying customer transferred to the affiliated REP by a competitive REP if the customer has an unpaid balance with the affiliated REP. No change was made in response to this comment.

§25.482(c), Termination prohibited

TXU recommended deleting subsection (c)(4) to remove possible conflicts with customers not following agreed payment arrangements as allowed in §25.480 (relating to Bill Payment and Adjustments).

The commission disagrees. The commission finds the change recommended by TXU is outside the scope of this rulemaking. Further, the commission does not believe that this provision prohibits disconnection of a customer who fails to comply with the terms of a deferred payment plan because averaging of payments over a period of time does not constitute "underbilling" for any particular period. No change was made in response to this comment.

TXU also recommended deletion of subsection (c)(7) in order to allow REPs the ability to offer estimated billing to customers. TXU commented that leaving subsection (c)(7) in may inhibit the growth of alternative billing options that may not rely on actual meter reads in rendering a customer's bill for service.

The commission disagrees. This comment is outside the scope of this rulemaking. Further, the commission notes that small and large non-residential customers with usage of 50 kW or more, the customers that would most likely be targeted under the types of arrangements mentioned by TXU, have the ability to waive the provisions of the commission's customer protection rules under §25.471(a) of this title. No change was made in response to this comment.

TXU also recommended that subsection (c)(7) be revised to delete the option of transferring any remaining deposit amount to the customer's REP, at the option of the customer.

The commission disagrees. This provision may provide a service to the customer and TXU has provided no justification for its deletion. Further, TXU's comment falls outside the scope of this rulemaking. No change was made in response to TXU's comment.

§25.482(i), Contents of termination notice

TXU recommended that subsection (i)(6) be revised to clarify that customers terminated for reasons other than non-payment will still be transferred to the POLR.

The commission agrees and has revised the rule accordingly.

§25.482(j), Notification of the registration agent

TXU recommended language to clarify that only non-paying customers will be switched to the affiliated REP and that customers terminated for other reasons will be switched to the POLR.

The commission agrees and has changed the rule as recommended by TXU.

§25.483. Disconnection of Service.

§25.483(a), Disconnection and reconnection policy

Centerpoint commented that TDUs have designed work processes to ensure that field work such as connections, disconnections, meter readings, etc. is done in the most timely and cost-efficient manner. For example, Centerpoint schedules work orders like disconnections for non- payment in particular geographic areas on particular days of the month to minimize fuel consumption, use manpower efficiently, and expedite the reconnection process. In order to complete disconnection orders in the most efficient manner possible, Centerpoint stated that it will be important for REPs to closely coordinate with

the TDUs in scheduling disconnects. Centerpoint suggested revising subsection (a) to require REPs to coordinate the scheduling of disconnections with TDUs in a manner consistent with the TDUs' field work processes.

The commission agrees that some level of coordination betweens REPs and the TDUs will be required to efficiently manage customer disconnections for non-payment and timely reconnections. The commission finds that appropriate coordination requirements should be developed before the fall of 2004 when non-paying residential customers of competitive REPs will no longer be transferred to the affiliated REP. However, the commission finds that it is premature to address such issues in the rule at this time. No change was made in response to this comment.

First Choice requested that subsection (a) be revised to include provisions for waiver of the requirement that an entity seeking a physical disconnection or reconnection use the appropriate Texas Standard Electronic Transaction (SET). First Choice claimed that it would not be Texas SET compliant for another two to three years. Thus, it would need a waiver from this requirement in order to fulfill its POLR responsibilities in the near term.

To address the issue raised by First Choice, the commission has revised language requiring use of the appropriate Texas Standard Electronic Transaction (SET) to language requiring that transactions be conducted in accordance with standards imposed by ERCOT. This change should meet First Choice's requirements while still ensuring that transactions be conducted in a manner approved by ERCOT.

§25.483(b), Disconnection authority

Consumer Groups assailed the proposal to authorize all REPs to disconnect by 2005 unless adverse findings are made by the commission prior to that time. Consumer Groups claimed that there is no reason to make a decision now about such an important issue.

Consumer Groups also claimed that there is no rational or logical connection between the changes with respect to the POLR contained in this proposed rule and the future grant of a right to disconnect that will have a significant impact on residential customers and lower income customers in particular. There are likely to be significant changes and developments in the move to retail competition that will be unforeseen by the commission at this time. As the market develops, the debate about the ability of REPs to disconnect will take place in a different atmosphere than if competition is slow to develop or does not develop at all.

Consumer Groups also argued that the criteria proposed for not allowing REPs to disconnect service are entirely improper and do not reflect the commission's statutory obligations to protect the public health and safety. According to Consumer Groups, the commission should not focus on whether the market will be injured, but on the public interest including the potential injury to residential customers and the relationship of that injury to the development of a competitive market.

TXU commented that there should be a firm start date for all REPs to have disconnection authority and therefore recommended deletion of the provisions of subsection (b), which authorizes the commission to delay such authority under certain circumstances.

HEAT also supported the proposed transition to allow all REPs to disconnect by 2005. HEAT argued that this structure forces customers and electric providers to take responsibility for electric service and encourages REPs and customers to work together on payment arrangements. According to HEAT, electric providers will not be able to transfer the burden of non-paying customers to another provider, and customers will be forced to make timely payments or risk disconnection.

The commission disagrees with both Consumer Groups and TXU. Disconnection has serious consequences for both customers and REPs. The commission finds that it is appropriate to reevaluate this issue in 2004 to ensure that the approach contemplated in the rule is in the public interest. For example, if billing errors recently experienced in the ERCOT market have not been corrected by 2004, it might be prudent for the commission to delay the effective date of provisions allowing all REPs to disconnect because of the adverse consequences such a rule could have for residential customers. Nevertheless, a specific date for moving forward should be established in order to communicate the commission's policy goals and ensure that market participants continue making reasonable progress toward developing systems and processes necessary to implement this change at the specified date. As discussed under preamble question 5, the commission will make an affirmative decision whether to implement the disconnection policy on October 1, 2004, or whether to delay implementation of such a policy until a later date. The commission has revised §25.483(b)(2) consistent with the discussion under preamble question 5.

§25.483(c), Disconnection with notice

TXU commented that the word "termination" had been used where "disconnection" was in fact the appropriate term.

The commission agrees and has corrected the rule.

TXU also recommended that a new subsection (c)(6) be added to allow disconnection of a customer when that customer returns for service and has failed to make appropriate payment to clear previous balances owed to the REP from whom the customer is seeking service.

The commission does not believe this change is necessary. Subsection (c)(1) already allows a REP to issue a disconnect notice for failure to pay a bill owed. The commission finds this provision allows the affiliated REP the ability to disconnect a non-paying customer transferred to it by a competitive REP if the customer fails to pay amounts owed the affiliated REP after notice requiring payment of such past due amounts is issued.

§25.483(d), Disconnection without prior notice

TIEC commented that, as discussed in its response to preamble question 5, REPs should not be allowed to request disconnection in the cases listed in this subsection, and particularly in the cases where no notice is required. TIEC commented that the cases listed in the rule involve intimate understandings of the customer's electric facilities and installations which REPs do not have. Because the TDU tariffs currently contain similar authorizations for the TDU to disconnect, TIEC claimed that there is no need for REPs to be able to request disconnection for these events. TIEC suggested that REPs be permitted to request disconnection only for nonpayment of undisputed charges. According to TIEC, such a limited right to disconnect would satisfy the commission's goal of keeping nonpaying customers from being transferred to the POLR while preserving the safety and protection of facilities in Texas.

The commission has not made the change suggested by TIEC. First, the commission finds this change is outside the scope of this rulemaking and is therefore not appropriate for consideration in this project. Second, while the commission agrees that the TDU has the ability to disconnect a customer for non-payment if any of the conditions specified in subsection (d) exist, the REP may also have an interest in issuing a notice of disconnection if any of the circumstances identified in subsection (d), such as theft of service from the REP, exist.

§25.483(e), Disconnection prohibited

TXU commented that subsection (e)(2) should be amended by striking language suggesting that the commission regulates electric service because prices for electric service are not regulated by the commission except for the prices charged by POLR providers and under the affiliated REP's PTB tariffs. TXU also recommended that the reference to optional services be clarified as services that are not related to the provision of electric service.

The commission disagrees. Generally, retail electric service is subject to, and under the jurisdiction of, the commission. Therefore, the language that TXU seeks to have deleted is an accurate reflection of the commission's authority. No change was made in response to this comment.

TXU proposed deleting subsection (e)(4) to remove possible conflicts with customers not following agreed payment arrangements as allowed in §25.480.

This comment is outside the scope of this rulemaking; therefore, no change was made in response to this comment.

TXU recommended deleting subsection (e)(7) in order to allow REPs the ability to offer estimated billing. TXU argued that retaining this paragraph may inhibit the growth of alternative billing options that may not rely on actual meter reads in rendering a customer's bill for service.

As discussed in response to comments to §25.482(c), this comment is outside the scope of this rulemaking; therefore, no change was made in response to this comment.

§25.483(h), Disconnection of ill and disabled

TXU recommended deleting the generic reference to "public health official" to ensure that appropriate qualification exists for persons acting under the provisions of paragraph (1)(A).

The commission finds that the issue raised by TXU is outside the scope of this rulemaking. No change was made in response to TXU's comment.

§25.483(l), Disconnection notices

TXU recommended a new paragraph (3) that would allow a notice of disconnection to be issued concurrently with a customer's bill. TXU claimed that this provision was needed to provide efficiency in communication with customers.

The commission disagrees. First, this change is outside the scope of this project and therefore is not ripe for consideration. Second, the commission does not believe it is reasonable to issue a disconnect notice at the time a bill is issued. The commission finds that all customers should be afforded a reasonable opportunity to pay their bill before disconnection is threatened. No change was made in response to this comment.

§25.483(m), Contents of disconnection notice

TXU recommended that paragraph (7) be revised by striking language giving the customer the option of having the remaining portion of its deposit remitted to its new REP.

The commission disagrees. This change is outside the scope of this rulemaking and is therefore not ripe for consideration at this time. Further, the commission finds that this provision provides customers some flexibility in addressing new deposit requirements and therefore may be beneficial to the customer. No change was made in response to this comment.

This commission has also made clarifying changes to §25.482 and §25.483 of this title to ensure that the rules accurately reflect the POLR structure created under this rulemaking. Specifically, these changes clarify that both the POLR and, beginning September 24, 2002, the affiliated REP, may disconnect a customer for non-payment. Residential and small non-residential customers who do not pay their competitive REP shall be terminated to the affiliated REP until October 1, 2004, at which point any REP will be able to disconnect a customer for non-payment.

All comments, including any not specifically referenced herein, were fully considered by the commission.

SUBCHAPTER B. CUSTOMER SERVICE AND PROTECTION

16 TAC §25.43

This repeal is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated (Vernon's 1998 and Supplement 2002) (PURA) §14.002, which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §39.101(b)(4) which provides that a customer is entitled to be served by a provider of last resort; §39.101(e) which authorizes the commission to enact rules to carry out the provisions of §39.101(a)-(d), including rules for minimum service standards for a retail electric provider relating to customer deposits and the extension of credit and termination of service; and §39.106 which directs the commission to designate providers of last resort in areas of the state where customer choice is in effect.

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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Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936-7306

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16 TAC §25.43

This new section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated (Vernon's 1998 and Supplement 2002) (PURA) §14.002, which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §39.101(b)(4) which provides that a customer

is entitled to be served by a provider of last resort; §39.101(e) which authorizes the commission to enact rules to carry out the provisions of §39.101(a)-(d), including rules for minimum service standards for a retail electric provider relating to customer deposits and the extension of credit and termination of service; and §39.106 which directs the commission to designate providers of last resort in areas of the state where customer choice is in effect.

§25.43. Provider of Last Resort (POLR).

(a) Purpose. The purpose of this section is to ensure that, as mandated by the Public Utility Regulatory Act (PURA) §39.106:

(1) A basic, standard retail service package will be offered by a POLR at a fixed, non-discountable rate to any requesting customer in all of the Texas transmission and distribution utilities' (TDU's) service areas that are open to competition; and

(2) All customers will be assured continuity of service if a retail electric provider (REP) terminates service in accordance with the termination provisions of Subchapter R of this chapter (relating to Customer Protection Rules for Retail Electric Service).

(b) Application.

(1) This section applies to REPs that may be designated as POLRs in TDU service areas in Texas. This section does not apply when an electric cooperative or a municipally owned utility (MOU) exercises its right to designate a POLR within its certificated service area. However, this section is applicable when an electric cooperative delegates its authority to the commission in accordance with subsection (p) of this section to select a POLR within the electric cooperative's service area.

(2) POLR service for a residential or small non-residential customer of a competitive REP whose electric service is terminated for non-payment under the provisions of §25.482 of this title (relating to Termination of Contract) shall be provided by the affiliated REP for that POLR area. In the case of the territory encompassed by Sharyland Utilities, LP, the affiliated REP shall be deemed to be First Choice Power, Inc., the entity providing default service in that area. The provisions of this section do not apply to any affiliated REP serving non-paying residential and small non-residential customers of competitive REPs except as otherwise specifically stated herein.

(3) As of September 24, 2002, a non-paying residential or small non- residential customer of an affiliated REP shall not be transferred to the POLR selected under this section.

(4) A large non-residential customer whose service is terminated for non- payment shall not be transferred to the POLR after September 24, 2002. Notwithstanding the foregoing, a non-paying large non-residential customer may be transferred to the POLR if that customer is receiving service under a contract entered into prior to September 24, 2002, the original term of which has not expired at the time transfer to POLR is requested, and if the contract makes no provision for waiver of the customer's right to be transferred to the POLR for non-payment.

(c) Definitions. The following words and terms when used in this section shall have the following meaning, unless the context indicates otherwise:

(1) Basic firm service--Electric service that is not subject to interruption for economic reasons and that does not include value added options offered in the competitive market. Basic firm service excludes, among other competitively offered options, emergency or back-up service, and stand-by service. For purposes of this definition, the phrase "interruption for economic reasons" does not mean disconnection for non-payment.

(2) Billing cycle--A period bounded by a start date and stop date that REPs and TDUs use to determine when a customer used a service.

(3) Billing month--Generally a calendar accounting period (approximately 30 days) for recording revenue, which may or may not coincide with the period a customer's consumption is recorded through meter readings.

(4) Large non-residential customer--A non-residential customer with a peak demand above one megawatt (MW).

(5) Load ratio--The amount of load for a particular customer class served by a REP on a nationwide basis in comparison to the amount of load for that class in areas in Texas where customer choice is in effect. This determination is to be made by dividing the REP's nationwide total megawatt-hour sales to the customer class during the prior year by the total megawatt-hour sales to such class in areas in Texas where customer choice was in effect during any portion of the prior year.

(6) Non-discountable rate--A rate that does not allow for any deviation from the price offered to all customers within a class, except as provided in §25.454 of this title (relating to Rate Reduction Program).

(7) POLR area--The service area of a TDU in an area where customer choice is in effect, except that the POLR area for Central Power and Light Company shall be deemed to include the area served by Sharyland Utilities, L.P.

(8) Provider of last resort (POLR)--A REP certified in Texas that has been designated by the commission to provide a basic, standard retail service package in accordance with this section to customers that are not being served by a REP for reasons other than non-payment.

(9) Residential customer--A residential customer as defined in §25.41 of this title (relating to the Price to Beat).

(10) Small non-residential customer--A small commercial customer as defined in §25.41 of this title.

(d) POLR service.

(1) For the purpose of POLR service, there will be three classes of customers: residential, small non- residential, and large non-residential.

(2) The POLR may be designated to serve any or all of the three customer classes in a POLR area. Within the customer class it is designated to serve, the POLR shall provide service to the following customers:

(A) Any customer requesting POLR service; and

(B) Any customer not receiving service from its selected REP for any reason other than non-payment who is automatically assigned to the POLR.

(3) The POLR shall offer a basic, standard retail service package, which will be limited to:

(A) Basic firm service;

(B) Call center facilities for customer inquiries;

(C) Standard retail billing (which may be provided either by the POLR or another entity);

(D) Benefits for low-income customers as provided for under PURA §39.903 relating to the System Benefit Fund; and

(E) Standard metering, consistent with PURA §39.107(a) and (b) (which may be provided either by the POLR or another entity).

(4) The POLR shall, in accordance with §25.108 of this title (relating to Financial Standards for Retail Electric Providers Regarding the Billing and Collection of Transition Charges), provide billing and collection duties for REPs who have defaulted on payments to the servicer of transition bonds or to TDUs.

(e) Standards of service.

(1) A REP who has been designated by the commission to serve as POLR for a class in a given area shall serve any customer in that class as described in subsection (d)(2) of this section.

(2) A POLR shall abide by the applicable customer protection rules as provided for under Subchapter R of this chapter. In addition, the POLR shall be held to the following general standards:

(A) The POLR shall inform any customer transferred to it that it is now providing service to the customer and disclose all charges for which the customer will be responsible;

(B) The POLR shall provide a commission-maintained list of certified REPs to any customer who inquires about selecting a provider;

(C) The POLR may not require that a customer sign up for a minimum term as a condition of service, except that if the POLR offers a level or average payment plan in accordance with Subchapter R of this chapter, a residential or small non-residential customer who elects to receive service under such plan may be required to sign up for a minimum term of no more than six months.

(f) Customer information.

(1) Forms. The forms in subparagraph (A)-(C) of this paragraph are effective for all POLR service rendered after December 31, 2002. These forms may only be changed through the rulemaking process and are available in the commission's Central Records Division and on the commission's website at www.puc.state.tx.us.

(A) Terms of Service Agreement, Provider of Last Resort (POLR) Residential Service:
Figure: 16 TAC §25.43(f)(1)(A)

(B) Terms of Service Agreement, Provider of Last Resort (POLR) Small Non- Residential Service:
Figure: 16 TAC §25.43(f)(1)(B)

(C) Terms of Service Agreement, Provider of Last Resort (POLR) Large Non- Residential Service:
Figure: 16 TAC §25.43(f)(1)(C)

(2) Provision of information to customers. The POLR shall provide each new customer the terms of service agreement applicable to the specific customer. Such terms of service agreements shall be updated as required under §25.475(d) of this title (relating to Information Disclosures to Residential and Small Commercial Customers.)

(g) General description of POLR selection process.

(1) POLR selected for areas where customer choice is in effect. The commission shall designate certified REPs to serve as POLRs in areas of the State in which customer choice is in effect, except that the commission shall not designate the POLR in the service areas of MOUs or electric cooperatives unless an electric cooperative has delegated its POLR designation authority to the commission in accordance with subsection (p) of this section.

(2) Process. The commission will solicit bids for POLR service for two-year terms as specified in paragraph (3) of this subsection. Bids shall be solicited from REPs that are eligible to provide POLR service under the provisions of subsection (h) of this section. The process for evaluating such bids is specified in subsection (i) of this section and the basis upon which bids shall be compared is specified in subsection (k)(3) of this section. If no eligible bids for a POLR customer class in a POLR area are submitted, the POLR shall be selected by lottery under the procedures set forth in subsection (j) of this section and the POLR rate established under the provisions of subsection (k) of this section.

(3) Term. POLRs shall serve two-year terms beginning in January of each odd- numbered year. The initial term for POLR service in areas of the state where retail choice is not in effect as of the effective date of the rule shall be set at the time POLRs are initially selected in such areas.

(h) REP eligibility to serve as POLR. In each even-numbered year, the commission shall determine the eligibility of certified REPs to serve as POLR for the terms scheduled to commence in January of the next year.

(1) Information requirements. The commission may require a REP and its affiliates to provide information to the commission necessary to establish that REP's eligibility to serve as POLR. Specific information received from a REP that is responsive to such a request by the commission shall be treated confidentially if it is submitted to the commission in accordance with the provisions of §22.71(d) of this title (relating to Filing of Pleadings, Documents and Other Materials). However, the commission's determination regarding eligibility of a REP to serve as POLR under the provisions of this section shall not be considered confidential information.

(2) Criteria. During the term of the price to beat for a particular customer class, an affiliated REP is ineligible to serve as POLR for that class in the POLR area defined by the boundaries of its affiliated TDU, unless the affiliated REP submits a bid to provide POLR service in the POLR area defined by the boundaries of its affiliated TDU at the price to beat. A REP is also ineligible to provide POLR service to a particular customer class in a POLR area if:

(A) A proceeding to revoke or suspend the REP's certificate is pending at the commission or that REP's certificate has been suspended or revoked by the commission;

(B) The REP's load ratio for the particular class is less than 1.0%;

(C) The commission does not reasonably expect the REP to be able to meet the criteria set forth in subparagraph (B) of this paragraph during the entirety of the POLR term;

(D) On the expected date of bid submittal, the REP or its predecessor, including a REP that has assumed the responsibilities of another REP, will not have served customers in Texas for at least 18 months;

(E) The REP does not serve the applicable customer class in Texas;

(F) The REP's customers are limited to its own affiliates; or

(G) The REP is certified only to provide POLR service for an affiliate.

(3) Publication of notice of eligibility. For each POLR term scheduled to commence in January of the next year, except for the year 2003, the commission shall publish the names of all of the REPs eligible to provide POLR service for each customer class in each POLR area. The notice shall be published in the *Texas Register* prior to or contemporaneously with publication of the invitation for bids. For 2003, only affiliated REPs shall be considered eligible REPs.

(i) Bid process. Initially, a competitive bid process will be used to select the POLR for each customer class in each designated POLR area.

(1) Invitation to bid. Before the expiration of a term of POLR service in a POLR area, the commission shall issue an invitation for bids for POLR service for each customer class in the POLR area. Notice of the bid invitation, any submission requirements, the submission deadline, and the project number assigned to the bid process for that POLR area shall be published in the *Texas Register*. A separate project number shall be designated for each POLR area.

(2) Bidder qualifications. A REP that has met the eligibility requirements of subsection (h) of this section shall be considered a qualified bidder.

(3) Submission of bids.

(A) Separate bids required. A bidder may submit a bid to serve any of the three customer classes in a POLR area. Bids for each customer class in a POLR area shall be submitted separately. A REP may submit a separate bid for POLR service for each customer class and POLR area for which it seeks to provide service.

(B) Filing and content. Each bid shall be filed in the appropriate project number on or before the date and time specified in the bid invitation; identify only one POLR area; specify only one customer class; include a bid in conformance with the rate structure for the class; and not contain any information that will be considered, after the closing date for submission of all bids, to be confidential or proprietary by the filing party.

(C) Designation of preference. A REP whose load ratio for a particular class is less than 5.0% that submits more than one bid for POLR service for that class may include in its bid a statement indicating its order of preference in POLR areas.

(4) Filing under seal. Prior to the closing date specified in the bid invitation, bids must be filed under seal for the limited purpose of ensuring the confidentiality of the bids submitted.

(5) Bid opening and public comment.

(A) All bids filed under seal shall be opened and filed publicly by commission staff in the applicable project number by 5:00 p.m. on the third business day following the submission date identified in the bid invitation.

(B) If the bid opening is cancelled, the bids filed under seal will be returned unopened to the bidders.

(C) Interested persons may submit comments on bids in the applicable project up to the 10th calendar day after the bid submission deadline specified in the bid invitation. Interested persons may submit reply comments on bids up to the 15th calendar day after the submission deadline specified in the invitation. All comments and reply comments shall be filed in the applicable project.

(6) Evaluation of bids.

(A) Bids that have been rejected pursuant to subparagraph (B) of this paragraph shall not be evaluated. The bids received for each customer class in each POLR area shall be evaluated on the basis of price in accordance with the provisions of subsection (k)(3) of this section. If two or more bidders bid the same lowest price, the lowest bidder shall be determined by lottery in accordance with the provisions of subsection (j) of this section, with the pool of lottery candidates limited to the bidders submitting tie bids. If, with respect to a particular class of customers, a bidder described in paragraph (3)(C) of this subsection submits the lowest bid for that class of customers in two or more POLR areas, staff shall determine that the bidder submitted the lowest price in the POLR area according to the preference statement submitted by the bidder with its bids. If the bidder did not state a preference or the preferences stated are irreconcilable, the bidder shall be deemed to prefer to serve in the POLR area to which the lowest project number has been assigned.

(B) The commission shall reject a bid for any of the following reasons:

(i) The bidder is not qualified.

(ii) The bid was received by the commission after the date and time specified in the bid invitation.

(iii) The bid did not conform to a requirement described in the bid invitation.

(iv) The rate structure submitted in the bid deviated from the rate structure applicable to the customer class or the bid price exceeds the maximum level specified in subsection (k)(3) of this section.

(v) The bidder asserts to the commission that the bid contains information considered, after the closing date for submission of all bids, to be confidential or proprietary.

(vi) In the event a bidder described in paragraph (3)(C) of this subsection submits two or more bids for the same customer class in different POLR areas then all bids from that bidder for that customer class, other than the preferred bid, shall be rejected.

(7) Report to the commission. Staff shall report on the bid process for each POLR area to the commission. The report shall identify the POLR customer classes and POLR areas for which no bids were submitted. The report shall also identify all rejected bids and state the reason why each bid was rejected, describe conforming bids, and summarize the comments and reply comments received. For each customer class in each POLR area, the report shall include a recommendation by staff that POLR service be awarded to the bidder that offered the lowest price in a conforming bid or that the POLR for a given customer class and POLR area should be selected by lottery because no eligible bids were received.

(8) Commission action. For a particular POLR class and POLR area, the commission shall either award a bid consistent with the provisions of this section or reject all bids and direct that the POLR for that customer class and POLR area be determined by lottery.

(j) Lottery. The provisions of this subsection shall govern the manner in which a lottery to select a POLR for a given POLR area and customer class is conducted.

(1) Lottery candidacy. The commission shall designate a pool of lottery candidates for each customer class in each POLR service area. Every REP eligible to serve as a POLR is a candidate for the lottery unless:

(A) By virtue of having successfully bid for POLR service, the REP will be serving as POLR for that customer class in two or more service areas in January of the next year; or

(B) The REP's load ratio for the customer class is less than 5.0% and the REP will be serving as POLR for the customer class in another area during the upcoming POLR term.

(2) Elimination from lottery pool. A REP otherwise eligible for the lottery pool that will be serving a particular customer class as POLR during the upcoming term in the POLR area defined by the boundaries of CenterPoint Energy Houston Electric shall be eliminated from the lottery pool for that class for the POLR area defined by the boundaries of the Oncor Electric Delivery Company. Similarly, a REP otherwise eligible for the lottery pool that will be serving a particular customer class as POLR during the upcoming term in the POLR area defined by the boundaries of the Oncor Electric Delivery Company shall be eliminated from the lottery pool for that class for the POLR area defined by the boundaries of CenterPoint Energy Houston Electric.

(3) Drawing. At a time and date noticed by the commission in the *Texas Register*, a separate drawing will be held for each customer class in each POLR area for which a POLR was not selected by bid. The drawings shall be held in the order of the project numbers assigned to the POLR service areas and interested persons may attend. The names of the lottery candidates shall be written on separate pieces of paper of identical size and color. A staff member shall place the names of the lottery candidates in a receptacle. A commission representative shall draw a piece of paper from the receptacle. The REP whose name is written on the piece of paper shall serve as the POLR for that customer class in that POLR area at the rate specified in subsection (k)(4) of this section.

(k) POLR rate.

(1) Components of POLR rate when service awarded by bid. The provisions of this paragraph apply to the POLR rate when POLR service is awarded by bid. The POLR rate for the residential and small non-residential customer classes shall be either the price to beat or a rate consisting of non-bypassable charges, a monthly customer charge that does not change during the term of the POLR, an energy charge, and, for small and large non-residential customers, a demand charge. For residential and small non- residential customers, the applicable standard price to beat rate shall be a floor on the POLR rate and the POLR rate may not fall below the PTB. For large non-residential customers, the POLR rate for large non-residential customers shall consist of non-bypassable charges, a monthly customer charge that does not change during the term of the POLR, an energy charge, and a demand charge.

(2) Elements of a bid.

(A) Residential customer class. Each bid for POLR service for the residential customer class shall be either a bid to serve customers at the price to beat or a bid that includes:

(i) A monthly customer charge that shall not change during the POLR term and that customer charge may be zero dollars; and

(ii) An energy charge subject to adjustment under the provisions of subsection (l) of this section, expressed as cents per kilowatt-hour (kWh). The energy charge may be differentiated into peak months (May through October) and off-peak months (November through April).

(B) Small non-residential customer class. Each bid for POLR service for the small non-residential class shall be either a bid to serve customers at the price to beat or shall include the components for bids for the residential customer class as set forth in subparagraph (A) of this paragraph and a demand charge that may be zero dollars.

(C) Large non-residential customer class. Each bid for POLR service for the large non-residential customer class shall include:

(i) A monthly customer charge that shall not change during the POLR term and that customer charge may be zero dollars;

(ii) A demand charge that may be zero dollars; and

(iii) The percent over the energy reference price specified by the commission that the bidder will charge for energy. For POLR areas in the Electric Reliability Council of Texas (ERCOT), the energy reference price shall be the market clearing price for energy (MCPE) determined on the basis of 15-minute intervals. For POLR areas outside of ERCOT, the commission shall specify the energy reference price prior to the inception of retail customer choice.

(3) Comparison and rejection of bids. Bids for POLR service for residential and small non-residential service shall be compared on the basis of price as specified in this paragraph.

(A) Residential customer class. Bids for POLR service for residential customers shall be compared assuming monthly residential energy usage of 1000 kWh. If a bid for POLR service for this average usage level exceeds 125% of the applicable standard residential price to beat rate for that usage level at the time bids are submitted, the bid shall be rejected. For purposes of this rule, the standard residential price to beat rate for residential service in each POLR area shall refer to the following price to beat tariffs, as amended or replaced:
Figure: 16 TAC §25.43(k)(3)(A)

(B) Small non-residential class. Bids for POLR service for small non- residential customers shall be compared assuming a demand level of 35 kW and a monthly usage level of 12,500kWh. If the POLR rates bid for these average usage levels exceed 125% of the applicable standard commercial price to beat rate for both usage levels at the time bids are submitted, the bid shall be rejected. For purposes of this rule, standard commercial price to beat rate shall refer to the following price to beat tariffs, as amended or replaced:
Figure: 16 TAC §25.43(k)(3)(B)

(C) Large non-residential class. Bids for POLR service for large non- residential customers shall be compared assuming a monthly demand of 2.5 MW and a monthly usage level of 1,000,000 kWh.

(4) POLR rates where POLR selected by lottery. This paragraph specifies the POLR rates that will be charged in a POLR area when the POLR is selected by lottery.

(A) Residential and small non-residential customer classes. The rate charged by a POLR selected by lottery shall be 125% of the applicable standard price to beat rate.

(B) Large non-residential class. The rate charged by a POLR selected by lottery shall be non- bypassable charges plus 150% of the applicable energy reference price as determined under paragraph (2)(C)(iii) of this subsection and a monthly customer charge of $2897. The minimum energy reference price shall be $7.25 per megawatt hour.

(5) Good cause adjustment to POLR rates. On a showing of good cause, the commission may permit the POLR to adjust the POLR rate, if necessary to ensure that the rate is sufficient to allow the POLR to recover its costs of providing service. Notwithstanding any other commission rule to the contrary, POLR rates may be adjusted on an interim basis for good cause shown and after at least three days' notice and an opportunity for hearing on the request for interim relief. Alternatively, the commission may rebid POLR service and relieve the current POLR of its POLR responsibilities. If POLR service is rebid, the process specified in subsection (i) of this section shall be followed except that eligible REPs shall be those REPs identified in the last list

that was published, with the POLR that is being relieved of its duties deleted from the list. If the commission elects to rebid POLR service and the bid process is unsuccessful, the commission may reconsider adjusting the POLR rates or select an alternate POLR provider by lottery in accordance with the provisions of subsection (j) of this section.

(l) Adjustment to energy charge component of residential and small non- residential POLR rates. The energy charge component of the POLR rate for the residential and small non- residential customer classes shall be adjusted as specified in this subsection if POLR service was awarded by bid.

(1) Energy charge component reevaluated monthly. The energy charge component of the POLR rate for the residential and small non-residential customer classes shall be recalculated at the end of every month during the POLR term in accordance with the provisions of paragraph (2) of this subsection. If the recalculated energy charge varies by more than 5.0% from the time the energy charge was bid or last adjusted, then the energy charge of the POLR rate for the following month shall be equal to the recalculated energy charge. If the recalculated energy charge does not vary by more than 5.0% from the time the energy charge was bid or last adjusted, then the energy charge component shall not be adjusted for the following month. All adjustments shall take place during the first billing cycle of the billing month following the recalculation. Adjustments shall not occur during the customer's billing month. The POLR shall submit its monthly rate to the commission at least 15 days prior to the beginning of the applicable month.

(2) Energy charge calculation.
Figure: 16 TAC §25.43(l)(2)

(3) Refunds. If in response to a complaint or upon its own investigation, the commission determines that a POLR failed to properly adjust the energy charge component of the POLR rate and as a result overcharged its customers, the commission shall require the POLR to issue refunds to the specific customers who were overcharged.

(m) Marketing to POLR customers. An employee answering the POLR phone line will read from a script to describe POLR service but may market the services of its affiliates or any other REP that has entered into a marketing agreement with the POLR. The POLR shall not discriminate between unaffiliated REPs in the terms and conditions of any such marketing agreement. The POLR shall provide to REPs and aggregators on at least a quarterly basis an updated mass customer list of customers served by the POLR containing information similar to the information that the registration agent is authorized to release under §25.472 of this title (relating to Privacy of Customer Information). The POLR shall not be required to comply with the provisions of §25.472(a)(2) of this title prior to releasing its list of customers

(n) Transition of customers to POLR service.

(1) POLR service for a requesting customer is initiated when the customer makes arrangements for service.

(2) A customer other than a residential customer or small commercial customer (as defined in §25.471(d) of this title (relating to General Provisions of Customer Protection Rules) may agree to a contract or terms of service that allow a REP to transfer the customer to POLR for reasons other than non-payment, including the failure of the customer and its REP to agree on terms of renewal or extension. Unless ERCOT has a transaction that allows REPs to transfer such customers to the POLR, the POLR shall accept written requests for such transfers from REPs and shall initiate a switch for the customer to be transferred to the POLR. The acquisition by the POLR of such customers is not a prohibited enrollment under §25.474 of this title (relating to the Selection or Change of Retail Electric Provider). Further, §25.472(d) of this title (relating to Privacy of Customer Information) does not apply to such permitted customer transfers.

(3) If the REP terminates service to a customer whose consumption is determined by monthly meter readings without giving notice, the POLR shall prorate the customer's usage based on the customer's historic data or load profile to establish the customer's charges for the relevant portion of the billing cycle, unless the customer requests and is willing to pay for an out-of-cycle meter read. Nothing in this section precludes a POLR from having an out-of-cycle meter read performed for a new customer on its own initiative provided the POLR does not pass on the cost of that meter read to the customer.

(4) The POLR is responsible for obtaining resources and services needed to serve a customer once it has been notified that it is serving that customer. The customer is responsible for charges for POLR service at the POLR rate in effect at that time.

(5) If a REP terminates service to a customer, it is financially responsible for the resources and services used to serve the customer until it notifies the independent organization of the termination of the service and until the switchover to the POLR is complete.

(6) The POLR is financially responsible for all costs of providing electricity to customers from the time the switchover or initiation of service is complete until such time as the customer leaves POLR service.

(o) Termination of POLR status.

(1) The commission may revoke a REP's POLR status after notice and opportunity for hearing:

(A) If the POLR fails to maintain REP certification;

(B) If the POLR fails to provide service in a manner consistent with this section; or

(C) For good cause, provided the commission affords the POLR due process.

(2) If a POLR defaults or has its status revoked before the end of its term, the commission may appoint any certified REP, other than a REP serving only its own affiliates, serving a customer class in that area to become the POLR until a new POLR is selected pursuant to the provisions of this rule. The rate for such POLR service shall be the rate established pursuant to subsection (k)(4) of this section.

(3) The provisions of this paragraph address the transition to a new POLR at the end of a POLR term.

(A) At the end of the POLR term the outgoing POLR may chose either to continue to serve POLR customers who do not select another provider through a competitive affiliate at a rate specified by the competitive affiliate or to terminate the customers who do not select another provider to the incoming POLR on the first meter read date after the term of the incoming POLR commences.

(B) A notice containing the information specified in either subparagraph (C) or (D) of this paragraph, as applicable, shall be provided to each POLR customer at least 60 days prior to the end of the POLR term. The notice shall be in type no smaller than 12 points in size. The notice shall satisfy the requirements of §25.474(m) of this title in the event that the customer fails to switch to another provider and is transferred by the POLR to a competitive affiliate of the outgoing POLR or the customer fails to switch to another provider and is transferred to the incoming POLR by the outgoing POLR. The notice shall also include a phone number for the outgoing POLR for the customer to call to obtain more information.

(C) The notice provided by a POLR that elects to transfer customers who fail to switch to another provider to a competitive affiliate shall include a comparison of the POLR rates currently charged to the customer to the rate offered by the competitive affiliate of the outgoing POLR as well as the applicable price to beat rate. The notice shall specify the deposit requirements of the competitive affiliate of the outgoing POLR and shall state that other providers may also require a deposit and may require payment of any amounts owed the provider for services previously rendered. The notice shall state where the customer may find additional information about offerings of other providers and shall inform the customer that, if the customer does not select another provider or request service from the incoming POLR by a specified date, that a competitive affiliate of the outgoing POLR will continue to serve the customer at the rate specified in the notice.

(D) If the POLR elects to transfer customers who do not select another provider to the incoming POLR on the first meter read date after the term of the incoming POLR commences, the notice to customers shall state where the customer can find more information about other offerings as well as the rates of the incoming POLR. The notice shall inform the customer that if the customer does not select another provider by a specified date, the customer will be transferred to the incoming POLR on the first meter read date after the commencement of the POLR term. The notice shall also inform the customer that the incoming POLR will bill the customer for a deposit and that the deposit can be made in two installments as will be described further in the notice from the incoming POLR.

(E) If a POLR customer either requests service from the incoming POLR or is terminated to the incoming POLR by the outgoing POLR, the outgoing POLR shall offset the customer's final bill against the customer's deposit and refund any remaining balance to the customer within 20 days from the customer's final meter read date. The customer shall be entitled to pay the deposit required by the incoming POLR in two installments in the manner provided in §25.478(f)(4) of this title (relating to Credit Requirements and Deposits).

(p) Electric cooperative delegation of authority. An electric cooperative that has adopted customer choice may propose to delegate to the commission its authority to select a POLR under PURA §41.053(c) in its certificated service area in accordance with this section. After notice and opportunity for comment, the commission will, at its option, accept or reject such delegation of authority. If the commission accepts the delegation of authority, the following conditions will apply:

(1) The board of directors will provide the commission with a copy of a board resolution authorizing such delegation of authority;

(2) The delegation of authority will be made at least 30 days prior to the time the commission issues an invitation for bids to establish a POLR for a contiguous or surrounding POLR area;

(3) The delegation of authority will be for a minimum period corresponding to the period for which the solicitation will be made;

(4) The electric cooperative wishing to delegate its authority to designate a POLR will also provide the commission with the authority to apply the selection criteria and procedures described in this section in selecting the POLR within the electric cooperative's certificated service area; and

(5) If the competitive bidding process that includes the electric cooperative certificated area fails, the commission will automatically reject the delegation of authority.

(q) Reporting requirements. Each POLR and affiliated REP serving nonpaying customers of competitive REPs shall file the following information with the commission on a quarterly basis beginning January of each year in a project established by the commission for the receipt of such information. Each quarterly report shall be filed within 30 days of the end of the quarter. Except as provided in paragraph (5) of this subsection, information filed by an affiliated REP in accordance with paragraph (1) of this subsection will be made publicly available by the commission on an aggregated basis. Except as provided in subsection (5) of this section, information filed by a POLR in accordance with paragraphs (2)-(4) of this subsection will be made publicly available by the commission for each POLR area.

(1) For each month of the reporting quarter, the affiliated REP shall report:

(A) The number of residential customers who were disconnected for non-payment and the number of those customers that were eligible for the rate reduction program under §25.454 of this title;

(B) The number of residential customers who were transferred to the affiliated REP by a competitive REP for non-payment and the number of those customers that were eligible for the rate reduction program under §25.454 of this title;

(C) The average amount owed to the affiliated REP by residential customers at the time of disconnection;

(D) The average amount owed to the affiliated REP by residential customers eligible for the rate reduction program at the time of disconnection;

(E) The number of small non-residential customers who were disconnected for non-payment;

(F) The average amount owed to the affiliated REP by small non-residential customers at the time of disconnection.

(2) For each month of the reporting quarter, each POLR shall report the total number of new customers acquired by the POLR and the following information regarding these customers:

(A) The number of customers eligible for the rate reduction program pursuant to §25.454 of this title;

(B) The number of customers from whom a deposit was requested pursuant to the provisions of §25.478 of this title and the average amount of deposit requested;

(C) The number of customers from whom a deposit was received, including those who entered into deferred payment plans for the deposit, and the average amount of the deposit;

(D) The number of customers whose service was physically disconnected pursuant to the provisions of §25.483 of this title (relating to Disconnection of Service) for failure to pay a required deposit; and

(E) Any explanatory data or narrative necessary to account for customers that were not included in either subparagraph (C) or (D) of this paragraph.

(3) For each month of the reporting quarter each POLR shall report the total number of customers to whom a disconnection notice was issued pursuant to the provisions of §25.483 of this title and the following information regarding those customers:

(A) The number of customers eligible for the rate reduction program pursuant to §25.454 of this title;

(B) The number of customers who entered into a deferred payment plan, as defined by §25.480(j) of this title (relating to Bill Payment and Adjustments) with the POLR;

(C) The number of customers whose service was physically disconnected pursuant to §25.483 of this title (relating to Disconnection of Service);

(D) The average amount owed to the POLR by each disconnected customer at the time of disconnection; and

(E) Any explanatory data or narrative necessary to account for customers that are not included in either subparagraph (B) or (C) of this paragraph.

(4) For the entirety of the reporting quarter, each POLR shall report the average number of calendar days a customer received POLR service.

(5) Reports filed under this subsection are subject to release as public information unless the reports or specific parts of the reports can be shown to be exempt from disclosure under Chapter 552 of the Texas Government Code, commonly known as the Texas Public Information Act (TPIA). If a reporting entity contends that all or part of a report is confidential, then the reporting entity shall file the information in accordance with the requirements of §22.71(d) of this title (relating to Filing of Pleadings, Documents and Other Materials). The reporting entity must submit in writing specific detailed reasons, including relevant legal authority, in support of its contentions that the material is exempt from disclosure under the TPIA. All reports and parts of reports that are not marked as confidential will be automatically considered public information upon submittal. The validity of any claim of confidentiality may be determined by the commission through a contested case proceeding, by the Office of the Attorney General pursuant to the provisions of the TPIA, or both.

(r) Waiver of customer protection rules. The provisions of §25.475(d) of this title requiring issuance of a revised terms of service statement to customers 45 days prior to any material change in the customer's terms of service shall not apply with respect to the implementation of the provisions of subsection (b)(3) of this section or §25.483(b) of this title.

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 R. CUSTOMER PROTECTION RULES FOR RETAIL ELECTRIC SERVICE

16 TAC §§25.478, 25.480, 25.482, 25.483

These amendments are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated (Vernon's 1998 and Supplement 2002) (PURA) §14.002, which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §39.101(b)(4) which provides that a customer is entitled to be served by a provider of last resort; §39.101(e) which authorizes the commission to enact rules to carry out the provisions of §39.101(a)-(d), including rules for minimum service standards for a retail electric provider relating to customer deposits and the extension of credit and termination of service; and §39.106 which directs the commission to designate providers of last resort in areas of the state where customer choice is in effect.

§25.478. Credit Requirements and Deposits.

(a) Credit requirements for permanent residential customers. A retail electric provider (REP) may require residential customers to establish and maintain satisfactory credit as a condition of providing service pursuant to the requirements of this section.

(1) Establishment of credit shall not relieve any customer from complying with the requirements for payment of bills by the due date of the bill.

(2) The credit worthiness of spouses established during shared service in the 12 months prior to their divorce will be equally applied to both spouses for 12 months immediately after their divorce.

(3) A residential customer of an affiliate REP or provider of last resort (POLR) can demonstrate satisfactory credit using any one of the criteria listed in subparagraphs (A) through (D) of this paragraph. A competitive retailer may establish other criteria by which a customer can demonstrate satisfactory credit, so long as such criteria are not discriminatory pursuant to §25.471(c) of this title (relating to General Provisions of Customer Protection Rules).

(A) A residential customer may be deemed as having established satisfactory credit if the customer:

(i) has been a customer of any REP or the electric utility (prior to 2002) within the two years prior to the customer's request for electric service;

(ii) is not delinquent in payment of any such electric service account; and

(iii) during the last 12 consecutive months of service was not late in paying a bill more than once.

(B) A residential customer may be deemed as having established satisfactory credit if the customer possesses a satisfactory credit rating obtained through an accredited credit reporting agency.

(C) A residential customer may be deemed as having established satisfactory credit if the customer is 65 years of age or older and the customer's account with the electric utility (prior to 2002) or any other REP has not had a delinquent balance credit if the customer is 65 years of age or older and the customer's incurred within the last 12 months for the same type of service applied for.

(D) A residential customer may be deemed as having established satisfactory credit if the customer has been determined to be a victim of family violence as defined in the Texas Family Code §71.004, by a family violence center or by treating medical personnel. This determination shall be evidenced by submission of a certification letter developed by the Texas Council on Family Violence. The certification letter may be submitted directly by use of a toll-free fax number to the affiliate REP or POLR.

(E) A residential customer may be deemed as having established satisfactory credit if the customer is medically indigent. In order for a customer to be considered medically indigent, the customer

must make a demonstration that the following criteria are met. Such demonstration must be made annually:

(i) the customer's household income must be at or below 150% of the poverty guidelines as certified by a governmental entity or government funded energy assistance program provider; and

(ii) the customer or customer's spouse must have been certified by that person's physician (for the purposes of this subsection, the term "physician" shall mean any medical doctor, doctor of osteopathy, nurse practitioner, registered nurse, state-licensed social workers, state- licensed physical and occupational therapists, and an employee of an agency certified to provide home health services pursuant to 42 U.S.C. §1395 *et seq*) as being unable to perform three or more activities of daily living as defined in 22 TAC §218.2, or the customer's monthly out-of-pocket medical expenses must exceed 20% of the household's gross income.

(F) Pursuant to PURA §39.107(g), a REP who requires pre-payment by a metered residential customer as a condition of initiating service may not charge the customer an amount for electric service that is higher than the price charged by the POLR in the applicable transmission and distribution service territory.

(G) The REP may obtain payment history information from the customer's previous REP or from an accredited credit reporting agency. The REP shall obtain the customer's authorization pursuant to §25.474 of this title (relating to Selection or Change of Retail Electric Provider), prior to obtaining such information from the customer's prior REP. A REP shall maintain payment history information for two years after electric service has been terminated to a customer in order to be able to provide credit history information at the request of the former customer. Additionally, a REP may utilize credit reporting agencies to document customers with poor credit/payment histories.

(4) If satisfactory credit cannot be demonstrated by the residential customer of an affiliate REP or POLR using these criteria, the customer may be required to pay a deposit pursuant to subsections (c) and (d) of this section.

(b) Credit requirements for non-residential customers. A REP may establish nondiscriminatory criteria to evaluate the credit requirements for non-residential customers and apply those criteria in a nondiscriminatory manner. If satisfactory credit cannot be demonstrated by the non-residential customer using the criteria established by the REP, the customer may be required to pay a deposit. No such deposit shall be required if the customer is a governmental entity.

(c) Initial deposits.

(1) An affiliate REP or POLR shall offer a residential customer who is required to pay an initial deposit the option of providing a written letter of guarantee pursuant to subsection (j) of this section, instead of paying a cash deposit. The letter of guarantee may be conditioned on the agreement of the guarantor to become or remain a customer of the provider affiliate REP or POLR for the term during which the guarantee is in effect. If the guarantor fails to become, or ceases to be, a customer of the affiliate REP or POLR, the provider affiliate REP or POLR may require the customer who was obligated to pay the initial deposit to pay such deposit as a condition of continuing the contract for service.

(2) An affiliate REP or POLR shall not require an initial deposit from an existing customer unless the customer was late paying a bill more than once during the last 12 months of service or had service terminated or disconnected for nonpayment. The customer may be required to pay this initial deposit within ten days after issuance of a written disconnection notice that requests such deposit. The disconnection notice may be issued concurrently with the request for deposit. Instead of an initial deposit, the customer may pay the total amount due on the current bill by the due date of the bill, provided the customer has not exercised this option in the previous 12 months.

(3) A competitive retailer that collects deposits from customers shall do so pursuant to subsections (f)-(i), (k), and (m) of this section.

(d) Additional deposits by existing customers.

(1) An affiliate REP or POLR may request an additional deposit if:

(A) the average of the customer's actual billings for the last 12 months are at least twice the amount of the original estimated annual billings; and

(B) a termination or disconnection notice has been issued or the account disconnected within the previous 12 months.

(2) A customer shall pay an additional deposit within ten days after the affiliate REP or POLR has issued a disconnection notice and requested the additional deposit.

(3) Instead of an additional deposit, a residential customer may pay the total amount due on the current bill by the due date of the bill, provided the customer has not exercised this option in the previous 12 months.

(4) An affiliate REP or the POLR may disconnect service if the additional deposit is not paid within ten days of the request, provided a written disconnection notice has been issued to the customer. A disconnection notice may be issued concurrently with either the written request for the additional deposit or current bill. However, the affiliate REP is not required to request an additional deposit as a condition of continuing service unless such a requirement is contained within the REP's terms of service document.

(e) Deposits for temporary or seasonal service and for weekend residences. A REP may require a deposit sufficient to reasonably protect it against the assumed risk for temporary or seasonal service or weekend residences, as long as the policy is applied in a uniform and nondiscriminatory manner. These deposits shall be returned according to guidelines set out in subsection (k) of this section.

(f) Amount of deposit.

(1) The total of all deposits, initial and additional, required by a REP, other than the POLR, from any residential customer shall not exceed an amount equivalent to the greater of either:

(A) the sum of the estimated billings for the next two months; or

(B) one-sixth of the estimated annual billing.

(2) For the purpose of calculating the amount of the deposit, the estimated billings shall include only charges for electric service that are disclosed in the REP's terms of service document provided to the customer.

(3) The POLR shall not collect a total deposit that exceeds an amount equivalent to one-sixth of the estimated annual billing.

(4) If a customer is qualified for the rate reduction program under §25.454 of this title (relating to Rate Reduction Program), then such customer shall be eligible to pay any deposit that exceeds the actual estimated billing for the next month or one-twelfth of the estimated annual billing in two installments. Notice of this option for customers eligible for the rate reduction program shall be included in any written notice to a customer requesting a deposit. The customer shall have the

obligation of providing sufficient information to the REP to demonstrate that the customer is eligible for the rate reduction program.

(A) The first installment shall not exceed the greater of the estimated billing for the next month or one- twelfth of the estimated annual billing and shall be due no earlier than ten days after the issuance of written notification.

(B) The second installment for the remainder of the deposit shall be due no earlier than 40 days after the issuance of written notification. The REP or POLR shall issue a written notification regarding the remaining deposit amount due within 20 days, but no less than ten days, prior to the due date for the second deposit installment.

(g) Interest on deposits. A REP that requires a deposit pursuant to this section shall pay interest on that deposit at an annual rate at least equal to that set by the commission on December 1 of the preceding year, pursuant to Texas Utilities Code §183.003 (relating to Rate of Interest). If a deposit is refunded within 30 days of the date of deposit, no interest payment is required. If the REP keeps the deposit more than 30 days, payment of interest shall be made retroactive to the date of deposit.

(1) Payment of the interest to the customer shall be made annually, if requested by the customer, or at the time the deposit is returned or credited to the customer's account.

(2) The deposit shall cease to draw interest on the date it is returned or credited to the customer's account.

(h) Notification to customers. When a REP requires a customer to pay a deposit, the REP shall provide the customer written information about the provider's deposit policy, the customer's right to post a guarantee in lieu of a cash deposit, how a customer may be refunded a deposit, and the circumstances under which a provider may increase a deposit. These disclosures shall be included either in the Your Rights as a Customer disclosure or the REP's terms of service document.

(i) Records of deposits.

(1) A REP that collects a deposit shall keep records to show:

(A) the name and address of each depositor;

(B) the amount and date of the deposit; and

(C) each transaction concerning the deposit.

(2) The REP that collects a deposit shall, upon the request of the customer, issue a receipt of deposit to each customer paying a deposit and shall provide means for a depositor to establish a claim if the receipt is lost.

(3) The REP shall maintain a record of each unclaimed deposit for at least four years.

(4) The REP shall make a reasonable effort to return unclaimed deposits.

(j) Guarantees of residential customer accounts. A guarantee agreement in lieu of a cash deposit issued by any REP, if applicable, shall conform to these minimum requirements:

(1) A guarantee agreement between a REP and a guarantor shall be in writing and shall be for no more than the amount of deposit the provider would require on the customer's account pursuant to subsection (f) of this section. The amount of the guarantee shall be clearly indicated in the signed agreement. The REP may require, as a condition of the continuation of the guarantee agreement, that the guarantor remain a customer of the REP during the term of the guarantee agreement.

(2) The guarantee shall be voided and returned to the guarantor according to the provisions of subsection (k) of this section.

(3) Upon default by a residential customer, the guarantor of that customer's account shall be responsible for the unpaid balance of the account only up to the amount agreed to in the written agreement.

(4) If the guarantor ceases to be a customer of the REP, the provider may treat the guarantee agreement as in default and demand the amount of the cash deposit from the residential customer as a condition of continuing service.

(5) The REP shall provide written notification to the guarantor of the customer's default, the amount owed by the guarantor, and the due date for the amount owed.

(A) The REP shall allow the guarantor 16 days from the date of notification to pay the amount owed on the defaulted account. If the sixteenth day falls on a holiday or weekend, the due date shall be the next business day.

(B) The REP may transfer the amount owed on the defaulted account to the guarantor's own electric service bill provided the guaranteed amount owed is identified separately on the bill as required by §25.479 of this title (relating to Issuance and Format of Bills).

(6) The REP may initiate termination of service (or disconnection of service for the POLR, or any REP having disconnect authority) to the guarantor for nonpayment of the guaranteed amount only if the termination of service (or, where applicable, the disconnection of service) was disclosed in the terms of service document, and only after proper notice as described by paragraph (5) of this subsection and §25.482 of this title (relating to Termination of Contract) or §25.483 of this title (relating to Disconnection of Service).

(k) Refunding deposits and voiding letters of guarantee.

(1) Retention period for deposits and letters of guarantee.

(A) A deposit held by a POLR shall be refunded when the customer has paid POLR bills for service for 12 consecutive residential billings or for 24 consecutive non-residential billings without having service disconnected for nonpayment of a bill and without having more than two occasions in which a bill was delinquent.

(B) A REP, other than the POLR, may keep a deposit for the entire time a customer receives electric service from the REP.

(C) Upon termination of a customer's electric service, a REP shall either transfer the deposit plus accrued interest to the customer's new REP or promptly refund the deposit plus accrued interest to the customer, at the customer's direction. The REP may subtract from the amount refunded any amounts still owed by the customer to the REP. If the REP obtained a guarantee, such guarantee shall be voided and returned to the guarantor. Alternatively, the REP may provide the guarantor with written documentation that the contract has been voided. If the customer does not meet these refund criteria, the deposit and interest or the letter of guarantee may be retained.

(2) If a customer's service is not connected, or is terminated or disconnected, the REP shall promptly void and return to the guarantor all letters of guarantee on the account or provide written documentation that the contract has been voided, or refund the customer's deposit plus accrued interest on the balance, if any, in excess of the unpaid bills for service furnished. Similarly, if the guarantor's service is not connected, or is terminated or disconnected, the REP shall promptly

void and return to the guarantor all letters of guarantee or provide written documentation that the guarantees have been voided. This provision does not apply when the customer or guarantor moves or changes the address where service is provided, as long as the customer or guarantor remains a customer of the REP.

(3) A REP shall terminate a guarantee agreement when the customer has paid its bills for 12 consecutive months without service being disconnected for nonpayment and without having more than two delinquent payments.

(l) Re-establishment of credit. Every customer who previously has been a customer of the REP and whose service has been terminated or disconnected for nonpayment of bills or theft of service by that customer (meter tampering or bypassing of meter) may be required, before service is reinstated, to pay all amounts due to the REP or execute a deferred payment agreement, if offered, and reestablish credit. Upon request, the REP shall reasonably demonstrate the amount of electric service received, but not paid for, and the reasonableness of any charges for the unpaid service, and any other charges required to be paid as a condition of electric service restoration to such premise.

(m) Upon sale or transfer of company. Upon the sale or transfer of a REP or the designation of an alternative POLR for the customer's electric service, the seller or transferee shall provide the legal successor to the original provider all deposit records, provided that the deposits were not returned to the customers and the legal successor accepts transfer of such deposits.

§25.480. Bill Payment and Adjustments.

(a) Application. This section applies to a retail electric provider (REP) that is responsible for issuing electric service bills to retail customers, unless the REP is issuing a consolidated bill (both energy services and transmission and distribution services) on behalf of an electric cooperative or municipally owned utility. This section does not apply to a municipally owned utility or electric cooperative issuing bills to its customers in its own service territory.

(b) Bill due date. A REP shall state a payment due date on the bill which shall not be less than 16 days after issuance. The issuance date is the issuance date on the bill or, if there is no issuance date on the bill, the postmark date on the envelope. A payment for electric service is delinquent if not received by the REP or at the REP's authorized payment agency by the close of business on the due date. If the sixteenth day falls on a holiday or weekend, then the due date shall be the next business day after the sixteenth day.

(c) Penalty on delinquent bills for electric service. A one-time penalty not to exceed 5.0% may be charged on a delinquent bill for electric service. No such penalty shall apply to residential or small commercial customers served by the provider of last resort (POLR), or to customers receiving a low- income discount pursuant to the Public Utility Regulatory Act (PURA) §39.903(h). The 5.0% penalty on delinquent bills may not be applied to any balance to which the penalty has already been applied. A bill issued to a state agency, as defined in the Government Code, Chapter 2251, shall be due and bear interest if overdue as provided in Chapter 2251.

(d) Overbilling. If charges are found to be higher than authorized in the REP's terms and conditions for service, then the customer's bill shall be corrected.

(1) The correction shall be made for the entire period of the overbilling.

(2) If the REP corrects the overbilling within three billing cycles of the error, it need not pay interest on the amount of the correction.

(3) If the REP does not correct the overcharge within three billing cycles of the error, it shall pay interest on the amount of the overcharge at the rate set by the commission.

(A) Interest on overcharges that are not adjusted by the REP within three billing cycles of the bill in error shall accrue from the date of payment or from the issuance date of the erroneous bill.

(B) All interest shall be compounded monthly based on the approved annual rate.

(C) Interest shall not apply to leveling plans or estimated billings.

(e) Underbilling. If charges are found to be lower than authorized by the REP's terms and conditions of service, or if the REP fails to bill the customer for service, then the customer's bill may be corrected.

(1) The REP may backbill the customer for the amount that was underbilled. The backbilling shall not include charges that extend more than six months from the date the error was discovered unless the underbilling is a result of theft of service by the customer.

(2) The REP may terminate service, or the POLR may disconnect service, if the customer fails to pay the additional charges within a reasonable time.

(3) If the underbilling is $50 or more, the REP shall offer the customer a deferred payment plan option for the same length of time as that of the underbilling. A deferred payment plan need not be offered to a customer whose underpayment is due to theft of service.

(4) The REP shall not charge interest on underbilled amounts unless such amounts are found to be the result of theft of service (meter tampering, bypass, or diversion) by the customer, as defined in §25.126 of this title (relating to Meter Tampering). Interest on underbilled amounts shall be compounded monthly at the annual rate. Interest shall accrue from the day the customer is found to have first stolen the service.

(f) Disputed bills. If there is a dispute between a customer and a provider about the REP's bill for any service billed on the retail electric bill, the REP shall promptly investigate and report the results to the customer. The provider shall inform the customer of the complaint procedures of the commission pursuant to §25.485 of this title (relating to Customer Access and Complaint Handling).

(g) Alternate payment programs or payment assistance.

(1) Notice required. When a customer contacts a REP and indicates inability to pay a bill or a need for assistance with the bill payment, the REP shall inform the customer of all alternative payment and payment assistance programs that are offered by or available from the REP, such as bill payment assistance, deferred payment plans, disconnection moratoriums for the ill, or low-income energy assistance programs, as applicable, and of the eligibility requirements and procedure for applying for each.

(2) Bill payment assistance programs.

(A) Each REP shall implement a bill payment assistance program for residential customers. At a minimum, such a program shall solicit voluntary donations from customers by a check-off box on the retail electric bill.

(B) Each REP shall provide an annual report to the commission summarizing:

(i) the total amount of customer donations;

(ii) the amount of money set aside for bill payment assistance;

(iii) the assistance agency or agencies selected to disburse funds to customers; and

(iv) the amount of money provided to each assistance agency to disburse funds to customers.

(C) An assistance agency selected by a REP to disburse bill payment assistance funds shall not discriminate in the distribution of such funds to customers based on the customer's race, creed, color, national origin, ancestry, sex, marital status, lawful source of income, disability, familial status, location of customer in an economically distressed geographic area, or qualification for low-income or energy efficiency services.

(h) Level and average payment plans. A REP shall offer a level or average payment plan to its customers. A REP shall not limit participation to only credit-worthy customers. A REP may collect under-recovered costs from a customer annually, or upon termination of service to the customer. A REP shall refund any over-recovered amounts to customers annually, or upon termination of service to the customer. Additionally, a REP may initiate its normal collection activity if a customer fails to make a timely payment according to such a plan. All details concerning a levelized or average payment program shall be disclosed in the customer's terms of service document.

(i) Payment arrangements. A payment arrangement is any agreement between the REP and a customer that allows a customer to pay the outstanding bill after its due date, but before the due date of the next bill. If the REP issued a termination notice (or in the case of the POLR, a disconnection notice) before the payment arrangement was made, that termination or disconnection should be suspended until after the due date for the payment arrangement. If a customer does not fulfill the terms of the payment arrangement, service may be terminated (or disconnected in the case of the POLR) after the later of the due date for the payment arrangement or the termination or disconnection date indicated in the notice, without issuing an additional disconnection notice. A REP may switch terminated customers to the POLR by notifying the registration agent.

(j) Deferred payment plans. A deferred payment plan is an arrangement between the REP and a customer that allows a customer to pay an outstanding bill in installments that extend beyond the due date of the next bill. A deferred payment plan may be established in person or by telephone, but all deferred payment plans shall be confirmed in writing by the REP.

(1) A REP may offer a deferred payment plan to any residential customer who has expressed an inability to pay his or her bill.

(2) A REP shall offer a deferred payment plan to a customer who has been underbilled, as described in subsection (e) of this section, or to customers who qualify for such plans pursuant to §25.482(g) of this title (relating to Termination of Contract) or §25.483(j) of this title (relating to Disconnection of Service).

(3) An affiliate REP or POLR shall offer such plans unless the customer:

(A) has been issued more than two termination or disconnection notices during the preceding 12 months; or

(B) has received service from the affiliate REP or POLR for less than three months, and the customer lacks:

(i) sufficient credit; or

(ii) a satisfactory history of payment for electric service from a previous REP (or its predecessor electric utility).

(4) Any deferred payment plans offered by a REP shall be implemented in a non- discriminatory manner, according to the provisions of this subsection.

(5) Every deferred payment plan offered by a REP shall provide that the delinquent amount be paid in equal installments over at least three billing cycles.

(6) A copy of the deferred payment plan shall be provided to the customer and:

(A) shall include a statement, in type no smaller than 14 point size, that states "If you are not satisfied with this agreement, or if the agreement was made by telephone and you feel this does not reflect your understanding of that agreement, contact your retail electric provider." In addition, where the customer and the REP's representative or agent meet in person, the representative shall read the preceding statement to the customer. The REP shall provide information to the customer in English or Spanish as necessary to make the preceding required statement understandable to the customer;

(B) may include a 5.0% penalty for late payment but shall not include a finance charge;

(C) shall state the length of time covered by the plan;

(D) shall state the total amount to be paid under the plan;

(E) shall state the specific amount of each installment;

(F) shall allow for the termination or disconnection of service (as appropriate) if the customer does not fulfill the terms of the deferred payment plan, and shall state the terms for disconnection or termination of service;

(G) shall not refuse a customer participation in such a program on any basis set forth in §25.471(c) of this title (relating to General Provisions of Customer Protection Rules); and

(H) shall allow either the customer or the REP to initiate a renegotiation of the deferred payment plan if the customer's economic or financial circumstances change substantially during the time of the deferred payment plan.

(7) A REP may pursue termination of service (or disconnection of service in the case of the POLR or a REP with disconnect authority pursuant to §25.483(b) of this title (relating to Disconnection of Service)) when a customer does not meet the terms of a deferred payment plan. However, service shall not be terminated or disconnected until appropriate notice has been issued, pursuant to §25.483 of this title or §25.482 of this title, as applicable, to the customer indicating that the customer has not met the terms of the plan. The REP may renegotiate the deferred payment plan agreement prior to disconnection. If the customer does not fulfill the terms of the plan, and the customer was previously provided a disconnection notice or termination notice for the outstanding amount, no additional disconnection or termination notice shall be required.

(k) Allocation of partial payments. A REP shall allocate a partial payment by the customer first to the oldest balance due for electric service, followed by the current amount due for electric service. When there is no longer a balance for electric service, payment may be applied to other non-electric services billed by the REP. A contract for electric service cannot be terminated for non-payment of non-electric services.

§25.482. Termination of Contract.

(a) Applicability. This section applies only with respect to customers who are subject to termination, but not disconnection, by their

retail electric provider (REP)' pursuant to §25.483 of this title (relating to Disconnection of Service).

(b) Termination policy. A REP other than a REP that is authorized to disconnect for nonpayment pursuant to the provisions of §25.483(b) of this title may terminate its contract with a customer for nonpayment of electric service charges and, if no other REP extends service to that customer, service shall be offered by the POLR until September 24, 2002, and thereafter by the affiliated REP. If a customer makes payment or satisfactory payment arrangements prior to the termination date, a REP shall continue serving the customer under the existing terms and conditions that were in effect prior to the issuance of a termination notice. If a REP chooses to terminate its contract with a customer, it shall follow the procedures in this section, or modify them in ways that are more generous to the customer in terms of the cause for termination, the timing of the termination notice, and the period between notice and termination. Nothing in this section shall be interpreted to require a REP to terminate its contract with a customer.

(c) Termination prohibited. A REP may not terminate its contract with a customer for any of the following reasons:

(1) delinquency in payment for electric service by a previous occupant of the premises if the occupant is not of the same household;

(2) failure to pay for any charge that is not related to electric service;

(3) failure to pay for a different type or class of electric utility service unless charges for such service were included on that account's bill at the time service was initiated;

(4) failure to pay charges arising from an underbilling, except theft of service, more than six months prior to the current billing;

(5) failure to pay disputed charges until a determination as to the accuracy of the charges has been made by the REP or the commission, and the customer has been notified of this determination;

(6) failure to pay charges arising from an underbilling due to any faulty metering, unless the meter has been tampered with or unless such underbilling charges are due under §25.126 of this title (relating to Meter Tampering); or

(7) failure to pay an estimated bill other than a bill rendered pursuant to an approved meter-reading plan, unless the transmission and distribution utility is unable to read the meter due to circumstances beyond its control.

(d) Termination on holidays or weekends. Unless requested by the customer, a REP shall not terminate a contract for electric service on holidays or weekends.

(e) Termination due to abandonment by the REP. A REP shall not abandon a customer or a service area without advance written notice to its customers and the commission and approval from the commission. In the event a provider terminates a customer's contract due to abandonment, that provider shall not collect or attempt to collect penalties from that customer.

(f) Termination of energy assistance clients. A REP shall not terminate a contract for service to a delinquent residential customer for a billing period in which the provider receives a pledge, letter of intent, purchase order, or other notification that an energy assistance provider is forwarding sufficient payment to continue service.

(g) Extreme weather. A REP shall not seek to terminate a residential customer's contract for electric service due to non-payment during an extreme weather emergency. A REP shall offer residential customers a deferred payment plan that complies with the requirements of §25.480 of this title (relating to Bill Payment and Adjustments) for bills that become due during the weather emergency. The term "extreme weather emergency" means the weather conditions described in §25.483 of this title (relating to Disconnection of Service).

(h) Termination notices. Except as provided in §25.475 of this title (relating to Information Disclosures to Residential and Small Commercial Customers) a REP may issue a notice of termination of contract. Any termination notice shall:

(1) not be issued before the first day after the bill is due, to enable the REP to determine whether the payment was received by the due date. Payment of the delinquent bill at the REP's authorized payment agency is considered payment to the REP.

(2) be a separate mailing or hand delivered with a stated date of termination with the words "termination notice" or similar language prominently displayed. A REP may send an additional notice by email or facsimile.

(3) have a termination date that is not a holiday or weekend day and that is not less than ten days after the notice is issued.

(i) Contents of termination notice. Any termination notice shall include the following information:

(1) The reasons for the termination of the contract;

(2) The actions, if any, that the customer may take to avoid the termination of the contract;

(3) If the customer is in default, the amount of all fees or charges which will be assessed against the customer as a result of the default under the contract, if any, as set forth in the REP's terms of service document provided to the customer;

(4) The amount overdue, if applicable;

(5) A toll-free telephone number that the customer can use to contact the REP to discuss the notice of termination or to file a complaint with the REP, and the following statement: "If you are not satisfied with our response to your inquiry or complaint, you may file a complaint by calling or writing the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas, 78711-3326; Telephone: (512) 936-7120 or toll-free in Texas at (888) 782-8477. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. Complaints may also be filed electronically at www.puc.state.tx.us/ocp/complaints/complain.cfm."

(6) A statement that informs the customer of the right to obtain services from another licensed REP, including the affiliated REP or a POLR, and that information about other REPs, the affiliated REP, or the POLR can be obtained from the commission and the POLR. Customers that do not exercise their right to choose another REP shall have their electric service transferred to the POLR or the affiliated REP, if termination is for non-payment, in accordance with the applicable rules or protocols, and may be required to pay a deposit, or prepay, to receive ongoing electric service. The REP shall not state or imply that nonpayment by the customer will result in physical disconnection of electricity or affect the customer's ability to obtain electric service from another REP, the affiliated REP, or the POLR.

(7) If a deposit is being held by the REP on behalf of the customer, a statement that the deposit will be applied against the final bill (if applicable) and the remaining deposit will be either returned to the customer or transferred to the new REP, at the customer's designation.

(8) The availability of deferred payment or other billing arrangements, if any, from the REP, and the availability of any state or

federal energy assistance programs and information on how to get further information about those programs.

(9) A description of the activities that the REP will use to collect payment, including the use of debt collection agencies, small claims court and other legal remedies allowed by law, if the customer does not pay or make acceptable payment arrangements with the REP.

(j) Notification of the registration agent. After the expiration of the notice period in subsection (h) of this section, a REP shall notify the registration agent of a switch request in a manner established by the registration agent so that the customer will receive service from the affiliated REP pursuant to §25.43(b)(2) and (3) of this title (relating to the Provider of Last Resort (POLR) or the POLR pursuant to §25.43(b)(1) and (4) and (d) of this title, unless the customer selects another REP or the POLR prior to the effective date of the switch.

(k) Customer's right to terminate a contract without penalty. As disclosed in the customer's terms of service document, a customer may terminate a contract without penalty in the event:

(1) The customer moves to another premises;

(2) Market conditions change and the contract allows the REP to terminate the contract without penalty in response to changing market conditions; or

(3) A REP notifies the customer of a material change in the terms and conditions of their service agreement.

§25.483. Disconnection of Service.

(a) Disconnection and reconnection policy. Only a transmission and distribution utility, municipally owned utility, or electric cooperative shall perform physical disconnections and reconnections. Unless otherwise stated, it is the responsibility of a retail electric provider (REP) to request such action from the appropriate transmission and distribution utility, municipally owned utility, or electric cooperative in accordance with that entity's relevant tariffs, in accordance with the requirements of the Electric Reliability Council of Texas, and in compliance with the requirements of this section. If a REP chooses to have a customer's electric service disconnected, it shall follow the procedures in this section or procedures that are more generous to the customer in terms of the cause for disconnection, the timing of the disconnection notice, and the period between notice and disconnection. Nothing in this section shall be interpreted to require a REP to disconnect a customer.

(b) Disconnection authority.

(1) The provider of last resort (POLR) and, beginning September 24, 2002, any REP may authorize the disconnection of a large non-residential customer, as that term is defined in §25.43 of this title (relating to Provider of Last Resort (POLR)), unless that customer is receiving service under a contract entered into prior to September 24, 2002, the original term of which has not expired at the time transfer to POLR is requested, and if the contract makes no provision for waiver of the customer's right to be transferred to the POLR for non-payment.

(2) Until October 1, 2004, and except as provided in subsection (d) of this section, only the affiliated REP or the POLR may authorize disconnection of residential and small non- residential customers, as those terms are defined in §25.43 of this title. No later than June 1, 2004, commission staff shall file a report with the commission assessing the potential impact on the public interest of authorizing all REPs to disconnect residential and small non-residential customers. On or before October 1, 2004, the commission shall make a determination as to whether authorizing all REPs to disconnect would be contrary to the public interest, taking into consideration such factors as the impact on the retail market as a whole and the likelihood of unauthorized disconnections. If the commission determines that authorizing all REPs to disconnect is not contrary to the public interest, REPs shall have such authority as of October 1, 2004, or another date determined by the commission, and after that date residential and small non-residential customers shall not be transferred to their affiliated REP for non-payment.

(c) Disconnection with notice. A REP having disconnection authority under the provisions of subsection (b) of this section, including the POLR, may authorize the disconnection of a customer's electric service after proper notice and not before the first day after the disconnection date in the notice for any of the following reasons:

(1) failure to pay a bill owed to the REP or to make deferred payment arrangements by the date of disconnection stated on the disconnection notice;

(2) failure to comply with the terms of a deferred payment agreement made with the REP;

(3) violation of the REP's' terms and conditions on using service in a manner that interferes with the service of others or the operation of nonstandard equipment, if a reasonable attempt has been made to notify the customer and the customer is provided with a reasonable opportunity to remedy the situation;

(4) failure to pay a deposit as required by §25.478 of this title (relating to Credit Requirements and Deposits); or

(5) failure of the guarantor to pay the amount guaranteed, when the REP has a written agreement, signed by the guarantor, that allows for disconnection of the guarantor's service.

(d) Disconnection without prior notice. Notwithstanding any contrary provision of subsection (b) of this section, any REP may, at any time, authorize disconnection of a customer's electric service without prior notice for any of the following reasons:

(1) Where a known dangerous condition exists for as long as the condition exists. Where reasonable, given the nature of the hazardous condition, the REP, or its agent, shall post a notice of disconnection and the reason for the disconnection at the place of common entry or upon the front door of each affected residential unit as soon as possible after service has been disconnected;

(2) Where service is connected without authority by a person who has not made application for service;

(3) Where service is reconnected without authority after disconnection for nonpayment;

(4) Where there has been tampering with the equipment of the transmission and distribution utility, municipally owned utility, or electric cooperative; or

(5) Where there is evidence of theft of service.

(e) Disconnection prohibited. A REP having disconnection authority under the provisions of subsection (b) of this section shall not authorize a disconnection for nonpayment of a customer's electric service for any of the following reasons:

(1) Delinquency in payment for electric service by a previous occupant of the premises;

(2) Failure to pay for any charge that is not for electric service regulated by the commission, including competitive energy service, merchandise, or optional services;

(3) Failure to pay for a different type or class of electric service unless charges for such service were included on that account's bill at the time service was initiated;

(4) Failure to pay charges resulting from an underbilling, except theft of service, more than six months prior to the current billing;

(5) Failure to pay disputed charges, except for the amount under dispute, until a determination as to the accuracy of the charges has been made by the REP or the commission, and the customer has been notified of this determination;

(6) Failure to pay charges arising from an underbilling due to any faulty metering, unless the meter has been tampered with or unless such underbilling charges are due under §25.126 of this title (relating to Meter Tampering); or

(7) Failure to pay an estimated bill other than a bill rendered pursuant to an approved meter-reading plan, unless the REP is unable to obtain the meter reading due to circumstances beyond its control.

(f) Disconnection on holidays or weekends. Unless a dangerous condition exists or the customer requests disconnection, a REP having disconnection authority under the provisions of subsection (b) of this section shall not request disconnection of a customer's electric service for nonpayment on a holiday or weekend, or the day immediately preceding a holiday or weekend, unless the REP's personnel are available on those days to take payments and request reconnection of service and personnel of the transmission and distribution utility, municipally owned utility, or electric cooperative are available to reconnect service.

(g) Disconnection due to abandonment by the POLR. A POLR shall not abandon a customer or a service area without written notice to its customers and approval from the commission, in accordance with §25.43 of this title (relating to Provider of Last Resort (POLR)).

(h) Disconnection of ill and disabled. A REP having disconnection authority under the provisions of subsection (b) of this section shall not authorize a disconnection for nonpayment of electric service at a permanent, individually metered dwelling unit of a delinquent customer when that customer establishes that disconnection of service will cause some person residing at that residence to become seriously ill or more seriously ill.

(1) Each time a customer seeks to avoid disconnection of service under this subsection, the customer shall accomplish all of the following by the stated date of disconnection:

(A) Have the person's attending physician (for purposes of this subsection, the "physician" shall mean any public health official, including medical doctors, doctors of osteopathy, nurse practitioners, registered nurses, and any other similar public health official) call or contact the REP by the stated date of disconnection;

(B) Have the person's attending physician submit a written statement to the REP; and

(C) Enter into a deferred payment plan.

(2) The prohibition against service disconnection provided by this subsection shall last 63 days from the issuance of the bill for electric service or a shorter period agreed upon by the REP and the customer or physician.

(i) Disconnection of energy assistance clients. A REP having disconnection authority under the provisions of subsection (b) of this section shall not authorize a disconnection for nonpayment of electric service to a delinquent residential customer for a billing period in which the REP receives a pledge, letter of intent, purchase order, or other notification that the energy assistance provider is forwarding sufficient payment to continue service.

(j) Disconnection during extreme weather. A REP having disconnection authority under the provisions of subsection (b) of this section shall not authorize a disconnect for nonpayment of electric service for any customer in a county in which an extreme weather emergency occurs. A REP shall offer residential customers a deferred payment plan that complies with the requirements of §25.480 of this title (relating to Bill Payment and Adjustments) for bills that become due during the weather emergency. The term "extreme weather emergency" shall mean a day when:

(1) the previous day's highest temperature did not exceed 32 degrees Fahrenheit, and the temperature is predicted to remain at or below that level for the next 24 hours anywhere in the county, according to the nearest National Weather Service (NWS) reports; or

(2) the NWS issues a heat advisory for a county, or when such advisory has been issued on any one of the preceding two calendar days in a county.

(k) Disconnection of master-metered apartments. When a bill for electric service is delinquent for a master-metered apartment complex:

(1) The REP having disconnection authority under the provisions of subsection (b) of this section shall send a notice to the customer as required by subsection (l) of this section. At the time such notice is issued, the REP, or its agents, shall also inform the customer that notice of possible disconnection will be provided to the tenants of the apartment complex in six days if payment is not made before that time.

(2) At least six days after providing notice to the customer and at least four days before disconnecting, the REP shall post a minimum of five notices in conspicuous areas in the corridors or other public places of the apartment complex. Language in the notice shall be in large type and shall read: "Notice to residents of (name and address of apartment complex): Electric service to this apartment complex is scheduled for disconnection on (date), because (reason for disconnection)."

(l) Disconnection notices. A disconnection notice for nonpayment shall:

(1) not be issued before the first day after the bill is due, to enable the REP to determine whether the payment was received by the due date. Payment of the delinquent bill at the REP's authorized payment agency is considered payment to the REP;

(2) be a separate mailing or hand delivered notice with a stated date of disconnection with the words "disconnection notice" or similar language prominently displayed;

(3) have a disconnection date that is not a holiday or weekend day, and is not less than ten days after the notice is issued;

(4) include a statement notifying the customer that if the customer needs assistance paying the bill by the due date, or is ill and unable to pay the bill, the customer may be able to make some alternate payment arrangement, establish a deferred payment plan, or possibly secure payment assistance. The notice shall also advise the customer to contact the provider for more information.

(m) Contents of disconnection notice. Any disconnection notice shall include the following information:

(1) The reason for disconnection;

(2) The actions, if any, that the customer may take to avoid disconnection of service;

(3) The amount of all fees or charges which will be assessed against the customer as a result of the default;

(4) The amount overdue;

(5) A toll-free telephone number that the customer can use to contact the REP to discuss the notice of disconnection or to file a complaint with the REP, and the following statement: "If you are not satisfied with our response to your inquiry or complaint, you may file a complaint by calling or writing the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas, 78711-3326; Telephone: (512) 936-7120 or toll-free in Texas at (888) 782-8477. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. Complaints may also be filed electronically at www.puc.state.tx.us/ocp/complaints/complain.cfm;"

(6) A statement that informs the customer of the right to obtain services from another licensed REP, and that information about other REPs can be obtained from the commission;

(7) If a deposit is being held by the REP on behalf of the customer, a statement that the deposit will be applied against the final bill (if applicable) and the remaining deposit will be either returned to the customer or transferred to the new REP, at the customer's designation;

(8) The availability of deferred payment or other billing arrangements, if any, from the REP, and the availability of any state or federal energy assistance programs and information on how to get further information about those programs; and

(9) A description of the activities that the REP will use to collect payment, including the use of debt collection agencies, small claims court and other legal remedies allowed by law, if the customer does not pay or make acceptable payment arrangements with the REP.

(n) Reconnection of service. Upon a customer's satisfactory correction of reasons for disconnection, the REP shall notify the transmission and distribution utility, municipally owned utility, or electric cooperative, within one day, to reconnect the customer's electric service and shall reinstate the 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.

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Rules Coordinator
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PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 69. REGULATION OF CERTAIN TRANSPORTATION SERVICE PROVIDERS

16 TAC §69.80

The Texas Department of Licensing and Regulation ("Department") adopts an amendment to §69.80 concerning the fees for the Regulation of Certain Transportation Service Providers program as published in the June 28, 2002 issue of the *Texas Register* (27 TexReg 5664), without changes, and will not be republished.

The amendment decreases the application processing and renewal fee for a Certificate of Registration as a Transportation Service Provider or Freight Forwarder from $320 to $200 for each application.

The Department drafted and distributed the proposed amendment to persons internal and external to the agency. No comments were received regarding the proposed amendment.

The Department is required by the Texas Occupations Code, Chapter 51, §51.202 to set fees in amounts reasonable and necessary to cover the costs of administering programs, which include the Regulation of Certain Transportation Service Providers program. The fees currently in place are above the amounts needed to cover program costs in current and future periods. The decrease would not adversely affect the administration or enforcement of the Regulation of Certain Transportation Service Providers program.

The amendment is adopted under Texas Occupations Code, Chapter 51, §51.202 which authorizes the Texas Commission of Licensing and Regulation to set fees in amounts reasonable and necessary to cover the costs of administering the programs and activities under its jurisdiction, which includes the Regulation of Certain Transportation Service Providers program. The statutory provisions affected by the adoption are those set forth in Texas Civil Statutes, Article 6675(e) and Texas Occupations Code, Chapter 51. No other statutes, articles, or codes are affected by the 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 26, 2002.

TRD-200205627
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: September 15, 2002
Proposal publication date: June 28, 2002
For further information, please call: (512) 463-7348

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CHAPTER 72. STAFF LEASING SERVICES

16 TAC §72.81, §72.83

The Texas Department of Licensing and Regulation ("Department") adopts amendments to §72.81 and §72.83 concerning the fees for the Staff Leasing Services program as published in the June 28, 2002 issue of the *Texas Register* (27 TexReg 5665), without changes, and will not be republished.

The amendments decrease the fees in the tiered structure for the two year license and two year renewal licensing fees, decrease the limited staff leasing service license fee, decrease the fee for a duplicate license or name change, and delete the fee for adding more than one trademark to a license.

The Department drafted and distributed the proposed rules to persons internal and external to the agency. No comments were received regarding the proposed amendments.

The Department is required by the Texas Occupations Code, Chapter 51, §51.202 to set fees in amounts reasonable and necessary to cover the costs of administering programs, which include the Staff Leasing Services program. The fees currently in place are above the amounts needed to cover program costs in current and future periods. The decrease would not adversely affect the administration or enforcement of the Staff Leasing Services program.

The amendment is adopted under Texas Occupations Code, Chapter 51, §51.202 which authorizes the Texas Commission of Licensing and Regulation to set fees in amounts reasonable and necessary to cover the costs of administering the programs and activities under its jurisdiction, which includes the Staff Leasing Services program. The statutory provisions affected by the adoption are those set forth in the Texas Labor Code, Chapter 91 and Texas Occupations Code, Chapter 51. No other statutes, articles, or codes are affected by the 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 26, 2002.

TRD-200205626
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: September 15, 2002
Proposal publication date: June 28, 2002
For further information, please call: (512) 463-7348

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TITLE 22. EXAMINING BOARDS

PART 8. TEXAS APPRAISER LICENSING AND CERTIFICATION BOARD

CHAPTER 153. RULES RELATING TO PROVISIONS OF THE TEXAS APPRAISER LICENSING AND CERTIFICATION ACT

22 TAC §153.5

The Texas Appraiser Licensing and Certification Board adopts amendments to §153.5, Fees, without changes to the proposed text as published in the June 7, 2002, issue of the *Texas Register* (27 Tex Reg 4908). The text will not be republished.

These adopted rules add §153.5(a)(11) which provides for an additional $10 renewal fee for general certified and residential certified appraisers in order to comply with on-line renewal provisions as mandated by SB-187 and SB-645, 77th Legislature, 2001. The additional $10 fee is required of all certified general and certified residential appraisers whether or not they renew on-line.

Written and oral comments were received from the Foundation Appraisers Coalition of Texas (FACT). They had questions concerning the amount and use of the fee, policies and procedures for implementation of an on-line renewal process, and additional rule changes which may be required. The board addressed these issues at the public meeting.

The amendments are adopted under the Powers and Duties of the Board, Texas Appraiser Licensing and Certification Act, §5 (Texas Civil Statutes, Article 6573a.2), which provides the board with authority to adopt rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 21, 2002.

TRD-200205477
Renil C. Linér
Commissioner
Texas Appraiser Licensing and Certification Board
Effective date: November 1, 2002
Proposal publication date: June 7, 2002
For further information, please call: (512) 465-3950

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PART 12. BOARD OF VOCATIONAL NURSE EXAMINERS

CHAPTER 233. EDUCATION

SUBCHAPTER A. DEFINITIONS

22 TAC §233.1

The Board of Vocational Nurse Examiners adopts the amendment of §233.1, relating to Definitions without changes to the proposed text as published in the July 19, 2002, issue of the *Texas Register* (27 TexReg 6484).

The adopted amendment will address terminology revisions due to the adoption of the new *Differentiated Entry Level Competencies for Graduates of Texas Nurses*, February 2002.

No comments were received relative to the adoption of this amendment.

The amendment is adopted under Chapter 302, Texas Occupations Code, Subchapter D, §302.151(b), which provides the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purpose of the law.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 20, 2002.

TRD-200205450
Terrie Hairston, RN, CHE
Executive Director
Board of Vocational Nurse Examiners
Effective date: September 9, 2002
Proposal publication date: July 19, 2002
For further information, please call: (512) 305-7653

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SUBCHAPTER D. VOCATIONAL NURSING EDUCATION STANDARDS

22 TAC §233.58

The Board of Vocational Nurse Examiners adopts the amendment of §233.58, relating to Vocational Nursing Education Standards without changes to the proposed text as published in the July 19, 2002, issue of the *Texas Register* (27 TexReg 6484).

The adopted amendment addresses terminology revisions due to the adoption of the new *Differentiated Entry Level Competencies for Graduates of Texas Nurses*, February 2002.

No comments were received relative to the adoption of this amendment.

The amendment is adopted under Chapter 302, Texas Occupations Code, Subchapter D, §302.151(b), which provides the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purpose of the law.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 20, 2002.

TRD-200205452
Terrie Hairston, RN, CHE
Executive Director
Board of Vocational Nurse Examiners
Effective date: September 9, 2002
Proposal publication date: July 19, 2002
For further information, please call: (512) 305-7653

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CHAPTER 240. PEER REVIEW AND REPORTING

22 TAC §240.13

The Board of Vocational Nurse Examiners adopts the repeal of 22 TAC §240.13, concerning minimum procedural standards during peer review without changes to the proposal as published in the July 19, 2002, issue of the *Texas Register* (27 TexReg 6485).

This rule will be adopted with new language. The adopted new language will replace the present language for minimum procedural standards during peer review.

No comments were received relative to the adoption of the repeal.

The repeal is adopted under Chapter 302, Texas Occupations Code, Subchapter D, §302.151(b), which provides the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purpose of the law.

No other statute, article or code will be 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 21, 2002.

TRD-200205469
Terrie Hairston, RN, CHE
Executive Director
Board of Vocational Nurse Examiners
Effective date: September 10, 2002
Proposal publication date: July 19, 2002
For further information, please call: (512) 305-7653

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22 TAC §240.13

The Board of Vocational Nurse Examiners adopts the new §240.13, relating to Incident-Based Nursing Peer Review without changes to the proposed text as published in the July 19, 2002, issue of the *Texas Register* (27 TexReg 6485).

The adopted new language will replace the present language minimum procedural standards during peer review.

No comments were received relative to the adoption of this rule.

The new section is adopted under Chapter 302, Texas Occupations Code, Subchapter D, §302.151(b), which provides the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purpose of the law.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 20, 2002.

TRD-200205449
Terrie Hairston, RN, CHE
Executive Director
Board of Vocational Nurse Examiners
Effective date: September 10, 2002
Proposal publication date: July 19, 2002
For further information, please call: (512) 305-7653

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PART 21. TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

CHAPTER 463. APPLICATIONS AND EXAMINATIONS

22 TAC §463.14

The Texas State Board of Examiners of Psychologists adopts amendments to §463.14, concerning Written Examinations, without changes to the proposed text as published in the July 5, 2002, issue of the *Texas Register* (27 TexReg 5941).

The amendments are being adopted in order to set a passing rate on the Jurisprudence Examination that is appropriate to application for licensure as a psychological associate.

The adopted rule will make the rules easier for the licensees and public to follow and understand.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

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 23, 2002.

TRD-200205614
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: September 12, 2002
Proposal publication date: July 5, 2002
For further information, please call: (512) 305-7700

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CHAPTER 465. RULES OF PRACTICE

22 TAC §465.1

The Texas State Board of Examiners of Psychologists adopts amendments to §465.1, concerning Definitions, without changes to the proposed text as published in the July 5, 2002, issue of the *Texas Register* (27 TexReg 5942).

The amendments are being adopted in order to clarify the correct term for forensic services and to provide clarifying language for other definitions. In addition, a superfluous definition is removed, insofar as it is contained in another Board rule.

The adopted rule will make the rules easier for the licensees and public to follow and understand.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

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 23, 2002.

TRD-200205615
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: September 12, 2002
Proposal publication date: July 5, 2002
For further information, please call: (512) 305-7700

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22 TAC §465.9

The Texas State Board of Examiners of Psychologists adopts amendments to §465.9, concerning Competency, without changes to the proposed text as published in the July 5, 2002, issue of the *Texas Register* (27 TexReg 5942).

The amendments are being adopted in order to clarify the duties of licensees when providing emergency psychological services.

The adopted rule will make the rules easier for the licensees and public to follow and understand.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

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 23, 2002.

TRD-200205616
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: September 12, 2002
Proposal publication date: July 5, 2002
For further information, please call: (512) 305-7700

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PART 39. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS

CHAPTER 850. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS

The Texas Board of Professional Geoscientists ("Board") adopts new rules §§850.1, 850.10, 850.60, 850.61, 850.62, 850.63, 850.65, 850.80, 850.81, and 850.82 regarding the implementation of the Texas Geoscience Practice Act as published in the June 28, 2002 issue of the *Texas Register* (27 TexReg 5690), without changes, and will not be republished.

These rules are necessary to implement Senate Bill 405, Acts of the 77th Texas Legislature, and to establish procedures and requirements necessary for the functioning of the Texas Board of Professional Geoscientists.

The Department drafted and distributed the proposed rules to persons internal and external to the agency. No comments were received regarding the proposed new rules. The new rules will provide the mechanisms to administer and enforce the mandate of Senate Bill 405.

SUBCHAPTER A. AUTHORITY AND RESPONSIBILITIES

22 TAC §850.1, §850.10

The new rules are adopted under Senate Bill 405, 77th Texas Legislature, which authorizes the Board to adopt and enforce rules consistent with the Act and necessary for the performance of its duties.

The statute affected by the adoption is Senate Bill 405, 77th Texas Legislature, and the code sections in which it may be codified. No other statutes, articles, or codes are affected by the 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 26, 2002.

TRD-200205623
William H. Kuntz, Jr.
Acting Executive Director
Texas Board of Professional Geoscientists
Effective date: September 15, 2002
Proposal publication date: June 28, 2002
For further information, please call: (512) 463-7348

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SUBCHAPTER B. ORGANIZATION

22 TAC §§850.60 - 850.63, 850.65

The new rules are adopted under Senate Bill 405, 77th Texas Legislature, which authorizes the Board to adopt and enforce rules consistent with the Act and necessary for the performance of its duties.

The statute affected by the adoption is Senate Bill 405, 77th Texas Legislature, and the code sections in which it may be codified. No other statutes, articles, or codes are affected by the proposal. Subchapter B. Organization.

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 26, 2002.

TRD-200205624
William H. Kuntz, Jr.
Acting Executive Director
Texas Board of Professional Geoscientists
Effective date: September 15, 2002
Proposal publication date: June 28, 2002
For further information, please call: (512) 463-7348

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SUBCHAPTER C. FEES

22 TAC §§850.80 - 850.82

The new rules are adopted under Senate Bill 405, 77th Texas Legislature, which authorizes the Board to adopt and enforce rules consistent with the Act and necessary for the performance of its duties.

The statute affected by the adoption is Senate Bill 405, 77th Texas Legislature, and the code sections in which it may be codified. No other statutes, articles, or codes are affected by the proposal.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 26, 2002.

TRD-200205625
William H. Kuntz, Jr.
Acting Executive Director
Texas Board of Professional Geoscientists
Effective date: September 15, 2002
Proposal publication date: June 28, 2002
For further information, please call: (512) 463-7348

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 25. ENVIRONMENTAL TESTING LABORATORY ACCREDITATION AND CERTIFICATION

The Texas Commission on Environmental Quality (commission) adopts new Chapter 25, Environmental Testing Laboratory Accreditation and Certification, Subchapter A, General Provisions, §§25.1, 25.2, 25.4, 25.6, and 25.8; Subchapter B, Environmental Testing Laboratory Accreditation, §§25.9, 25.10, 25.12, 25.14, 25.16, 25.18, 25.20, 25.22, 25.24, 25.26, 25.30, 25.32, 25.34, 25.36, and 25.38; and Subchapter C, Environmental Testing Laboratory Certification, §§25.50, 25.52, 25.54, 25.56, 25.58, 25.60, 25.62, 25.64, 25.66, 25.68, 25.70, 25.74, 25.76, and 25.78. Sections 25.4, 25.6, 25.14, 25.20, and 25.56 are adopted *with changes* to the proposed text as published in the May 10, 2002 issue of the *Texas Register* (27 TexReg 3916). Sections 25.1, 25.2, 25.8 - 25.10, 25.12, 25.16, 25.18, 25.22, 25.24, 25.26, 25.30, 25.32, 25.34, 25.36, 25.38, 25.50, 25.52, 25.54, 25.58, 25.60, 25.62, 25.64, 25.66, 25.68, 25.70, 25.74, 25.76, and 25.78 are adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Commercial, governmental, industrial, and other environmental testing laboratories located inside and outside of Texas analyze thousands of environmental samples each year. The results of these analyses are used by the commission to make permitting, compliance, enforcement, cleanup, and other decisions.

The environmental testing laboratory accreditation program was transferred from the Texas Department of Health (TDH) to the commission as part of House Bill (HB) 2912, 77th Legislature, 2001. Oversight of environmental testing laboratories has been limited to the TDH's formal certification of laboratories analyzing drinking water samples, inspections by the executive director that may have occurred as part of a larger permit compliance inspection, and inspections performed as part of the commission's limited laboratory inspection program. TDH had also developed rules for a voluntary laboratory accreditation program for laboratories analyzing wastewater samples, but had not yet implemented the program.

The Sunset Advisory Commission noted the commission's reliance on environmental data in its decision-making, the limited oversight of environmental laboratories producing the data, and other issues in its staff report concerning the commission. Highlighted as Issue 5, the report included the following key findings:

"1) Oversight of environmental labs providing data to the State is inconsistent and divided between agencies; 2) Unregulated, unaccredited labs are more likely to produce inaccurate data for agency decision making, resulting in increased risk to public health and the environment, and increased agency costs; and 3) Uniform standards provided by a national accreditation program would allow Texas labs to effectively compete with accredited labs in other states." (Sunset Advisory Commission Staff Report, Texas Natural Resource Conservation Commission, 2000, Page 49.)

The report went on to make several recommendations, including that: 1) the commission be required to implement a voluntary environmental laboratory accreditation program consistent with national standards; 2) the Drinking Water Laboratory Certification Program be transferred from TDH to the commission; 3) the commission be required to accept only data or analyses from accredited laboratories for all decisions affecting permitting, compliance, enforcement, and corrective action; and 4) on-site or in-house labs be exempt from accreditation. With these recommendations, the Sunset Advisory Commission stated in its report that, "This should increase the confidence in agency decision making, provide greater assurance of protecting public health, and minimize unnecessary costs for the agency." (Sunset Advisory Commission Staff Report, Texas Natural Resource Conservation Commission, 2000, Page 54.)

In 2001, the 77th Texas Legislature passed HB 2912, §1.12, which amended Texas Water Code (TWC) by adding new §5.127. This section requires that all data used by the commission for commission decisions regarding permits or other authorizations, compliance matters, enforcement actions, or corrective actions be from an accredited environmental testing laboratory, unless the environmental testing laboratory is: an in-house or on-site environmental testing laboratory periodically inspected by the commission; accredited under federal law; or providing data and analysis for emergency response activities and required data and analysis are not available from an accredited environmental testing laboratory. New §5.127 also allows the commission to require that data used in other commission decisions be obtained from an accredited environmental testing laboratory and requires the commission to periodically inspect unaccredited in-house or on-site environmental testing laboratories providing data for commission decisions.

The legislature also passed HB 2912, Article 6, which transferred Texas Health and Safety Code (THSC), Chapter 421, to TWC, Chapter 5, redesignating Chapter 421 as Subchapter R, §§5.801 - 5.807 and amending it to revise the definitions and numbering. Subchapter R transferred authority for environmental laboratory accreditation and drinking water certification from TDH to the commission and requires that the state's environmental testing laboratory accreditation program be consistent with the National Environmental Laboratory Accreditation Conference (NELAC). Subchapter R also created a special account for accreditation and certification fees.

TWC, §5.802, requires that the environmental testing laboratory accreditation program be consistent with NELAC standards. The commission is adopting by reference the NELAC standards approved by NELAC in May 2001. This document is available on-line at *www.epa.gov/ttnnela1/2001standards.html* or may be viewed in the library at the commission's central office at 12100 Park 35 Circle in Austin. Accredited environmental testing laboratories as well as those seeking accreditation must comply with all NELAC standards; however, for clarity and usability the commission has included only portions of the standards in the adopted rules.

Additionally, HB 2912, §18.02 transferred the Safe Drinking Water Certification Program from the TDH to the commission, effective September 1, 2001. The commission is currently operating the drinking water laboratory certification program according to the rules adopted by the TDH.

Finally, HB 2912, §18.03 transferred the Environmental Testing Laboratory Certification Program, including existing authority, accreditation, appropriations, rules, equipment, and personnel involved in lab accreditation from TDH to the commission, effective September 1, 2001. As required by HB 2912, §18.03(d), accreditation requirements relating to data provided for commission decisions take effect three years after the commission publishes notice in the *Texas Register* that the agency's accreditation program has met NELAC standards. Until that date, environmental testing laboratories that analyze samples for compliance with the Safe Drinking Water Act (SDWA) must continue to be certified according to Chapter 25. After that date, laboratories that analyze samples for compliance with the SDWA must be accredited according to Chapter 25, and the executive director, as authorized by the commission's rules, will no longer grant certifications. To ease the transition from the environmental testing laboratory certification program to the environmental testing laboratory accreditation program, Subchapter C is as similar to Subchapter B as possible.

The adopted rules are necessary for the implementation and administration of HB 2912, §§1.12, 6.01, 18.02, and 18.03. Adopted new Chapter 25 establishes an accreditation program for environmental testing laboratories providing data for commission decisions for all media and continues the existing environmental laboratory certification program for laboratories providing data to the commission for decisions relating to compliance with the SDWA. The adopted accreditation and certification programs include analyses and tests performed by environmental testing laboratories, but do not include field measurements, source air emission measurements, or the use of continuous analysis devices outside of a laboratory. The commission will monitor NELAC's development of field activity standards and may include accreditation standards for field measurements at a later date.

SECTION BY SECTION DISCUSSION

The title of this chapter is Environmental Testing Laboratory Accreditation and Certification.

Subchapter A, General Provisions

Adopted new §25.1, Purpose, describes the purpose of Chapter 25 and states that while accreditation of an environmental laboratory is voluntary, the commission will only accept data for a commission decision from an accredited laboratory, except as provided in new §25.6. This section also states the agency's accreditation program will become effective three years after notice is published that the program has met NELAC requirements. During the three-year period, laboratories that supply data for commission decisions relating to the SDWA must be certified. After the three-year period, all data and analyses referenced in new §25.4(b) and (c) must be provided by accredited laboratories.

Adopted new §25.2, Definitions, defines words and terms as used in this chapter.

Accreditation is defined as an authorization granted by the executive director to an environmental testing laboratory that meets requirements of Subchapters A and B. The definition clarifies one of the two authorizations granted by the executive director according to Chapter 25.

Accrediting authority is defined as an agency recognized by the National Environmental Laboratory Accreditation Program (NELAP) that grants accreditation on behalf of a state, territory, or federal agency. The definition, with changes to simplify the language of the definition, is from NELAC, §1A, Glossary, and is incorporated in this rule.

Analyte is defined as a constituent for which an environmental sample is analyzed. The definition clarifies one element of the fields of accreditation and fields of certification.

Certification is defined as an authorization granted by the executive director to an environmental testing laboratory which analyzes drinking water and meets requirements of Subchapters A and C. The definition clarifies one of the two authorizations granted by the executive director according to Chapter 25.

Environmental testing laboratory is defined as a scientific laboratory that performs analyses to determine the chemical, molecular, or pathogenic components of environmental media for regulatory compliance. The definition is from TWC, §5.801, and is incorporated in the rule.

Environmental testing laboratory assessment is defined as the process used by an accrediting or certifying authority to measure the performance, effectiveness, and conformity of an environmental testing laboratory to the accreditation or certification standards and this chapter. An environmental testing laboratory assessment may include a physical inspection of a laboratory and its operations. The definition clarifies the components of an environmental testing laboratory inspection.

Fields of accreditation is defined as the matrix, technology, method, and analyte or analyte group for which an environmental testing laboratory may be accredited. The definition clarifies the types of accreditations the executive director will offer.

Fields of certification is defined as the methods and analytes for which an environmental testing laboratory may be certified. The methods and analytes are used in a commission decision relating to compliance with the SDWA. The definition clarifies the types of certifications the executive director will offer.

In-house environmental testing laboratory is defined as an environmental testing laboratory that provides analytical data to its operator for a commission decision relating to permits or other authorizations issued to the laboratory's operator; compliance matters and enforcement actions taken concerning the laboratory's operator; or corrective actions taken by the laboratory's operator to satisfy statutes, rules, or commission orders. This definition, which clarifies that an in-house environmental testing laboratory is a specific type of environmental testing laboratory, implements TWC, §5.127(b).

Laboratory personnel is defined as individuals who manage, perform, maintain, or verify the work or the quality of the work at the environmental testing laboratory. The definition clarifies who must perform certain activities prescribed in Chapter 25.

Matrix is defined as sample type, including drinking water; nonpotable water; solid and chemical materials; air and emissions; and biological tissue. The definition clarifies one element of the fields of accreditation.

Mobile environmental testing laboratory is defined as an environmental testing laboratory capable of being moved from one site to another site. The definition clarifies a type of laboratory that may be accredited according to Chapter 25.

National Environmental Laboratory Accreditation Conference (NELAC) is defined as the voluntary organization of state, territorial, federal environmental officials, and interest groups whose primary purpose is to establish mutually acceptable national standards for accrediting environmental testing laboratories. The definition, with changes to simplify the language of the definition, is from NELAC, §1A, Glossary, and is incorporated in this rule.

National Environmental Laboratory Accreditation Program (NELAP) is defined as the environmental testing laboratory accreditation program including NELAC. The definition, with changes to simplify the language of the definition, is from NELAC, §1A, Glossary, and is incorporated in this rule.

On-site environmental testing laboratory is defined as an in-house environmental testing laboratory that is located at a regulated entity. This definition, which clarifies a type of environmental testing laboratory, implements TWC, §5.127(b).

Operator is defined as an individual authorized to act on behalf of the environmental testing laboratory. This definition clarifies who is responsible for acting on behalf of an environmental testing laboratory.

Primary accreditation is defined as accreditation of an environmental testing laboratory according to NELAC standards and the requirements of this chapter. This definition distinguishes a primary accreditation from a secondary accreditation.

Proficiency test sample is defined as a sample, the composition of which is unknown by an environmental testing laboratory or the individual performing the analysis. The sample is used to evaluate whether the laboratory and analyst can produce results within specified acceptance criteria. This definition, with changes to simplify the language of the definition, is from NELAC, §1A, Glossary, and is incorporated into this rule.

Quality system is defined as a structured and documented management system describing the policies, objectives, principles, organizational authority, responsibilities, accountability, and implementation plan of an organization for ensuring the quality of its work processes, products, and services. The quality system provides the framework for planning, implementing, and assessing work performed by the environmental testing laboratory for quality assurance and quality control. This definition is from NELAC, §1A, Glossary, and is incorporated in this rule.

Secondary accreditation is defined as accreditation granted by the executive director to an environmental testing laboratory that has been granted primary accreditation by another NELAP accrediting authority. This definition distinguishes secondary accreditation from primary accreditation.

In adopted new §25.4, Applicability, subsections (a) - (d) allow an environmental testing laboratory to apply for accreditation after the commission publishes notice in the *Texas Register* that the accreditation program has met NELAC standards. These subsections require that an environmental testing laboratory that prepares and provides data used by the commission to make a decision relating to a permit, authorization, compliance action, enforcement action, corrective action, characterization of an environmental process or condition, or an assessment of an environmental process or condition become accredited no later than

three years after the commission publishes notice in the *Texas Register* that the accreditation program has met NELAC standards except as provided in new §25.6. The commission added the words "prepares and" to §25.4(d) to clarify that this subsection applies to accreditation requirements to environmental testing laboratory results prepared and submitted on or after the third anniversary of the date the commission publishes notice that its accreditation program has met NELAC standards. The revision will allow the commission to accept data prepared before the third anniversary but submitted on or after that date. Further, these subsections require that an in-house environmental testing laboratory be accredited if it provides analytical data to a third party and the data are used by the commission to make a decision relating to a permit, authorization, compliance action, enforcement action, corrective action, characterization of an environmental process or condition, or an assessment of an environmental process or condition. These subsections implement TWC, §5.127(a) - (c) and §5.802 and HB 2912, §18.03.

Subsection (e) requires an environmental testing laboratory that provides data relating to the SDWA be accredited or certified by the agency or certified by the United States Environmental Protection Agency (EPA) until the commission publishes notice in the *Texas Register* that the accreditation program has met NELAC standards. This subsection continues existing requirements contained in 30 TAC Chapter 290.

Subsection (f) provides that three years after the commission publishes notice in the *Texas Register* that the accreditation program has met NELAC standards, the agency's drinking water certification program will be eliminated and all environmental testing laboratories that provide data relating to the SDWA will have to be accredited by the agency or certified by EPA. The commission has determined that once the environmental testing laboratory accreditation program is implemented it will be easier and more cost-effective to have only one environmental testing laboratory program. An environmental testing laboratory may obtain accreditation for each field of certification it has under the environmental testing laboratory certification program. This subsection implements HB 2912, §18.03(d).

Adopted new §25.6, Conditions Under Which the Commission May Accept Analytical Data, states the commission may accept data from: 1) an unaccredited on-site or in-house environmental testing laboratory that is inspected at least every three years by the executive director; and prepares the data for a permit, registration, or other authorization, and the permit, registration, or other authorization issued by the commission to the operator of the laboratory; 2) an environmental testing laboratory accredited under federal law; 3) a laboratory that provides analytical data necessary for emergency response activities and the required analytical data are not otherwise available from a laboratory accredited according to Chapter 25; or 4) a laboratory that provides a type of analytical data for which the agency does not offer accreditation. The commission revised §25.6(1) to clarify that it applies to data provided for any matter under the commission's jurisdiction relating to permits or other authorizations, compliance matters, enforcement actions, or corrective actions. The rules do not authorize unaccredited in-house environmental testing laboratories to provide data to the commission for use in commission decisions if the data are not related to the environmental testing laboratory operator's permit, authorization, compliance matters, enforcement actions, or corrective actions. This section implements TWC, §5.127.

Adopted new §25.8, Contracting, provides the executive director with the authority to contract for services related to Chapter 25 and allows the executive director to authorize contractors to collect fees for these services. The commission determined this section is necessary to efficiently implement this chapter.

Subchapter B, Environmental Testing Laboratory Accreditation

Adopted new §25.9, Standards for Environmental Testing Laboratory Accreditation, provides that accreditation will be based on the environmental testing laboratory's conformance to NELAC standards and the requirements of this chapter. This section implements TWC, §5.802.

In adopted new §25.10, Fields of Accreditation, subsection (a) requires the executive director to identify fields of accreditation offered by the agency and make a list of this information available to the public through the commission's website and Compliance Support Division and Agency Communications. The website address is *http://www.tnrcc.state.tx.us/enforcement/csd/qa*. The phone number for the Compliance Support Division is (512) 239-6300. The phone number for Agency Communications is (512) 239- 0028. This information will be available after the commission receives approval as a NELAC accrediting authority. This subsection follows NELAC's structure of accrediting an environmental testing laboratory by matrix, technology, method, and analyte or analyte group, and thus is included in this rule to make this rule consistent with NELAC, which is required by TWC, §5.802. Additionally, this section informs the public and environmental testing laboratories where a current list of the fields of accreditation available to environmental testing laboratories can be found. Subsection (b) allows the executive director to change fields of accreditation offered by the agency after 30 days' notice on the agency website. This provision allows the executive director to modify the fields of accreditation as technology changes and as the law changes without requiring a rule change. It would take substantially longer than 30 days to amend the rule each time a new field of accreditation was offered, or the analyte list changed on one of the multi-analyte lists, and it is important that the executive director be able to make changes to the fields of accreditation quickly to account for changes in analytical capabilities, as well as changes in the law. Additionally, this section provides a way to inform environmental testing laboratories of changes to fields of accreditation in a timely manner.

In adopted new §25.12, Initial Application for Accreditation, subsection (a) requires that an application for accreditation be filed using a form provided by the executive director. The adopted rule also requires an applicant to submit any required or requested documents and records and the fee provided in new §25.30 with the application. This subsection implements TWC, §5.803. Subsection (b) allows an operator of an environmental laboratory to request that noncontiguous facilities and mobile laboratories be accredited as a single entity if they operate under the same ownership, day-to-day management, day-to-day technical direction, and quality system, including document management, records management, and test reporting. The commission determined it is appropriate to accredit noncontiguous facilities and mobile laboratories as a single entity if the environmental testing laboratory meets the listed requirements, because NELAC's goal is to promote uniform standards of quality. This objective will be met by allowing environmental testing laboratories with more than one location, whether fixed or mobile, to obtain a single accreditation. Subsection (c) allows an operator of an environmental laboratory to submit an application for accreditation or an application to increase the laboratory's fields of accreditation at

any time. The commission anticipates that environmental testing laboratories will continuously evaluate the fields of accreditation that they want to pursue. The executive director determined it is appropriate to allow environmental testing laboratories to modify their fields of accreditation at any time so that the environmental testing laboratories can pursue various types of analytical work.

Adopted new §25.14, Term of Accreditation, establishes a one-year term of accreditation. Additionally, this section authorizes the executive director to grant interim accreditation for up to one year in order to schedule an environmental testing laboratory assessment. The commission revised §25.14(b) by replacing the word "when" with the word "that" to clarify the intent of this subsection. This section implements NELAC, §4.2, Period of Accreditation, and §4.5.1, Interim Accreditation.

In adopted new §25.16, Renewal Application for Accreditation, subsection (a) provides that the executive director must receive an environmental testing laboratory's renewal application and applicable fees no later than the expiration date of a laboratory's accreditation. The commission has determined that it is important to provide environmental testing laboratories with a definite deadline for renewal applications. Subsection (b) provides that, if a renewal application is received after the expiration date of the laboratory's accreditation, the laboratory must apply for and meet all requirements for a new accreditation, including an environmental testing laboratory assessment. The commission has determined that it is important to provide environmental testing laboratories with a definite deadline for renewal applications. Finally, subsection (c) requires that modifications made during the term of an accreditation to increase a laboratory's fields of accreditation be renewed on the accreditation renewal date, regardless of the date of the modifications. The commission has determined that it is appropriate to have all of an environmental testing laboratory's fields of accreditation expire on the same date because it will simplify the recordkeeping requirements for both the environmental testing laboratory and the executive director, thus, reducing the risk that an environmental testing laboratory will fail to renew a specific field of accreditation in a timely manner.

In adopted new §25.18, Environmental Testing Laboratory Assessments, subsection (a) requires an environmental testing laboratory assessment before the executive director grants an environmental testing laboratory's initial accreditation and at least every two years after accreditation is granted. This provision implements NELAC, §3.3.1, Frequency and Types of On-Site Assessments. Subsection (b) authorizes the executive director to perform either announced or unannounced assessments. This provision implements NELAC, §3.3.4, Announced and Unannounced Visits.

In adopted new §25.20, Proficiency Test Sample Analyses, subsection (a) requires environmental testing laboratory personnel to periodically analyze proficiency test samples before accreditation is granted. For initial accreditation, the adopted rule requires the operator of an environmental testing laboratory to ensure that two proficiency test samples are successfully analyzed, if available, according to NELAC standards. This section implements NELAC, §2.4.1, Required Level of Participation; §2.7.2, Initial or Continuing PT Studies; and §4.14, Proficiency Test Samples. For environmental testing laboratories seeking ongoing accreditation, subsection (b) requires the operator of an environmental testing laboratory to ensure that two proficiency test samples per year for each field of accreditation are analyzed, if available, according to NELAC standards. If a laboratory does not meet requirements for ongoing analyses of proficiency test samples, the adopted rule allows a laboratory to participate in supplemental proficiency test studies according to NELAC standards. This subsection implements NELAC, §2.4.1, Required Level of Participation; §2.7.3.1, Supplemental PT Studies for Demonstrating Corrective Action; §2.7.2, Initial or Continuing PT Studies; and §2.7.3, Supplemental PT Studies. Subsection (c) would require the executive director to determine a laboratory's accreditation status within 60 days if the laboratory does not successfully analyze proficiency test samples as required. This subsection implements NELAC, §2.7.5, Second Failed Study. In subsections (a) and (b), the commission added the words, "if available" to the rule language to clarify that an environmental testing laboratory is not required to analyze a proficiency test sample for a field of accreditation if a proficiency test sample is not available from an approved proficiency test provider. Finally, subsection (d) requires laboratories to purchase proficiency test samples, if available, from NELAP-designated vendors. This subsection implements NELAC, §2.4.1, Required Levels of Participation and §4.1.4, Proficiency Testing Samples.

In adopted new §25.22, Secondary Accreditation of Out-of-State Environmental Testing Laboratories, subsection (a) requires the executive director to grant or renew the accreditation of an environmental testing laboratory that is located in another state and that is accredited by a NELAP- approved accrediting authority, other than Texas, within 30 days after receiving the laboratory's completed application and fee, if the laboratory is accredited for the requested fields of accreditation. This subsection implements TWC, §5.804. Subsection (b) requires the executive director to notify the laboratory in writing within 30 days of the executive director's decision to grant or deny the accreditation. This subsection implements TWC, §5.804 and NELAC, §1.5.3. The commission has determined that subsection (b) should be included in the rule to specify how much time the executive director has to evaluate an out-of-state environmental testing laboratory's accreditation. This subsection also assures out-of-state laboratories that the executive director will act on their applications in a timely manner.

Adopted new §25.24, Duties and Responsibilities of Accredited Environmental Testing Laboratories, establishes duties and responsibilities of an environmental testing laboratory accepting accreditation. The duties and responsibilities include providing reasonable access to the executive director to the laboratory and its facilities, personnel, documents, records, data, analyses, and operations; using and displaying the accreditation certificate according to the NELAC standards; and operating the laboratory and maintaining the laboratory's accreditation according to NELAC standards and the adopted rules. This section implements TWC, §5.805 and NELAC, §3.5, Assessment Procedures; §4.3, Maintaining Accreditation; §4.6, Awarding of Accreditation; and §4.6.1, Use of NELAC Accreditation by Accredited Laboratories.

Adopted new §25.26, Withdrawal from Accreditation Program, allows an environmental testing laboratory to withdraw from the accreditation program in whole or in part at any time by notifying the executive director in writing. This section implements NELAC, §4.4.4, Voluntary Withdrawal. The NELAC standard requires written notification no later than 30 days before the expiration of an environmental testing laboratory's accreditation. The adopted rule is less restrictive because the commission intends to allow an environmental testing laboratory to withdraw from the accreditation program in whole or in part at any time.

Adopted new §25.30, Accreditation Fees, requires accreditation fees to cover program costs and establishes a new fee structure for the program. Subsection (b) requires an environmental testing laboratory applying for accreditation to pay an annual administrative fee of $500 for primary accreditation and annual category fees. Subsection (c) requires an environmental testing laboratory applying for secondary accreditation to pay an annual administrative fee of $250 and annual category fees. Category fees are based on the types of analyses a laboratory performs for which the environmental testing laboratory is seeking accreditation. Subsections (d) - (h) include 51 categories of analysis, including categories related to drinking water; non-potable water; biologic tissue; solid and chemical materials; and air. Subsection (i) requires the operator of an environmental testing laboratory located in another state and applying for primary accreditation to pay a fee equal to the reasonable travel costs associated with conducting an assessment at the laboratory. Subsection (j) allows fees for accreditation modifications, replacement of accreditation certificates, and reinstatement of a suspended accreditation. All fees will be nonrefundable.

The adopted accreditation fees were developed to produce enough revenue to recover the cost of the accreditation program, as required by TWC, §5.803(b). Annual program costs were estimated using standard employee salary rates and estimates of staffing requirements, training, travel, supply, and other costs. Annual program revenues were calculated using estimates of the number of laboratories that will become accredited and the types of analyses these laboratories will perform.

The total number of laboratories that will become accredited is not known. Staff estimates 200 in-state laboratories will receive accreditation. This number is based on staff's experience inspecting commercial laboratories over the past several years.

The actual fields of accreditation for which these laboratories will seek accreditation is also not known. Therefore, staff estimates the types of analyses and proportion of the estimated 200 laboratories performing these types of analyses. The estimates are also based on staff's experience inspecting commercial laboratories over the past several years.

The adopted fees include categories based on sample matrix and types of analyses. The matrices correspond to the matrices used by NELAC for fields of accreditation. The types of analyses reflect groups of analytical techniques and technology staff have encountered inspecting commercial laboratories over the past several years.

The categories are weighted to reflect their relative complexity, difficulty, time required for environmental testing laboratory inspection, and numbers of analyses. The relative complexity, difficulty, time required for the inspection, and numbers of analyses were based on the agency's regulatory programs and staff's experience inspecting commercial laboratories over the past several years. Each category weight was multiplied by a constant dollar amount to arrive at the annual category fee. The constant dollar amount was assigned to produce enough revenue to recover the cost of the accreditation program, as required by TWC, §5.803(b).

In addition to category fees, the adopted accreditation fees include an annual administrative fee. The administrative fee was assigned to produce, with the category fees, enough revenue to recover the cost of the accreditation program. A lower annual administrative fee was assigned for laboratories seeking secondary accreditation. The lower fee reflects the commission's judgment that secondary accreditation costs should be somewhat lower than costs for awarding primary accreditations, because the executive director's staff will not be required to conduct an environmental testing laboratory assessment.

The adopted accreditation fees include a fee equal to the reasonable travel costs (including transportation, lodging, per diem, and any telephone charges) associated with conducting an assessment at an out-of-state laboratory. The fee ensures the agency will recover out-of-state travel costs that arise from inspections of laboratories located in other states.

The adopted accreditation fees also include fees for adding one or more fields of accreditation; replacing an accreditation certificate; and reinstating a suspended accreditation. These fees were assigned to ensure the agency receives revenue from activities outside of the routine accreditation process.

In adopted new §25.32, Denial of Accreditation Application, subsection (a) allows the executive director to deny an initial or renewal application for insufficiency. An application may be determined to be insufficient if laboratory personnel fail to submit a completed application; fail to submit the required fees; fail to successfully analyze and report proficiency test samples; fail to implement a quality system; fail to document that laboratory personnel meet education, training, and experience requirements; fail to allow entry during normal business hours for an assessment; fail to pass required environmental testing laboratory assessments; fail to submit a report identifying action the environmental testing laboratory will take to correct deficiencies in the assessment report within 30 days of receiving an assessment report; or fail to implement actions to correct the deficiencies identified in the assessment report as identified by the executive director. This subsection provides consistency with other program areas. Subsection (b) allows the commission to deny an applicant's initial or renewal application for accreditation for cause after notice and an opportunity for a hearing if the laboratory personnel misrepresent any fact pertinent to receiving or maintaining accreditation or the laboratory or its operator is indebted to the state for a fee, penalty, or tax imposed by the statute or any other reason which causes the executive director to determine that quality of the data being produced by the laboratory's personnel is unreliable or inaccurate, based on the facts of the case. This subsection provides consistency with other program areas. Finally, subsection (c) requires an environmental testing laboratory to wait at least six months before reapplying for accreditation if the laboratory was unsuccessful in correcting deficiencies and the laboratory's application is denied. If an application is denied for cause, the environmental testing laboratory must wait six months from the date of the commission's final decision to reapply. The purpose of the six-month period is to allow an environmental testing laboratory sufficient time to correct deficiencies and prepare a new application for accreditation. This section implements NELAC, §4.4.1, Denial.

In adopted new §25.34, Suspension of Accreditation, subsection (a) allows the commission to suspend an environmental laboratory's accreditation in whole or in part for up to six months after notice and opportunity for hearing according to 30 TAC Chapter 80. Reasons for suspension include: failure to maintain a quality system; failure to comply with minimum performance and quality assurance standards; failure to maintain records of the laboratory's personnel, operations, data, or analyses; failure to successfully complete required proficiency tests; failure to employ staff that meet required personnel qualifications for education,

training, and experience; and failure to notify the executive director of changes in accreditation criteria. Subsection (b) requires the executive director to reinstate an environmental testing laboratory's accreditation if the laboratory effectively corrects and takes steps to prevent a recurrence of the deficiencies that led to a suspension; complies with requirements imposed by the executive director or the commission; and submits an acceptable application for reinstatement.

In adopted new §25.36, Revocation of Accreditation, subsection (a) allows the commission to revoke an environmental testing laboratory's accreditation after notice and opportunity for hearing according to Chapter 80. This section implements TWC, §5.807. Subsection (b) requires the commission to revoke applicable parts of a laboratory's accreditation for certain deficiencies related to unsuccessful analyses of proficiency test samples. This section implements TWC, §5.807 and NELAC, §4.4.3, Revocation. Subsection (c) requires an environmental testing laboratory to wait at least one year after revocation before reapplying for accreditation and requires an environmental testing laboratory whose accreditation was revoked to meet all requirements for a new accreditation, including an environmental testing laboratory assessment.

In adopted new §25.38, Accreditation Advisory Committee, subsection (a) requires the executive director to establish an advisory committee to help interpret NELAC standards and to advise the executive director and the commission on technical matters relating to the operation of the accreditation program. Subsection (b) requires that the committee abide by TWC, §5.107 and 30 TAC Chapter 5. This section provides the executive director with the ability to consult with outside groups to improve the environmental testing laboratory accreditation program. This section implements NELAC, §6.2(g).

Subchapter C, Environmental Testing Laboratory Certification

Adopted new §25.50, Standards for Environmental Testing Laboratory Certification, requires conformity with the *Manual for the Certification of Laboratories Analyzing Drinking Water*, Fourth Edition, EPA 815-B-97-001, March 1997; and the *Lab Cert Manual Errata*, Labcert Bulletin, EPA-815-N-99-002a, April 1999, published by EPA, and requirements contained in Chapter 25, as the basis for certifying an environmental testing laboratory's capability to analyze samples for compliance with the SDWA. This section continues the Safe Drinking Water Certification Program as it was administered by TDH.

In adopted new §25.52, Fields of Certification, subsection (a) requires the executive director to identify fields of certification that are offered by the agency and make a list of this information available to the public through the agency's website and Compliance Support Division and Agency Communications. The website address is *http://www.tnrcc.state.tx.us/enforcement/csd/qa*. The phone number for the Compliance Support Division is (512) 239-6300 and the phone number for Agency Communications is (512) 239- 0028. This information will be available upon the effective date of these rules. Subsection (b) allows the executive director to change fields of certification offered by the agency after 30 days' notice on the agency website. This provision allows the executive director to modify the fields of certification if the commission changes the requirements for the Safe Drinking Water Certification Program.

In adopted new §25.54, Initial Application for Certification, subsection (a) requires that an application for certification be filed using a form provided by the executive director. The adopted rule also requires an applicant to submit any required or requested documents and records and the fee provided in §25.70 with the application. This section implements TWC, §5.803 and provides consistency with §25.12. Subsection (b) allows an operator of an environmental laboratory to request that noncontiguous facilities be certified as a single entity if they operate under the same ownership, day-to-day management, day-to-day technical direction, and quality system, including document management, records management, and test reporting. The commission determined it is appropriate to accredit noncontiguous facilities as a single entity if the environmental testing laboratory meets the listed requirements to promote uniform standards of quality. This objective will be met by allowing environmental testing laboratories with more than one location to obtain a single accreditation. Subsection (c) allows an operator of an environmental laboratory to submit an application for certification or an application to increase the laboratory's fields of certification at any time. The commission anticipates that environmental testing laboratories will continuously evaluate the fields of certification that they want to pursue. The commission has determined that it is appropriate to allow environmental testing laboratories to modify their fields of certification at anytime so that the environmental testing laboratories can pursue various types of analytical work.

Adopted new §25.56, Term of Certification, establishes a one-year term of certification if the environmental testing laboratory application meets the standards for certification of this chapter. Subsection (b) allows the executive director to grant interim certification for up to one year in order to schedule an environmental testing laboratory inspection. The commission revised §25.56(b) by replacing the word "when" with the word "that" to clarify the intent of this subsection. This section continues the Safe Drinking Water Certification Program as it was administered by TDH, except that the term of the certification will be one year instead of two years.

In adopted new §25.58, Renewal Applications for Certification, subsection (a) provides that the executive director must receive an environmental testing laboratory's renewal application and applicable fees no later than the expiration date of a laboratory's certification. The executive director has determined that it is important to provide environmental testing laboratories with a definite deadline for renewal applications. Subsection (b) provides that, if a renewal application is received after the expiration date of the laboratory's certification, the laboratory must apply for and meet all requirements for a new certification, including an environmental testing laboratory assessment. Subsection (c) requires that modifications made during the term of a certification to increase a laboratory's fields of certification be renewed on the certification renewal date, regardless of the date of the modifications. This section is consistent with §25.16 of Subchapter B.

Adopted new §25.60, Environmental Testing Laboratory Certification Assessments, requires environmental testing laboratory assessments of environmental testing laboratories before certification is granted initially and at least every three years after certification is granted. Subsection (b) allows these environmental testing laboratory assessments to be announced or unannounced. This section implements the environmental testing laboratory assessment program required by the SDWA.

Adopted new §25.62, Proficiency Test Sample Analyses, requires an environmental testing laboratory to periodically analyze certain proficiency test samples before and after certification is granted. Subsection (a) requires, for initial certification,

the successful analysis of one proficiency test sample for each field of certification during the previous 12 months. For ongoing certification, subsection (b) requires analysis of at least two proficiency test samples per year approximately six months apart for each field of certification and successful analysis of one proficiency test sample each year for each field of certification. If a laboratory does not meet requirements for ongoing analysis of proficiency test samples, the adopted rule allows a laboratory to participate in supplemental proficiency test studies. Subsection (c) requires the executive director to determine a laboratory's certification status within 60 days if the laboratory does not successfully analyze proficiency test samples as required. Subsection (d) requires laboratories to purchase proficiency test samples from vendors approved by the National Institute for Standards and Technology. This section continues the Safe Drinking Water Program as it was administered by TDH.

Adopted new §25.64, Secondary Certification of Out-of-State Environmental Testing Laboratories, requires the executive director to grant or renew the certification of an environmental testing laboratory that is in another state and certified by EPA or another state within 30 days if the laboratory submitted the required application, was already certified for the applicable fields of certification by EPA or other state, and paid required fees. Subsection (b) requires that the executive director notify the laboratory in writing within 30 days of granting or denying certification. This section is consistent with §25.16 of Subchapter B.

Adopted new §25.66, Duties and Responsibilities of Certified Laboratories, establishes duties and responsibilities of a laboratory applying for and accepting certification. The duties and responsibilities include providing reasonable access to the executive director to the laboratory and its facilities, personnel, documents, records, data, analyses, and operations and operating the laboratory and maintaining the laboratory's certification according to the standards for certification included in Chapter 25. This section continues the Safe Drinking Water Certification Program as it was administered by TDH.

Adopted new §25.68, Withdrawal From Certification Program, allows an environmental testing laboratory to withdraw from the certification program in whole or in part at any time by notifying the executive director in writing. This section is consistent with §25.26 of Subchapter B.

Adopted new §25.70, Certification Fees, requires certification fees to cover program costs and establishes a fee structure for the program. Environmental testing laboratories applying for primary certification will be required to pay an annual administrative fee of $500 and annual category fees, while environmental testing laboratories applying for secondary certification will pay an annual administrative fee of $250 and category fees. Category fees will be based on the types of analyses a laboratory performs and for which the laboratory chooses to seek certification. The adopted rule contains 11 drinking water categories, including: microbiology; radiochemistry; metals; general chemistry; disinfection by-products; volatile organic compounds by gas chromatograph mass spectrometry; semivolatile organic compounds by gas chromatograph mass spectrometry; organic compounds by gas chromatography using detection other than mass spectrometry; organic compounds by high performance liquid chromatography; polychlorinated dibenzo-p-dioxins and dibenzofurans; and asbestos. Subsection (e) requires the operator of an environmental testing laboratory located in another state and applying for primary certification to pay a fee including costs equal to the reasonable travel costs associated with conducting an assessment at the laboratory. Subsection (f) also allows fees for certification modifications, replacement of certification certificates, and reinstatement of suspended certifications. Subsection (g) states that all fees are nonrefundable.

The adopted certification fees were developed to produce enough revenue to recover the cost of the certification program. Annual program costs were estimated using standard employee salary rates and existing staffing, training, travel, supplies, and other costs. Annual program revenues were calculated using current drinking water laboratory certifications, the types of analyses these laboratories perform, and current appropriations.

The adopted fees use categories based on a drinking water matrix and drinking water analyses. The matrix and types of analyses and category fees are consistent with Subchapter B as it relates to the analysis of drinking water samples.

In addition to category fees, the adopted certification fees include annual administrative fees. The adopted certification fees include a fee equal to the reasonable travel costs (including transportation, lodging, per diem, and any telephone charges) associated with conducting an assessment at an out-of-state laboratory. The adopted certification fees also include: fees for adding one or more fields of certification; replacing a certification certificate; and reinstating a suspended certification. These fees are consistent with Subchapter B.

Adopted new §25.74, Denial of Certification Application, allows the executive director to deny an application for certification for insufficiency or cause after notice and opportunity to file a motion to overturn according to 30 TAC §50.139. Subsection (a) allows the executive director to deny an initial or renewal application for insufficiency. An application may be determined to be insufficient if laboratory personnel fail to submit a completed application; fail to submit the required fees; fail to successfully analyze and report proficiency test samples; fail to implement a quality system; fail to document that laboratory personnel meet education, training, and experience requirements; fail to allow entry during normal business hours for an assessment; fail to pass required environmental testing laboratory assessments; fail to submit a report identifying action the environmental testing laboratory will take to correct deficiencies in the assessment report within 30 days of receiving an assessment report; or fail to implement actions to correct the deficiencies identified in the assessment report by the executive director. Subsection (b) allows the commission to deny an applicant's initial or renewal application for cause after notice and an opportunity for a hearing if the laboratory personnel misrepresent any fact pertinent to receiving or maintaining certification or the laboratory or its operator is indebted to the state for a fee, penalty, or tax imposed by a statute within the commission's jurisdiction or a rule adopted under such a statute, or any other reason which causes the executive director to determine that quality of the data being produced by the laboratory's personnel is unreliable or inaccurate, based on the facts of the case. This section is consistent with Subchapter B.

Adopted new §25.76, Suspension of Certification, allows the commission to suspend an environmental testing laboratory's certification in whole or in part for one month to six months after notice and opportunity for hearing according to Chapter 80. Reasons for suspension include: failure to maintain a quality system; failure to comply with minimum performance and quality assurance standards; failure to maintain records of the laboratory's personnel, operations, data, or analysis; failure to successfully complete required proficiency tests; failure to employ staff who meet required personnel qualifications for

education, training, and experience; or failure to notify the executive director of changes in certification criteria. Subsection (b) requires the executive director to reinstate an environmental testing laboratory's certification if the laboratory effectively corrected and took steps to prevent a recurrence of the deficiencies that led to a suspension, complied with requirements imposed by the executive director and the commission, and submitted an acceptable application for reinstatement.

Adopted new §25.78, Revocation of Certification, allows the commission to revoke an environmental testing laboratory's certification after notice and opportunity for hearing according to Chapter 80. Reasons for revocation include: failure to correct deficiencies that led to a suspension of certification within six months of the notice of suspension; failure to submit an acceptable report identifying actions the environmental testing laboratory will take to correct deficiencies identified in the environmental testing laboratory assessment; failure to implement actions to correct deficiencies identified during an environmental testing laboratory assessment; failure to complete required proficiency test studies; submission of proficiency test sample results generated by another laboratory as its own; misrepresentation of any fact pertinent to receiving and maintaining certification; failure to allow entry during normal business hours for an environmental testing laboratory assessment; conviction of charges relating to the falsification of any report relating to a laboratory analysis; failure to remit fees within the time limit established by the executive director; or indebtedness to the state for a fee, penalty, or tax imposed by a statute within the commission's jurisdiction or a rule adopted under such a statute. Subsection (b) requires the commission to revoke applicable parts of a laboratory's certification for certain deficiencies related to unsuccessful analysis of proficiency test samples. Finally, subsection (c) requires an environmental testing laboratory whose certification was revoked to wait a minimum of one year before reapplying for certification and meet all requirements for a new certification, including an environmental testing laboratory assessment. This section is consistent with Subchapter B with the exception of proficiency testing requirements because of differences between the programs.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A rule is a major environmental rule if it meets the two requirements set out in §2001.0225. The first requirement of a major environmental rule is that the specific intent of the rule is to protect the environment or reduce risks to human health from environmental exposure. The second requirement is that the rule 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 rulemaking has two major purposes. First, it will provide a mechanism for the commission to accredit scientific laboratories that analyze environmental samples. Second, the adopted rules continue the certification program for scientific laboratories that analyze samples under the SDWA until the laboratory accreditation program is in place. Protection of the environment and human health may be a result of this rulemaking, but that result is not the specific intent of the rules. Thus, these rules do not meet the definition of a major environmental rule.

Additionally, these adopted rules are not a major environmental rule in that they do not meet any of the four applicability requirements of the second part of the definition of a major environmental rule. A rule is considered a major environmental rule if as a result of the rule: a federal standard is exceeded (unless the rule is specifically required by state law); an express requirement of state law is exceeded (unless the rule is specifically required by federal law); a requirement of a delegation agreement or contract between the state and the federal government is exceeded; or the rule is adopted solely under the general powers of the agency. First, these adopted rules do not exceed a standard set by federal law. These adopted rules will implement a laboratory accreditation program. NELAP encourages each state to participate; however, participation is not mandated at the federal level. The SDWA requires environmental testing laboratories that analyze samples for compliance with the SDWA be certified. These rules incorporate that requirement, which is a federal requirement, but they do not exceed the federal requirement. Second, these rules do not exceed an express requirement of state law, rather they implement state law, specifically TWC, Chapter 5, Subchapter R, and TWC, §5.127. Third, these rules do not exceed a delegation agreement or contract, because there is no federal authority regarding laboratory accreditation. Fourth, these rules do not adopt a rule solely under the general powers of the commission and do not exceed an express requirement of state law. The requirements that would be implemented through these rules are expressly defined under TWC, Chapter 5, Subchapter R, which requires the commission to enact rules governing the accreditation of environmental laboratories. Thus, these rules do not meet any of the requirements for them to be considered a major environmental rule.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these adopted rules under Texas Government Code, §2007.43. This rulemaking has two major purposes. First, it will provide a mechanism for the commission to accredit scientific laboratories that analyze environmental samples. Second, the adopted rules continue the certification program for scientific laboratories that analyze samples under the SDWA until the laboratory accreditation program is in place.

These rules are adopted in an effort to reasonably fulfill an obligation mandated by state law to implement a voluntary environmental testing laboratory accreditation program and to continue the drinking water laboratory certification program, previously managed by the TDH. The adopted rules will substantially advance the implementation of the requirements under TWC, Chapter 5, Subchapter R. Promulgation and enforcement of these adopted rules will not affect private real property. Therefore, the commission has determined that these adopted new rules will not result in a takings.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The executive director reviewed the adopted rulemaking and found that the adopted rules 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 was held in Fort Worth, on May 29, 2002 in the Fort Worth Regional Office, as well as in Austin on June 4, 2002 at the Texas Natural Resource Conservation Commission, and in Houston, on June 5, 2002 at the City of Houston Pollution Control Building Auditorium. No comments were received at the hearings. The comment period closed on Monday, June 10, 2002. The commission received written comments from the City of Austin Water and Wastewater Utility (COA); Environmental Laboratory Department Eastman Chemical (Eastman Chemical); Harris County Public Health & Environmental Services Pollution Control Division (HCPCD); Occidental Chemical Corporation (OxyChem); Texas Chemical Council (TCC); Texas Cooperative Extension (TCE); and Texas Parks and Wildlife (TPW).

COA, Eastman Chemical, HCPCD, OxyChem, TCC, TCE, and TPW generally supported the commission's steps to ensure that data used in regulatory decisions are accurate and reliable. No commenter generally opposed the proposal. COA, Eastman Chemical, HCPCD, OxyChem, TCC, TCE, and TPW suggested changes to the proposal as stated in the RESPONSE TO COMMENTS section of this preamble.

RESPONSE TO COMMENTS

General

TCE commented that including the analysis of agronomic soil, manure, and animal and food processing effluent in the proposed rule is not practical because currently there is no national or regional accreditation program for agronomic soil, manure, or effluent testing laboratories. TCE also commented that including the analysis of agronomic soil, manure, and animal and food processing effluent in the proposed rule is not practical because there are no "guaranteed soil, manure, or effluent samples" currently available.

The commission is not aware of a nationally- or regionally-recognized accreditation program for agronomic soil, manure, or agronomic effluent testing laboratories (laboratories that analyze concentrated animal feeding operation (CAFO) samples). TWC, §5.127(a), however, states that the commission may accept data for use in commission decisions only if the data is from an accredited environmental testing laboratory except as provided in TWC, §5.127(b). TWC, §5.802, requires that the environmental testing laboratory accreditation program must be consistent with NELAP. NELAP is the overall environmental testing laboratory accreditation program including NELAC. NELAC is the voluntary organization of state, territorial, federal environmental officials, and interest groups whose primary purpose is to establish mutually acceptable national standards for accrediting environmental testing laboratories. The commission has determined that the standards adopted by NELAC are appropriate for laboratories that analyze CAFO samples because the standards adopted by NELAC include provisions that provide the flexibility needed to address the concerns raised by this commenter and insure the commission's need for accurate data is met. The commission made no changes to the rule in response to this part of the comment. Further, the commission assumes "guaranteed soil, manure, or effluent samples" refers to single blind proficiency testing samples or certified reference materials. Analysis of proficiency test samples or use of certified reference materials is only one component of an environmental testing laboratory's quality system and method proficiency. To become accredited and maintain accreditation an environmental testing laboratory must meet the quality systems requirements contained in NELAC, Chapter 5 and the requirements of this chapter. To clarify that an environmental testing laboratory is not required to analyze a proficiency test sample if one is not available from an approved provider, the commission has added "if available" language to §25.20(a) and (b).

TCE commented that including the analysis of agronomic soil, manure, and animal and food processing effluent in the proposed rule is not practical because with few exceptions, the methods used for soil, manure, and animal effluent testing are not recognized by EPA or Association of Analytical Chemists (AOAC).

TWC, §5.127(a), states that the commission may only accept data for use in commission decisions from accredited environmental testing laboratories except as provided in TWC, §5.127(b). TWC, §5.802, requires that the laboratory accreditation program must be consistent with NELAP. NELAC standards do not require that the methods used for soil, manure, and animal effluent testing be recognized by EPA or AOAC. Under NELAC standards environmental testing laboratories may be accredited for fields of accreditation that do not use EPA or AOAC methods. NELAP is the overall environmental testing laboratory accreditation program including NELAC. NELAC is the voluntary organization of state, territorial, federal environmental officials, and interest groups whose primary purpose is to establish mutually-acceptable national standards for accrediting environmental testing laboratories. Moreover, the analytical requirements and test methods for CAFO samples are specified in 30 TAC Chapter 321, Subchapter B. The commission made no change to the rule based on this comment.

TCE commented that including the analysis of agronomic soil, manure, and animal and food processing effluent in the proposed rule is not practical because the matrix influence these sample types is considerably different from the matrix influences of traditional environmental samples.

TWC, §5.127(a), states that the commission may only accept data for use in commission decisions from accredited environmental testing laboratories except as provided in TWC, §5.127(b). TWC, §5.802, requires that the laboratory accreditation program must be consistent with NELAP. NELAP is the overall environmental testing laboratory accreditation program including NELAC. NELAC is the voluntary organization of state, territorial, federal environmental officials, and interest groups whose primary purpose is to establish mutually-acceptable national standards for accrediting environmental testing laboratories. The commission has determined that the standards adopted by NELAC are appropriate for laboratories that analyze CAFO samples because the standards adopted by NELAC contain provisions to provide the needed flexibility to address the concerns raised by this comment and ensure the commission's need for accurate data is met. The commission made no change to the rule based on this comment.

TCE commented that including the analysis of agronomic soil, manure, and animal and food processing effluent in the proposed rule is not practical because that the samples do not require heavy metal analysis and subsequently do not fall under SW-846 guidelines.

TWC, §5.127(a), states that the commission may only accept data for use in commission decisions from accredited environmental testing laboratories except as provided in TWC, §5.127(b). TWC, §5.802, requires that the laboratory accreditation program must be consistent with NELAP. NELAC standards do not require that the methods used for soil, manure, and animal effluent testing be from SW-846. Under NELAC standards environmental testing laboratories may be accredited for fields

of accreditation other than heavy metals or other analyses described by SW-846. NELAP is the overall environmental testing laboratory accreditation program including NELAC. NELAC is the voluntary organization of state, territorial, federal environmental officials, and interest groups whose primary purpose is to establish mutually- acceptable national standards for accrediting environmental testing laboratories. The commission made no change to the rule based on this comment.

TCE commented that the proposed rules will negatively affect CAFO and laboratories performing routine analysis of CAFO samples by increasing the cost of analysis to CAFO operators by a factor of ten.

The commission cannot verify that environmental testing laboratories will increase analytical fees to CAFOs by a factor of ten. The legislature determined that even if the analytical cost increases, all environmental testing laboratories that provide data to the commission for decision-making must be accredited, except as provided in TWC, §5.127(b). In TWC, §5.803(b), the legislature directed the commission to establish a schedule of reasonable accreditation fees designed to recover the costs of the accreditation program. The legislature determined that even if the analytical cost increases, all environmental testing laboratories that provide data to the commission for decision-making must be accredited, except as provided in TWC, §5.127(b). The commission cannot verify that environmental testing laboratories will increase analytical fees to CAFOs by a factor of ten. The executive director's staff has evaluated the anticipated costs of the environmental testing laboratory accreditation and certification program and has determined that the proposed fees are reasonable. The commission made no change to the rule in response to this comment.

TCE commented that the proposed rules will negatively affect CAFOs and laboratories performing routine analysis of CAFO samples by eliminating existing testing laboratories ability to analyze soil, manure, or effluent.

TWC, §5.127(a), states that the commission may only accept data for use in commission decisions from accredited environmental testing laboratories except as provided in by TWC, §5.127(b). TWC, §5.802, requires that the laboratory accreditation program must be consistent with NELAP. The commission will accredit all environmental testing laboratories that meet the requirements of this chapter. Environmental testing laboratories currently performing analysis for CAFOs may continue to analyze CAFO samples, provided the laboratory obtains accreditation from the commission. Additionally, these rules do not specify which environmental testing laboratory a CAFO must use, only that the data must be from an accredited environmental testing laboratory if it is supplied to the commission for decision-making. The commission made no change to the rule in response to this comment.

TCE commented that the proposed rules will negatively affect CAFO and laboratories performing routine analysis of CAFO samples, because the overall number of samples taken by CAFOs will be reduced. Thus, implementation of best management practices will be reduced to limit the CAFOs' or effluent generators' cost.

CAFO operators must meet the specific minimum best management practices required under Chapter 321, Subchapter B. CAFO operators are also encouraged to install and operate additional best management practices to help ensure compliance with environmental protection goals. Additionally, §321.42 delineates where samples must be taken, as well as the required analysis. The commission does not agree that CAFO operators will compensate for the increasing expenses by reducing activities required by permit or regulation designed to reduce environmental impacts. The commission did not make changes to the rule based on this comment.

TCE commented that the proposed rules will negatively affect CAFOs and laboratories performing routine analysis of CAFO samples by stifling the current method evaluation research studying the impact of manure or effluent applications on soil nutrient levels, plant and crop response, or environmental consequences.

TWC, §5.127(a), states that the commission may only accept data for use in commission decisions from accredited environmental testing laboratories except as provided in TWC, §5.127(b). TWC, §5.802, requires that the laboratory accreditation program must be consistent with NELAP. If the laboratory data will not be used by the commission in a decision- making process, the data does not have to be from an accredited environmental testing laboratory. Thus, the environmental testing laboratory accreditation program will not impact research studies on the impact of manure or effluent applications on soil nutrient levels, plant and crop response, or environmental consequences. The commission made no change to the rule in response to this comment.

TCE commented that the soil testing industry recognizes the need for oversight of data reported to CAFOs and other agronomic-based application fields.

The commission appreciates the comment in support of the rule.

TCE suggested that the commission evaluate laboratories that perform analytical work for CAFOs by reviewing the laboratories' standard operating procedures to insure the laboratories are in line with standard, accepted agronomic laboratory protocols. Additionally, TCE suggested the commission perform physical audits of laboratories that provide service to CAFOs to determine if the laboratories follow accepted agronomic laboratory protocols.

TWC, §5.127(a), states that the commission may only accept data for use in commission decisions from accredited environmental testing laboratories except as provided in TWC, §5.127(b). TWC, §5.802, requires that the laboratory accreditation program must be consistent with NELAP. Since laboratories that analyze CAFO samples will be submitting data to the commission to be used in the commission's decision-making process, the executive director must use NELAC standards in evaluating the laboratories that analyze CAFO samples. NELAP is the overall environmental testing laboratory accreditation program including NELAC. NELAC is the voluntary organization of state, territorial, federal environmental officials, and interest groups whose primary purpose is to establish mutually-acceptable national standards for accrediting environmental testing laboratories. To become accredited, NELAC standards require, among other things, evaluation of an environmental testing laboratory's standard operating procedures and quality systems and a physical audit. The commission made no changes to the rule in response to this comment.

TCE "suggest{ed} that these labs be a part of a proficiency testing program such as the North American Proficiency Testing Program, administered through the Soil Science Society of America."

The commission interprets that "these labs" refers to environmental testing laboratories serving the CAFO industry. TWC, §5.127(a), states that the commission may only accept data for use in commission decisions from accredited environmental testing laboratories except as provided in TWC, §5.127(b). TWC, §5.802, requires that the laboratory accreditation program must be consistent with NELAP. NELAP is the overall environmental testing laboratory accreditation program including NELAC. NELAC is the voluntary organization of state, territorial, federal environmental officials, and interest groups whose primary purpose is to establish mutually- acceptable national standards for accrediting environmental testing laboratories. Thus, if a CAFO submits data to the commission for use in a commission decision, the data must be from a NELAC accredited environmental testing laboratory. The rules, however, do not prevent an environmental testing laboratory from also participating in a proficiency testing program administered by the North American Proficiency Testing Program. NELAC standards require a proficiency test sample provider must be approved by the National Institute for Standards and Technology National Voluntary Laboratory Accreditation Program, NELAC, §2.3.1; thus if the Soil Science Society of America wants to become an approved proficiency test provider for the NELAC program it must meet NELAC standards. The commission made no change to the rule in response to this comment.

COA asked if field and treatment plant tests and measurements such as turbidity, pH, chlorine residual, and alkalinity that have historically been conducted by certified operators and reported to the commission for compliance purposes would be covered under this rule. According to COA these tests are routinely performed in the treatment plant or in the field.

TWC, §5.127(a), states the commission may only accept data for use in commission decisions from accredited environmental testing laboratories regardless of the analyte, except as provided in TWC, §5.127(b). TWC, §5.127(b), states in part that the commission may, under certain conditions, accept data from an in-house or on-site environmental testing laboratory that is not accredited. Thus, if a regulated entity sends its samples to a commercial laboratory for analysis and the data is used for a commission decision, the laboratory must be accredited. If the regulated entity's in-house or on-site environmental testing laboratory analyzes the samples, the environmental testing laboratory does not have to be accredited. The accreditation and certification programs include analyses and tests performed by environmental testing laboratories but do not include field measurements, source air emission measurements, or the use of continuous analysis devices outside of a laboratory. Thus, if the sample is analyzed in the field, this rule does not apply; however, if the same sample is analyzed in an environmental testing laboratory, the laboratory must be accredited except as provided in TWC, §5.127(b). The commission will monitor NELAC's development of field activity standards and may include accreditation standards for field measurements at a later date. If the data is not used for a commission decision, it does not have to be from an accredited environmental testing laboratory. The commission made no change to the rule in response to this comment.

COA commented that they appreciate the efforts by staff in holding stakeholder meetings and speaking at association meetings.

The commission appreciates the comment in support of the rule.

Eastman Chemical commented that the rules create a double standard for environmental testing laboratories in Texas by requiring that the standard for a commercial lab that produces data for use by the commission in decision making must be accredited by NELAC and that an "in-house" environmental testing laboratory that produces data for use by the commission in decision-making does not have to be NELAC accredited and only has to meet an "inspection" standard. Eastman Chemical commented that "common sense and good science" require that all environmental testing laboratories in Texas that produce data for use by the commission in its decision-making processes should be held to similar standards.

TWC, §5.127(a), states that the commission may only accept data for use in commission decisions from accredited environmental testing laboratories, except as provided in TWC, §5.127(b). TWC, §5.127(b), states in part that the commission may accept data from an in- house or on-site environmental testing laboratory that is not accredited if it is inspected periodically. Thus, the commission cannot require in-house environmental testing laboratories to become accredited. The commission made no change to the rule based on this comment.

Eastman Chemical suggested to insure similar standards that the commission use "laboratory- experienced and laboratory-trained inspectors" to inspect in-house laboratories because laboratory inspections are complex since each inspection requires the inspector to have "a thorough understanding of analytical chemistry, statistics, and quality assurance/quality control techniques." Eastman Chemical suggested that to ensure consistency in inspection standards the commission require that use the same inspectors who conduct the NELAC inspections also conduct the inspections for the in-house laboratories.

TWC, §5.802, states the environmental testing laboratory accreditation program must be consistent with standards approved by NELAP. NELAP is the overall environmental testing laboratory accreditation program including NELAC. NELAC is the voluntary organization of state, territorial, federal environmental officials, and interest groups whose primary purpose is to establish mutually acceptable national standards for accrediting environmental testing laboratories. NELAC §3.2 provides minimum requirements for environmental testing laboratory assessment personnel, including education, basic training, refresher training, and technical training. Staff conducting accreditation inspections will meet NELAC standards for assessors. Staff inspecting in-house or on-site environmental testing laboratories, however, are not required to meet the same requirements because inspections of in-house or on-site environmental testing laboratories are not required to meet NELAC standards. Moreover, the commission intends to ensure all inspections, including those of in-house and on-site environmental testing laboratories, are rigorously conducted by trained staff. The commission, however, has determined that because of the drain on the commission's resources it is not practicable to have all in-house and on-site inspections conducted by laboratory-experienced and laboratory-trained personnel. The commission may use accreditation staff to inspect certain in-house or on-site environmental testing laboratories, especially those performing complex or wide-ranging analyses. The commission made no change to the rule based on this comment.

Eastman Chemical suggested to insure similar standards that the commission consolidate and standardize permit provisions related to analytical requirements because "the current permit system is inadequate to ensure that environmental laboratories in Texas have sufficient guidance and/or control to uniformly generate decision-making data according to any commonly-accepted quality standard."

The commission acknowledges analytical requirements in permits and other authorizations have changed over time and may differ among regulatory programs; however, the comment is beyond the scope of this rulemaking. The commission made no change to the rule in response to this comment.

Subchapter A, General Provisions

COA commented that the definitions of "in-house laboratory" and "on-site laboratory" in §25.2 add confusion about the types of laboratories and suggested using one definition for "environmental testing laboratory."

TWC, §5.127(a), states that the commission may only accept data for use in commission decisions from accredited environmental testing laboratories, except as provided in TWC, §5.127(b). TWC, §5.127(b), states in part that the commission may accept data from an in- house or on-site environmental testing laboratory that is not accredited if it is inspected periodically. Thus, the definitions are needed to clarify which laboratories are in-house and on-site environmental testing laboratories. The commission made no change to the rule in response to this comment.

TPW commented that the provisions in §25.4(c) requiring laboratories to be accredited if the laboratory provides data to third parties limit the opportunity for in-house laboratories to perform pro bono work. According to TPW "it is well understood that the TNRCC cannot, by itself, conduct all the environmental monitoring which is required in the state. The TNRCC needs to build partnerships to see that adequate monitoring is conducted."

The commission acknowledges that the requirement for an environmental testing laboratory to be accredited may discourage some environmental testing laboratories from providing pro bono services to the commission. The rules, however, address a fundamental risk identified by the Sunset Advisory Commission (Sunset Commission). According to the Sunset Commission, unaccredited environmental testing laboratories are more likely to produce inaccurate data for agency decision-making, which results in increased risks to public health and the environment and increased agency costs. Sunset Advisory Staff Report, Texas Natural Resource Conservation Commission, 2000, Page 49. To address this concern, the legislature enacted TWC, §5.127(a) stating that the commission may only accept data for use in commission decisions from accredited environmental testing laboratories, except as provided in TWC, §5.127(b). Thus, the commission has determined that it is inappropriate to accept data from an unaccredited environmental testing laboratory, even if the data is provided to the commission pro bono. Moreover, the commission has determined that because the environmental laboratory accreditation program will help insure that the data submitted to the commission will be of high quality it will be an effective tool in developing partnerships to insure that adequate monitoring is conducted. The commission made no change to the rule in response to this comment.

TPW commented that requiring environmental testing laboratories that provide pro bono work to be accredited could result in significant cost to smaller regulated entities; thus, TPW suggested adding the words, "as a fee-for-service operation" in §25.4(c).

The commission cannot verify that environmental testing laboratories will increase analytical fees to small regulated entities. Additionally, TWC, §5.127(a), requires that data used in commission decisions be from an accredited environmental testing laboratory, except as provided in TWC, §5.127(b). Therefore, the commission has determined that even if the analytical cost to small regulated entities increases, all environmental testing laboratories that provide data to the commission for decision-making must be accredited, except as provided in TWC, §5.127(b). The commission made no change to the rule in response to this comment.

TPW suggested that, while the intent of the rule is to ensure that the commission receives reliable data, the provisions in §25.4(c) could actually limit the amount of data assessment provided to the commission and "be counterproductive if it reduces the amount of good data that can be used by the TNRCC."

The commission acknowledges requiring environmental testing laboratories that provide pro bono work to be accredited may reduce the volume of data received by the commission. The need for reliable data was identified by the Sunset Commission in the Sunset Advisory Staff Report, Texas Natural Resource Conservation Commission, 2000, Page 49; thus, the legislature enacted TWC, §5.127(a). To help ensure that the data the commission receives is reliable, the commission may only accept data for use in commission decisions from accredited environmental testing laboratories as provided in TWC, §5.127(a). TWC, §5.127(b), only authorizes the use of data from unaccredited environmental testing laboratories in a few limited instances. All other data must be from an accredited environmental testing laboratory. Thus, even if the volume of data is reduced the commission has determined that the need to insure the reliability of the data overrides the possible reduction in the volume. Additionally, the commission has determined that because the laboratory accreditation program will insure the reliability of the data the program will not be counterproductive to the commission's decisions-making processes. The commission made no change in the rule in response to this comment.

Regarding §25.4(c), TCC commented that there are situations where two or more companies will share treatment and laboratory services within an operating facility. TCC believes that these types of laboratories should not be required to become accredited; therefore, TCC recommended that the language in §25.4(c) be changed to read, "An in-house environmental testing laboratory is accredited if it provides analytical data to an off-site third party and the data are used for a commission decision relating to a...."

According to TWC, §5.127(b)(1), the commission may accept analytical data from an unaccredited in-house or on-site laboratory, provided the environmental testing laboratory is inspected periodically. The legislature, however, did not provide any guidance regarding the definition of an in- house or on-site environmental testing laboratory. The commission, therefore, determined this provision should only apply to analytical data provided by a laboratory to the laboratory's operator because the environmental testing laboratory's operator assumes the risk of inaccurate analytical data from its in-house laboratory. Furthermore, the commission determined that it is not appropriate to extend this provision to include data generated for a separate entity that occupies the same physical location as the environmental testing laboratory because the entity cannot assume the risk of inaccurate analytical data from another entity's in-house laboratory. The commission made no change to the rule in response to this comment.

Regarding §25.4(d), TPW recommends that the commission "grandfather" data collected using state and federal money. TPW stated that data is currently being collected but the data may be submitted to the commission after laboratories are

required to be accredited. TWP suggested adding, "...except for data collected under contract or grant from a state or federal agency prior to that date..." to §25.4(d).

The commission agrees in part with the comment and has revised §25.4(d) to apply accreditation requirements to environmental testing laboratory results prepared and submitted on or after the third anniversary of the date the commission publishes notice its accreditation program has met NELAC standards. HB 2912, §18.03(d), 77th Legislature, 2001, states that TWC, §5.127, applies only to results submitted to the commission on or after the third anniversary of the date on which the commission publishes notice in the *Texas Register* that the commission's environmental laboratory testing program has met NELAC standards. This revision will allow the commission to accept data prepared before the third anniversary but submitted on or after that date. This revision will apply to all types of data, not just to data collected under a contract or grant from a state or federal agency. The commission, however, notes certain agency programs may require environmental testing laboratory accreditation as a condition for a grant or contract before accreditation requirements become mandatory.

OxyChem commented that in §25.6(1)(A), it is not clear how the executive director would carry out the inspection that is required to be conducted every three years. Specifically, OxyChem asked who initiates the inspection, what laboratory operations would be inspected, and when must inspection findings be implemented.

TWC, §5.127(b)(1), states in part that the commission may accept analytical data from an unaccredited in-house or on-site laboratory if the laboratory is inspected periodically. An in-house or on-site environmental testing laboratory will be inspected according to the terms of the permit, registration, or other authorization issued by the commission to the operator of the laboratory. The executive director will initiate the inspection, determine what laboratory operations will be inspected, and determine when corrective actions must be implemented. The commission made no changes to the rule based on this comment.

Regarding §25.6(1)(B), TPW commented that it is not clear if entities that operate an in- house laboratory can submit data for the purposes listed in §25.4(b). TPW recommended clarifying that entities operating an in-house laboratory may submit data to the commission for all purposes listed in §25.4(b).

Section 25.6(1) allows the commission to accept data from an unaccredited laboratory if the laboratory is an in-house or on-site laboratory. Section 25.2(9) and (15) define an in-house and an on- site laboratory as one that provides data to the laboratory's operator for permits or authorizations issued to and compliance, enforcement, or corrective actions related to the laboratory's operator. The commission clarified that §25.6(1) applies to data provided for any matter under the commission's jurisdiction relating to permits or other authorizations, compliance matters, enforcement actions, or corrective actions. The rules do not authorize unaccredited in-house environmental testing laboratories to provide data to the commission for use in commission decisions, if the data is not related to the environmental testing laboratory's operator's permit, authorization, compliance matters, enforcement actions, or corrective actions.

Subchapter B, Environmental Testing Laboratory Accreditation and Subchapter C, Environmental Testing Laboratory Certification

OxyChem commented that the requirement for annual accreditations in §25.14(a) is too frequent and that accreditation every three years is sufficient. OxyChem commented that an annual accreditation period places too much of a burden on environmental testing laboratories and accrediting authorities. Additionally, OxyChem commented that the quality of data does not change from year to year and that because environmental testing laboratories have stringent quality assurance/quality control (QA/QC) programs it is rare that data quality is compromised.

TWC, §5.802, states the environmental testing laboratory accreditation program must be consistent with standards approved by NELAP. NELAP is the overall environmental testing laboratory accreditation program including NELAC. NELAC is the voluntary organization of state, territorial, federal environmental officials, and interest groups whose primary purpose is to establish mutually- acceptable national standards for accrediting environmental testing laboratories. NELAC standards require a one-year term of accreditation (NELAC §4.2). Thus, the commission must implement an annual accreditation program. A three-year accreditation period would conflict with TWC, 5.802. While the commission acknowledges that many unaccredited environmental testing laboratories have stringent QA/QC programs, this rule provides the commission with assurance that data from an environmental testing laboratory is of high quality. These rules require all environmental testing laboratories to maintain stringent QA/QC programs by establishing definite minimum QA/QC standards. Since NELAC requires an annual accreditation period and TWC, §5.802, requires the commission to implement an accreditation program that conforms with NELAC, the commission's environmental testing laboratory accreditation program must require environmental testing laboratories to renew accreditations annually. The commission made no changes to the rule in response to this comment.

OxyChem commented that in §25.18(a)(2), an environmental testing laboratory assessment period of three years is sufficient. OxyChem commented that a two-year environmental testing laboratory assessment period places too much of a burden on environmental testing laboratories and accrediting authorities. OxyChem commented that the quality of data does not change from year to year and that because environmental testing laboratories have stringent QA/QC programs it is rare that data quality is compromised.

TWC, §5.802, states the environmental testing laboratory accreditation program must be consistent with standards approved by NELAP. NELAP is the overall environmental testing laboratory accreditation program including NELAC. NELAC is the voluntary organization of state, territorial, federal environmental officials, and interest groups whose primary purpose is to establish mutually- acceptable national standards for accrediting environmental testing laboratories. NELAC standards require environmental testing laboratory assessments once every two years (NELAC §3.3.1). Thus, the commission must implement a program that assesses environmental testing laboratories at least once every two years. A three-year assessment period would conflict with TWC, §5.802. While the commission acknowledges that many unaccredited environmental testing laboratories have stringent QA/QC programs, this rule provides the commission with assurance that data from an environmental testing laboratory is of high quality. These rules require all environmental testing laboratories to maintain stringent QA/QC programs by establishing definite minimum QA/QC standards. Since NELAC requires assessments once every two years and TWC, §5.802, requires the commission to implement an accreditation program that conforms with NELAC, the commission's environmental testing laboratory accreditation program must require environmental testing

laboratory assessments at least every two years. The commission made no changes to the rule in response to this comment.

COA commented that the provisions in §25.14(b) and §25.56(b) that require the executive director to schedule an assessment within six months of receiving a completed application from an environmental testing laboratory should not hold true if the laboratory is "ready and willing to complete the assessment, and the commission is unable to schedule the assessment because of budgets, staffing, or otherwise." COA suggested the following language for §25.14(b) and §25.56(b): "The executive director may issue interim certification/accreditation for up to 12 months to an environmental testing laboratory that meets standards for certification/accreditation and requirements of this chapter or obtains a third party audit. If the laboratory does not provide reasonable access for the executive director to schedule an assessment within six months of commission receipt of the application, the interim certification is cancelled. If the executive director is not able, due to no fault of the laboratory, to scheduled the assessment, then the interim certification remains in effect."

Sections 25.14(b) and 25.56(b) authorize the executive director to issue an interim accreditation or certification to an environmental testing laboratory that meets the accreditation or certification standards, except that the executive director has not been able to schedule an environmental testing laboratory assessment. The commission has revised the rule to clarify the intent of these sections. Because §25.14(b) and §25.56(b) provide a mechanism for interim accreditation or certification, the proposed language for third-party audits is not necessary. Furthermore, a third-party audit may not meet NELAC accreditation or Texas certification standards. The commission will not issue an accreditation or certification to an environmental testing laboratory that does not provide access to its facilities during normal business hours.

COA commented that in §25.18(b), assessments can be either announced or unannounced. COA commented that assessments for "initial, routine, and re-accreditation or re-certification" should be announced and that assessments for "follow-up to corrective actions, failed proficiency test samples, safety violations, suspected criminal or fraudulent practices" should be unannounced. COA stated that announced inspections allow both the environmental testing laboratory staff and the commission staff to be prepared by having ready "quality control data, personnel proficiency data, performance testing data, and other information" that would make the assessment run smoothly and efficiently.

TWC, §5.802, states the environmental testing laboratory accreditation program must be consistent with standards approved by NELAP. NELAP is the overall environmental testing laboratory accreditation program including NELAC. NELAC is the voluntary organization of state, territorial, federal environmental officials, and interest groups whose primary purpose is to establish mutually- acceptable national standards for accrediting environmental testing laboratories. These standards state environmental testing laboratory assessments may either be announced or unannounced and the accrediting authority is not required to provide advance notice (NELAC §3.3.4). Thus, the commission may conduct either announced or unannounced inspections. The commission made no change to the rule in response to this comment.

COA commented that the language in §25.20 and §25.34 could be interpreted to mean that if different analytic methods are used for an analyte category and that if a laboratory fails one method but passes the other method, then the laboratory fails for the entire category. COA suggested that the commission allow environmental testing laboratories to retain certification for each method passed during the proficiency test.

Sections 25.20 and 25.34 allow an environmental testing laboratory to retain its accreditation for a specific field of accreditation if the environmental testing laboratory meets its proficiency testing requirements for that specific field of accreditation. Field of accreditation refers to a unique combination of matrix, method, and analyte. Section 25.20 requires environmental testing laboratories to successfully analyze proficiency testing samples according to NELAC standards. NELAC §2.7.4 provides that failing a proficiency test sample only affects the accreditation status of that specific field of accreditation. NELAC §4.4.3 describes situations in which an environmental testing laboratory's entire accreditation will be suspended or revoked. These situations are included in §25.34, which provides an environmental testing laboratory's accreditation may be suspended "in whole or in part" for failing to successfully complete required proficiency tests. Therefore, §25.20 and §25.34 allow an environmental testing laboratory to retain its accreditation for a specific field of accreditation if the environmental testing laboratory meets NELAC standards for that field. The commission made no change in the rule in response to these comments.

OxyChem commented that in §25.20(b), the requirement for two proficiency tests per year is "onerous without tangible benefit." OxyChem commented that environmental testing laboratories that conduct frequent analysis in one category are familiar with that category and experience little deviation from quality analysis and that if an environmental testing laboratory does not conduct frequents analysis in one category that semi-annual proficiency tests "would be overkill."

TWC, §5.802, states the environmental testing laboratory accreditation program must be consistent with standards approved by NELAP. NELAP is the overall environmental testing laboratory accreditation program including NELAC. NELAC is the voluntary organization of state, territorial, federal environmental officials, and interest groups whose primary purpose is to establish mutually- acceptable national standards for accrediting environmental testing laboratories. These standards require two proficiency testing studies per year, where available (NELAC §2.4.1). Annual proficiency test samples would be inconsistent with NELAC standards. Thus, for consistency with NELAC the commission has determined that it is appropriate to require two proficiency test samples per year. The commission made no change to the rule in response to these comments.

TPW commented that the requirement in §25.20(b) for semi-annual proficiency test samples is not needed and that the commission could ensure that accurate and appropriate analyses are being conducted at environmental testing laboratories by requiring the laboratories to maintain quality assurance documentation. TPW further commented that annual proficiency tests are the standard with the federal government, and that doubling the number of samples will not increase the performance of the laboratory nor the accuracy of the data. Moreover, according to TPW, semi-annual proficiency testing is labor intensive and costly.

TWC, §5.802, states the environmental testing laboratory accreditation program must be consistent with NELAP. NELAP is the overall environmental testing laboratory accreditation program including NELAC. NELAC is the voluntary organization of state, territorial, federal environmental officials, and interest groups whose primary purpose is to establish mutually-

acceptable national standards for accrediting environmental testing laboratories. Semi-annual analysis of proficiency test samples is only one part of the NELAP accreditation process. To obtain and maintain accreditation an environmental testing laboratory must, among other things, keep quality assurance documentation. Because NELAC standards require environmental testing laboratories to do more than simply maintain records, the commission must follow suit. Furthermore, it is not clear which federal proficiency test program TPW is referring to. The commission notes that the water pollution (WP) and water supply (WS) proficiency evaluation (PE) programs, both federal programs, include two sets of PE samples per year. The EPA privatized these PE sample programs in 1999. The legislature directed the commission to implement the environmental testing laboratory accreditation program following NELAC standards. NELAC standards require an environmental testing laboratory to analyze two proficiency test samples per year, where available, for each field of accreditation for which its seeks or wants to maintain accreditation (NELAC §2.4.1). Thus, any environmental testing laboratory that desires NELAP accreditation must meet NELAC standards. The commission is aware that simply requiring an environmental testing laboratory to analyze two sets of proficiency test samples per year does not guarantee that the environmental testing laboratory's performance will be better or that the data generated by the environmental testing laboratory will be more accurate. The commission also acknowledges that semi-annual analyses of proficiency testing samples imposes additional costs on environmental testing laboratories. According to NELAC standards, environmental testing laboratories must analyze two proficiency testing samples per year, if a proficiency test sample is available for the field of accreditation (NELAC §2.4.1). Thus, only requiring annual proficiency test samples would be inconsistent with NELAC standards. The commission made no change to the rule in response to this comment.

COA commented that it liked the provision in §25.26 and §25.68 that allows an environmental testing laboratory to withdraw in whole or in part from the environmental laboratory testing accreditation and certification program at any time.

The commission appreciates the comment in support of the rule.

Eastman Chemical commented that the fee structure proposed in the rules is "reasonable and established on the logical basis of matrices."

The commission appreciates the comment in support of the rule.

TPW requests that the commission waive the accreditation fees in §25.30 and the certification fees in §25.70 for state agencies.

TWC, §5.803(b), states the commission shall establish a schedule of reasonable accreditation fees designed to recover the costs of the accreditation program. The commission determined costs should be apportioned among all regulated entities. TWC, §5.803, requires that the commission set fees to recover the cost of the environmental testing laboratory accreditation program. If the commission exempted state agencies from paying accreditation and certification fees it would place an unfair burden on the environmental testing laboratories still required to pay the fees. Additionally, because state agencies are not exempt from paying permitting or other fees, the commission has determined it would not be appropriate to exempt state agencies from the accreditation fees. The commission made no change to the rule in response to these comments.

Regarding §25.30, HCPCD commented that the fees associated with the environmental testing laboratory accreditation program should be waived if a governmental agency provides data free of charge (pro bono) to the commission.

These rules address a fundamental risk identified by the Sunset Commission. According to the Sunset Commission, unaccredited environmental testing laboratories are more likely to produce inaccurate data for agency decision-making, which results in increased risks to public health and the environment and increased agency costs (Sunset Advisory Staff Report, Texas Natural Resource Conservation Commission, 2000, Page 49). To address this concern, the legislature enacted TWC, §5.127(a), stating that the commission may only accept data for use in commission decisions from accredited environmental testing laboratories, except as provided in TWC, §5.127(b). Thus, the commission has determined that it is inappropriate to accept data from an unaccredited environmental testing laboratory, even if the data is provided to the commission by a governmental agency pro bono. Moreover, TWC, §5.803(b), states the commission shall establish a schedule of reasonable accreditation fees designed to recover the costs of the accreditation program. The commission determined costs should be apportioned among all regulated entities. Since pro bono data provided to the commission must be from accredited environmental testing laboratories, the commission has determined that it would not be appropriate to exempt governmental agencies from paying accreditation and certification fees because it would place an unfair burden on the environmental testing laboratories still required to pay the fees. The commission made no change to the rule in response to these comments.

Regarding §25.30, HCPCD commented that the fee structure established by the environmental testing laboratory accreditation program may discourage governmental laboratories from providing pro bono services to the commission.

The commission acknowledges that the fee structure established by the environmental testing laboratory accreditation program may discourage some governmental laboratories from providing pro bono services to the commission. The rules, however, address a fundamental risk identified by the Sunset Commission. According to the Sunset Commission unregulated, unaccredited labs are more likely to produce inaccurate data for agency decision making, resulting in increased risk to public health and the environment, and increased agency costs. Sunset Advisory Staff Report, Texas Natural Resource Conservation Commission, 2000, Page 49. To address this concern, the legislature enacted TWC, §5.127(a), stating that the commission may only accept data for use in commission decisions from accredited environmental testing laboratories, except as provided in TWC, §5.127(b). Thus, the commission has determined that it is inappropriate to accept data for use in commission decisions from an unaccredited environmental testing laboratory, even if the data is provided by a governmental laboratory to the commission pro bono. The commission made no change to the rule in response to this comment.

Regarding §25.30, HCPDC commented that they believe the fee structure in the rules was written to address the oversight of commercial environmental testing laboratories. Additionally, according to HCPDC the accreditation fees are a normal cost of doing business for commercial environmental testing laboratories.

According to TWC, §5.803(b), fees are intended to cover the costs of the accreditation program including costs associated with application review, environmental testing inspections, and

preparation of reports. The fee structure was developed to produce sufficient funds to operate the environmental testing laboratory accreditation program, without respect to whether an environmental testing laboratory is a commercial operation. If the commission exempted governmental agencies from paying accreditation and certification fees it would place an unfair burden on the environmental testing laboratories still required to pay the fees. Additionally, because governmental agencies are not exempt from paying permitting or other fees, the commission has determined it would not be appropriate to exempt governmental agencies from the accreditation fees. The commission has made no change to the rule in response to this comment.

COA commented that the fees in §25.30 and in §25.70 are reasonable.

The commission appreciates the comment in support of the rule.

TPW asked if the language in proposed §§25.32(b)(2), 25.36(a)(10), 25.74(b)(2), and 25.78(a)(10), means that laboratory accreditation or certification can be denied or revoked for non- payment of any commission imposed fee. TPW commented that if this is the case, this requirement seems onerous and suggested that language for non-payment of fees other than accreditation fees and certification fees be removed from the rule.

The commission responds that the intent of §§25.32(b)(2), 25.36(a)(10), 25.74(b)(2), and 25.78(a)(10), is that an environmental laboratory's accreditation or certification can be denied or revoked for non-payment of any commission imposed fees, penalties, or taxes within the commission's jurisdiction or rule adopted under such a statute. These sections are consistent with other agency rules and are necessary for the commission to conform to standard business and revenue collection practices and to meet its fiduciary duty to the citizens of the state. The fees and taxes are standard business expenses for environmental testing laboratories and ensuring that these fees and taxes are paid provides a level playing field for the regulated entities. The commission notes that 30 TAC Chapter 70 authorizes the commission to provide relief to a regulated entity experiencing financial hardships which may lower or eliminate an administrative penalty if the regulated entity can establish an inability to pay. The commission made no change to the rule based on this comment.

OxyChem commented that in §25.56(a), a certification period of three years is sufficient because data quality does not change much over one year.

The commission currently issues two-year certifications (25 TAC §73.25(e)(8)(A) and HB 2912, 77th Legislature, §18.02(b)). The commission has determined that it will be both more efficient and cost effective to administer only one environmental testing laboratory oversight program to insure the quality of the data used in commission's decisions is of high quality. Thus, after the environmental testing laboratory accreditation program is implemented, the commission will eliminate the environmental testing laboratory certification program. To ease the transition from the environmental testing laboratory certification program to the environmental testing laboratory accreditation program, the commission will operate the certification program under the guidelines of the accreditation program. The environmental testing accreditation program requires an annual accreditation period; therefore, the commission has determined that it is appropriate to modify the existing certification period to one year. Additionally, while it may be true that the quality of data produced by an environmental testing laboratory may not change much over one year, the rules address a fundamental risk identified by the Sunset Commission. According to the Sunset Commission unregulated, unaccredited labs are more likely to produce inaccurate data for agency decision-making, resulting in increased risk to public health and the environment, and increased agency costs (Sunset Advisory Staff Report, Texas Natural Resource Conservation Commission, 2000, Page 49). The commission has made no change in the rule in response to this comment.

COA commented that in §25.60(b), assessments can be either announced or unannounced. COA commented that assessments for "initial, routine, and re-accreditation or re-certification" should be announced and that assessments for "follow-up to corrective actions, failed proficiency test samples, safety violations, suspected criminal or fraudulent practices" should be unannounced. COA stated that announced inspections allow both the environmental testing laboratory staff and the commission staff to be prepared by having ready "quality control data, personnel proficiency data, performance testing data, and other information" that would make the assessment run smoothly and efficiently.

The commission has determined that it will be both more efficient and cost effective to administer only one environmental testing laboratory oversight program to insure the quality of the data used in commission's decisions is of high quality. Thus, after the environmental testing laboratory accreditation program is implemented, the commission will eliminate the environmental testing laboratory certification program. To ease the transition from the environmental testing laboratory certification program to the environmental testing laboratory accreditation program, the commission will operate the certification program under the guidelines of the accreditation program. The environmental testing accreditation program provides that environmental testing laboratory assessments may either be announced or unannounced and the accrediting authority is not required to provide advance notice (NELAC §3.3.4). Thus, the commission has determined that it is appropriate to conduct either announced or unannounced certification inspections. The commission made no change to the rule in response to this comment.

COA commented that the language in §25.62 and §25.76 could be interpreted to mean that if different methods are used in one analyte category and that if a laboratory failed one method but passed the other method, then the laboratory fails for the entire category. COA suggested that the commission allow environmental testing laboratories to retain certification for each method passed during the proficiency test.

Sections 25.62 and 25.76 allow an environmental testing laboratory to retain its certification for a specific field of certification if the environmental testing laboratory meets its proficiency testing requirements for that specific field of certification. Field of certification refers to a unique combination of matrix, method, and analyte. Section 25.62 requires proficiency testing samples to be successfully analyzed before and after a certification is issued. Section 25.50 requires the certification of an environmental testing laboratory that analyzes samples for compliance with the SDWA be based on the requirements of this chapter and EPA's *Manual for the Certification of Laboratories Analyzing Drinking Water*, 4th Edition, March 1997 and the *Lab Cert Manual Errata*, Labcert Bulletin, April 1999. EPA's *Manual for the Certification of Laboratories Analyzing Drinking Water* provides that a proficiency testing failure should only affect the status of a specific field of certification (III-8). Section 25.76 provides that

an environmental testing laboratory's certification may be suspended "in whole or in part" for failing to successfully complete required proficiency tests. Therefore, §25.62 and §25.76 allow an environmental testing laboratory to retain its certification for a specific field of certification if the environmental testing laboratory meets certification standards for that field. The commission made no change in the rule in response to these comments.

OxyChem commented that the requirement in §25.78(b), that an environmental testing laboratory consecutively fail three proficiency tests before the environmental testing laboratory's certification was revoked was reasonable.

The commission appreciates the comment in support of the rule.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §§25.1, 25.2, 25.4, 25.6, 25.8

STATUTORY AUTHORITY

The new sections are adopted under the authority granted to the commission by the Texas Legislature in HB 2912, §1.12, Use of Environmental Testing Laboratory Data and Analysis; Article 6, Accreditation of Environmental Testing Laboratories; §18.02, Transfer of Safe Drinking Water Laboratory Certification Program; and §18.03, Transfer of Environmental Testing Laboratory Certification Program. The new sections will be implemented in accordance with TWC, §5.802, which requires the commission to adopt rules for the administration of an environmental testing laboratory accreditation program; §5.803, which requires the commission to establish a schedule of reasonable accreditation fees; §5.804, which authorizes the commission to adopt rules governing accreditation of an environmental laboratory accredited in another state; and §5.805, which requires the commission to adopt rules to implement TWC, Chapter 5, Subchapter R; and §5.127, which allows the commission to accept environmental testing laboratory data and analyses for use in commission decisions regarding any matter under the commission's jurisdiction relating to permits or other authorizations, compliance matters, enforcement actions, or corrective actions only if the data and analyses are prepared by an environmental testing laboratory accredited by the commission under Subchapter R or an environmental testing laboratory described in subsection (b). Additionally, the commission may accept for use in its decisions data and analyses prepared by an on-site or in-house environmental testing laboratory if the laboratory is periodically inspected by the commission; an environmental testing laboratory that is accredited under federal law; or, if the data and analyses are necessary for emergency response activities and the required data and analyses are not otherwise available, an environmental testing laboratory that is not accredited by the commission under Subchapter R or under federal law. Further, the commission by rule may require that data and analyses used in other commission decisions be obtained from an environmental testing laboratory accredited by the commission under Subchapter R. Finally, the commission is required to periodically inspect on-site or in-house environmental testing laboratories described in Subchapter R. These new sections are also adopted under the general authority granted in TWC, §5.102, which authorizes the commission to perform any acts necessary and convenient to the exercise of its jurisdiction and powers; §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); §5.107, which authorizes the commission to establish Advisory Committees; and §5.122, which authorizes the commission to delegate uncontested matters to the executive director.

§25.4. Applicability.

(a) An environmental testing laboratory may apply for accreditation after the commission publishes notice in the *Texas Register* that the environmental testing laboratory accreditation program has met National Environmental Laboratory Accreditation Conference (NELAC) standards.

(b) An environmental testing laboratory must be accredited according to this chapter, except as provided in §25.6 of this title (relating to Conditions Under Which the Commission May Accept Analytical Data), if the laboratory provides analytical data which is used for a commission decision relating to a:

(1) permit;

(2) authorization;

(3) compliance action;

(4) enforcement action;

(5) corrective action;

(6) characterization of an environmental process or condition; or

(7) assessment of an environmental process or condition.

(c) An in-house environmental testing laboratory is to be accredited if it provides analytical data to a third party and the data is used for a commission decision relating to a:

(1) permit;

(2) authorization;

(3) compliance action;

(4) enforcement action;

(5) corrective action;

(6) characterization of an environmental process or condition; or

(7) assessment of an environmental process or condition.

(d) Subsections (b) and (c) of this section apply only to environmental testing laboratory results prepared and submitted to the commission on or after the third anniversary of the date on which the commission publishes notice in the *Texas Register* that the commission's environmental laboratory testing program established under this chapter has met NELAC standards.

(e) Until subsection (d) of this section is effective, an environmental testing laboratory that provides analytical data used for a commission decision relating to the Safe Drinking Water Act (SDWA) must be:

(1) accredited according to this subchapter and Subchapter B of this chapter (relating to Environmental Testing Laboratory Accreditation);

(2) certified according to this subchapter and Subchapter C of this chapter (relating to Environmental Testing Laboratory Certification); or

(3) certified by EPA.

(f) After subsection (d) of this section is effective, an environmental testing laboratory that provides analytical data used for a commission decision relating to the SDWA will no longer be certified and must be accredited according to this subchapter and Subchapter B of this chapter, unless the laboratory is certified by the EPA.

§25.6. Conditions Under Which the Commission May Accept Analytical Data.

The commission may accept analytical data provided by an environmental testing laboratory, for any matter under the commission's jurisdiction relating to permits or other authorizations, compliance matters, enforcement actions, or corrective actions, that is not accredited according to this chapter if the laboratory:

(1) is an on-site or in-house environmental testing laboratory that:

(A) is inspected at least every three years by the executive director; and

(B) prepares the data for a permit, registration, or other authorization, and the permit, registration, or other authorization was issued by the commission to the operator of the laboratory;

(2) is accredited under federal law, including certification by the EPA to provide analytical data for decisions relating to compliance with the Safe Drinking Water Act;

(3) provides analytical data necessary for emergency response activities and the required analytical data are not otherwise available from an environmental testing laboratory accredited according to this chapter or federal law; or

(4) provides analytical data for which the commission does not offer accreditation.

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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Stephanie Bergeron
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For further information, please call: (512) 239-4712

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SUBCHAPTER B. ENVIRONMENTAL TESTING LABORATORY ACCREDITATION

30 TAC §§25.9, 25.10, 25.12, 25.14, 25.16, 25.18, 25.20, 25.22, 25.24, 25.26, 25.30, 25.32, 25.34, 25.36, 25.38

STATUTORY AUTHORITY

The new sections are adopted under the authority granted to the commission by the Texas Legislature in HB 2912, §1.12, Use of Environmental Testing Laboratory Data and Analysis; Article 6, Accreditation of Environmental Testing Laboratories; §18.02, Transfer of Safe Drinking Water Laboratory Certification Program; and §18.03, Transfer of Environmental Testing Laboratory Certification Program. The new sections will be implemented in accordance with TWC, §5.802, which requires the commission to adopt rules for the administration of an environmental testing laboratory accreditation program; §5.803, which requires the commission to establish a schedule of reasonable accreditation fees; §5.804, which authorizes the commission to adopt rules governing accreditation of an environmental laboratory accredited in another state; and §5.805, which requires the commission to adopt rules to implement TWC, Chapter 5, Subchapter R; and §5.127, which allows the commission to accept environmental testing laboratory data and analyses for use in commission decisions regarding any matter under the commission's jurisdiction relating to permits or other authorizations, compliance matters, enforcement actions, or corrective actions only if the data and analyses are prepared by an environmental testing laboratory accredited by the commission under Subchapter R or an environmental testing laboratory described in subsection (b). Additionally, the commission may accept for use in its decisions data and analyses prepared by an on-site or in-house environmental testing laboratory if the laboratory is: periodically inspected by the commission; an environmental testing laboratory that is accredited under federal law; or, if the data and analyses are necessary for emergency response activities and the required data and analyses are not otherwise available, not accredited by the commission under Subchapter R or under federal law. Further, the commission by rule may require that data and analyses used in other commission decisions be obtained from an environmental testing laboratory accredited by the commission under Subchapter R. Finally, the commission is required to periodically inspect on-site or in-house environmental testing laboratories described in Subchapter R. These new sections are also adopted under the general authority granted in TWC, §5.102, which authorizes the commission to perform any acts necessary and convenient to the exercise of its jurisdiction and powers; §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); §5.107, which authorizes the commission to establish Advisory Committees; and §5.122, which authorizes the commission to delegate uncontested matters to the executive director.

§25.14. Term of Accreditation.

(a) The executive director shall award accreditation for a period of one year if an environmental testing laboratory's application and operations conform to the National Environmental Laboratory Accreditation Conference (NELAC) standards and this chapter.

(b) The executive director may issue an interim accreditation for up to 12 months to an environmental testing laboratory that meets the NELAC standards and requirements of this chapter except that an environmental testing laboratory assessment has not been completed because the executive director has been unable to schedule an assessment within six months of receiving a complete application for accreditation.

§25.20. Proficiency Test Sample Analyses.

(a) The operator of an environmental testing laboratory applying for initial accreditation shall ensure that two proficiency test samples are successfully analyzed, if available, according to National Environmental Laboratory Accreditation Conference (NELAC) standards, for each requested field of accreditation.

(b) The operator of an accredited environmental testing laboratory shall ensure at least two proficiency test samples are analyzed, if

available, each year for each field of accreditation according to NELAC standards. An environmental testing laboratory that does not meet the requirements of the subsection may participate in a supplemental proficiency test study according to the NELAC standards.

(c) The executive director shall determine the environmental testing laboratory's accreditation status for all affected fields of accreditation within 60 days of determining that laboratory personnel failed to analyze proficiency test samples successfully according to NELAC standards.

(d) Proficiency test samples, if available, shall be purchased from a National Environmental Laboratory Accreditation Program designated provider.

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. ENVIRONMENTAL TESTING LABORATORY CERTIFICATION

30 TAC §§25.50, 25.52, 25.54, 25.56, 25.58, 25.60, 25.62, 25.64, 25.66, 25.68, 25.70, 25.74, 25.76, 25.78

STATUTORY AUTHORITY

The new sections are adopted under the authority granted to the commission by the Texas Legislature in HB 2912, §1.12, Use of Environmental Testing Laboratory Data and Analysis; Article 6, Accreditation of Environmental Testing Laboratories; §18.02, Transfer of Safe Drinking Water Laboratory Certification Program; and §18.03, Transfer of Environmental Testing Laboratory Certification Program. The new sections will be implemented in accordance with TWC, §5.802, which requires the commission to adopt rules for the administration of an environmental testing laboratory accreditation program; §5.803, which requires the commission to establish a schedule of reasonable accreditation fees; §5.804, which authorizes the commission to adopt rules governing accreditation of an environmental laboratory accredited in another state; §5.805, which requires the commission to adopt rules to implement TWC, Chapter 5, Subchapter R; and §5.127, which allows the commission to accept environmental testing laboratory data and analyses for use in commission decisions regarding any matter under the commission's jurisdiction relating to permits or other authorizations, compliance matters, enforcement actions, or corrective actions only if the data and analyses are prepared by an environmental testing laboratory accredited by the commission under Subchapter R or an environmental testing laboratory described in subsection (b). Additionally, the commission may accept for use in its decisions data and analyses prepared by an on-site or in-house environmental testing laboratory if the laboratory is periodically inspected by the commission; an environmental testing laboratory that is accredited under federal law; or, if the data and analyses are necessary for emergency response activities and the required data and analyses are not otherwise available, an environmental testing laboratory that is not accredited by the commission under Subchapter R or under federal law. Further, the commission by rule may require that data and analyses used in other commission decisions be obtained from an environmental testing laboratory accredited by the commission under Subchapter R. Finally, the commission is required to periodically inspect on-site or in-house environmental testing laboratories described in Subchapter R. These new sections are also adopted under the general authority granted in TWC, §5.102, which authorizes the commission to perform any acts necessary and convenient to the exercise of its jurisdiction and powers; §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); §5.107, which authorizes the commission to establish Advisory Committees; and §5.122, which authorizes the commission to delegate uncontested matters to the executive director.

§25.56. Term of Certification.

(a) The executive director shall award certification for a period of one year if an environmental testing laboratory's application and operations conform to standards for certification and this chapter.

(b) The executive director may issue an interim certification for up to 12 months to an environmental testing laboratory that meets standards for certification and requirements of this chapter except that an environmental testing laboratory assessment has not been completed because the executive director has been unable to schedule the assessment within six months of receiving a complete application for accreditation.

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 101. GENERAL AIR QUALITY RULES

The Texas Commission on Environmental Quality (agency or commission) adopts an amendment to §101.1 and the repeal of §§101.6, 101.7, 101.11, 101.12, and 101.15 - 101.17. The commission also adopts new §101.201 in new Division 1, *Emissions Events*; new §101.211 in new Division 2, *Maintenance, Startup, and Shutdown Activities*; new §§101.221 - 101.224 in new Division 3, *Operational Requirements, Demonstrations, and Actions to Reduce Excessive Emissions*; and new §§101.231 - 101.233 in new Division 4, *Variances*. The amendment and repeals are being adopted in Subchapter A, *General Rules*, and the new sections are being adopted in new Subchapter F, *Emissions Events*

and Scheduled Maintenance, Startup, and Shutdown Activities. The commission adopts the amendment, repeals, and new sections as revisions to the state implementation plan (SIP) which will be submitted to the United States Environmental Protection Agency (EPA). The primary purpose for this rulemaking action is to incorporate the statutory requirements of House Bill (HB) 2912, §5.01 and §18.14, 77th Legislature, 2001, into the commission rules. Sections 101.1, 101.201, 101.211, 101.221 - 101.223, and 101.233 are adopted *with changes* to the proposed text as published in the April 26, 2002, issue of the *Texas Register* (26 TexReg 3475). Sections 101.6, 101.7, 101.11, 101.12, 101.15 - 101.17, 101.224, 101.231, and 101.232 are adopted *without changes* and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

During the 77th Legislative Session, the legislature adopted HB 2912. The bill became effective on September 1, 2001. One change resulting from HB 2912 was an amendment to Texas Health and Safety Code (THSC), Subchapter B, Chapter 382, which is the Texas Clean Air Act (TCAA), by adding new §382.0215 and §382.0216. Section 382.0215, Assessment of Emissions Due to Emissions Events, addresses the commission's assessment of emissions due to emissions events. A new term, *emissions event*, was introduced and defined to mean an upset or unscheduled maintenance, startup, or shutdown activity resulting in the unauthorized emission of air contaminants from an emissions point. Section 382.0215 also established recordkeeping and reporting requirements for sources which had an emissions event that resulted in emissions of a *reportable quantity* (RQ) or greater; established reporting requirements for certain boilers and combustion turbines which burn certain fuels and have continuous emission monitoring systems (CEMS); and mandated that the commission centrally track all emissions events. Section 382.0215 also requires the commission to develop the capacity for electronic reporting by January 1, 2003 and to place such reported information into a centralized database accessible to the public. Furthermore, §382.0215 requires the commission to annually assess the information received concerning emissions events, including the actions taken by the commission in response to the emissions events, and report this information to the legislature.

THSC, §382.0216, *Regulation of Emissions Events*, requires the commission to establish criteria to determine when emissions events are considered excessive. Section 382.0216 also requires that the following six criteria must be included when determining if an emissions event was excessive: 1) the frequency of the facility's emissions events; 2) the cause of the emissions event; 3) the quantity and impact on human health or the environment of the emissions event; 4) the duration of the emissions event; 5) the percentage of the facility's total annual operating hours during which emissions events occur; and 6) the need for startup, shutdown, and maintenance activities. Under the requirements of §382.0216, once the commission determines that a facility has had excessive emissions events, the commission must require the owner or operator of the facility to take corrective action to reduce these types of emissions. The owner or operator of the facility must then either file a corrective action plan (CAP) or file a letter of intent to obtain an authorization for the emissions. The owner or operator of the facility may only file a letter of intent if the emissions are sufficiently frequent, quantifiable, and predictable. Furthermore, §382.0216 provides action dates for both the commission and affected facilities for the submittal and approval of the CAPs and required authorizations. Finally, §382.0216 establishes that the burden of proof is on the owner or operator of the facility to claim a defense to commission enforcement action and that the commission must consider chronic excessive emissions events when reviewing an entity's compliance history.

Based on the legislative changes in HB 2912, concerning assessment and regulation of emissions events, the commission is adopting the revision of its current upset, maintenance, startup, and shutdown (U/M) rules (i.e., amending current rules and providing new rules) to reflect the requirements of HB 2912. The statutory notes of HB 2912, §18.14 state: "The purpose of Sections 382.0215 and 382.0216, Health and Safety Code, as added by this Act, is to add new or more stringent requirements regarding upsets, startups, shutdowns, and maintenance. Those sections may not be construed as limiting the existing authority of the Texas Natural Resource Conservation Commission under Chapter 382, Health and Safety Code, to require the reporting or the permitting of the emission of air contaminants or to bring enforcement action for a violation of Chapter 382." Therefore, the commission is adopting the requirements provided in HB 2912 to enhance the existing rules and upset/maintenance program.

SECTION BY SECTION DISCUSSION

The primary purpose of this rulemaking action is to incorporate the statutory requirements of HB 2912. Because some sections of Chapter 101 are being opened for revisions, the commission is taking the opportunity to revise the general format of Chapter 101. Currently, Chapter 101 is divided into Subchapter A, *General Rules*, and Subchapter H, *Emissions Banking and Trading*. Subchapter A contains §§101.1 - 101.30 which pertain to a wide variety of topics, whereas the rules in Subchapter H pertain only to emissions banking and trading. The commission intends that as rules in Subchapter A are amended, the different sections (or rules) will be moved to more topically specific subchapters, except for the definitions in §101.1, which will remain in Subchapter A. In this rulemaking action, the commission is adopting the repeal of §§101.6, 101.7, 101.11, 101.12, and 101.15 - 101.17, and adopting the move of the rule language contained within these sections into a new Subchapter F. The rule language contained in repealed §101.6, *Upset Reporting and Recordkeeping Requirements*, is moved to new §101.201, with the title being changed to *Emissions Event Reporting and Recordkeeping Requirements*. Rule language found in repealed §101.7, *Maintenance, Start-up and Shutdown Reporting, Recordkeeping, and Operational Requirements*, is moved to new §101.211, with the title being changed to *Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements*. Rule language found in repealed §101.11, *Demonstrations*, is moved to new §101.221 and new §101.222 with revised section titles of *Operational Requirements* and *Demonstrations*, respectively. Revisions to the language being moved into §§101.201, 101.211, 101.221, and 101.222 will be discussed later in this section of the preamble. A new §101.223, *Actions to Reduce Excessive Emissions*, will also be discussed later in this section of the preamble. The rule language found in repealed §101.12, *Temporary Exemptions During Drought Conditions*; repealed §101.15, *Petition for Variance*; repealed §101.16, *Effect of Acceptance of Variance or Permit*; and repealed §101.17, *Transfers*, will be moved to new §§101.224, 101.231, 101.232, and 101.233, respectively, and the new sections will retain the original titles, with the exception of §101.233 which will be retitled *Variance Transfers*. The changes being made to language of these sections are

purely administrative, and will also be discussed later in this section of the preamble.

Section 101.1--Definitions (Administrative changes)

Due to the addition of new terms, the numbering of the terms defined in this section has been revised. Furthermore, there are numerous administrative corrections which are made to definitions. These changes are being adopted so that the rule language will conform to commission and Texas Register formatting and style standards. Generally, no change in the meaning of these definitions is intended by this rulemaking action, except where updates are based on changed facts. These definitions are: fuel oil; maintenance area; and nonattainment area (lead). The adopted administrative definition changes are as follows. The acronym VOC is deleted from the definition for *carbon adsorber* because it is not used again in the definition. The phrase "(See incinerator)" is deleted from the definition for *commercial incinerator* for formatting and style purposes. The acronym VOC is expanded to volatile organic compound and the acronym deleted because it is only used once in the definition for *component*. The words in the definition for *criteria pollutant or standard* are lowercased because they are not a proper noun, and the acronym CFR is deleted because it is not used again in the definition. The definition for *de minimis* is italicized because the term is a Latin term. The acronym ERC is deleted from the definition for *emissions reduction credit* because it is not used again in the definition. In the definition for *federal motor vehicle regulation*, the acronym CFR is expanded to Code of Federal Regulations and the acronym deleted because it is not used again in the definition. In the definition for *federally enforceable*, the acronym CFR is expanded to Code of Federal Regulations and acronymed because it is used more than once in the definition. In addition, the words "pursuant to" are changed to the word "under" to reduce the legalistic style of writing. The phrase "as defined in this section" is added to the definition for *flare* because the definition refers to the definition for *vapor combustor*. The definition for *fuel oil* is updated by changing the citation for the American Society for Testing and Materials (ASTM) to reflect the current ASTM specifications and to add two new grades of fuel (1 (low sulfur) and 2 (low sulfur)) as listed in the current specifications. In the definition for *gasoline* the words "vapor pressure" in the phrase "Reid Vapor Pressure" are lowercased because they are not proper nouns, the acronym kPa is expanded to kiloPascals, and the acronyms RVP and kPa are deleted because they are only used once in the definition. In the definition for *high-volume low-pressure (HVLP) spray guns*, the acronym HVLP is deleted because it is only used once in the definition. In the definition for *leak*, the acronym VOC is expanded to volatile organic compound and the acronyms VOC and ppmv are deleted because they are only used once in the definition. In the definition for *liquid fuel*, the acronym Btu is expanded to British thermal unit and the acronym deleted because it is only used once in the definition. A new maintenance area is added to the definition for *maintenance area* which is the Collin County lead maintenance area. In the definition for *maintenance plan*, the word "Plan" is lowercased because it is not a proper noun, the acronym SIP is expanded to state implementation plan, and the acronym SIP deleted because it is only used once in the definition. In the definition for *Metropolitan Planning Organization (MPO)*, the acronym MPO is deleted because it is only used once, and the acronym USC is expanded to United States Code. The acronym MERC is deleted from the definition *mobile emissions reduction credit (MERC)* because it is only used once in the definition. The acronym CFR is expanded to Code of Federal Regulations and the acronym deleted from the definition for *municipal solid waste landfill* because it is only used once in the definition. The words in the definition for *national ambient air quality standard* are lowercased because they are not proper nouns, and the acronyms NAAQS, CO, Pb, NO_2, O_3, PM_{10}, $PM_{2.5}$, and SO_2 are deleted because they are only used once. In the definition for *nonattainment area*, the words "national ambient air quality standard" and the word "dioxide" are lowercased in two places because they are not proper nouns. In addition, the acronym CFR is expanded to Code of Federal Regulations and the acronym deleted; the acronym FR is added to the term *Federal Register* because it is used more than once; and the acronyms ELP, NO_2, HGA, BPA, DFW, and SO_2 are deleted because they are used only once. Finally, in the definition for *nonattainment area*, the Collin County lead nonattainment area text is deleted and the text "No designated nonattainment areas" is added to subparagraph (C) because Collin County has been officially redesignated as a lead maintenance area. In the definition for *particulate matter emissions*, the acronym CFR is expanded to Code of Federal Regulations and acronymed because it is used more than one time; and the acronym SIP is expanded to state implementation plan and the acronym deleted because it is only used once. In the definition for PM_{10}, the acronym CFR is expanded to Code of Federal Regulations and acronymed because it is used more than once, and the number "10" is changed to the word "ten" to conform with Texas Register style. In the definition for PM_{10} *emissions*, the acronym CFR is expanded to Code of Federal Regulations, the acronym SIP is expanded to state implementation plan, and both acronyms are deleted because they are only used once in the definition. In the definition for *polychlorinated biphenyl compound (PCB)*, the acronym CFR is expanded to Code of Federal Regulations and the acronyms PCB and CFR are deleted because they are only used once in the definition. In the definition for *reasonable further progress (RFP)*, the acronym SIP is expanded to state implementation plan, and the acronyms RFP and SIP are deleted because they are only used once in the definition. The acronym USC is expanded to United States Code and the acronym deleted from the definition for *solid waste* because it is only used once. The acronym kPa is expanded to kiloPascal and the acronym deleted from the definition for *standard conditions* because it is used only once in the definition. In the definition for *submerged fill pipe*, the acronym cm is expanded to centimeters because it is only used once in the definition. In the definitions for *sulfuric acid mist/sulfuric acid* and *total suspended particulate*, the acronym CFR is expanded to Code of Federal Regulations and the acronym deleted because it is used only once in each definition. In the definition for *true vapor pressure*, the acronyms psia and VOC are expanded to pounds per square inch absolute and volatile organic compound, respectively, and the acronyms deleted because they are only used once in the definition. In the definition for *vapor combustor*, the acronym VOC is expanded to volatile organic compound and the acronym deleted because it is only used once in the definition. Finally, in the definition for *VOC water separator*, the acronym is expanded to volatile organic compound (VOC) because it is used more than once in the definition.

Section 101.1--Definitions

The commission is not adopting the new term *authorized emissions* as proposed in §101.1(4), and is not adopting the proposed changes to the term *unauthorized emissions* proposed in §101.1(105), renumbered as §101.1(104). The commission

has decided to separate these proposed changes from this rulemaking and may reconsider them in another forum such as a commission work session.

The commission is adopting the definition of a new term *emissions event* to incorporate the change in the statute. THSC, §382.0215, adds the term *emissions event*, defined as "an upset, or unscheduled maintenance, startup, or shutdown activity, that results in the unauthorized emissions or air contaminants from an emissions point." The commission replaced *upset* with the new term *emissions event* in §§101.201, 101.211, and 101.222.

The commission revised the term *non-reportable upset* to the more correct term *non-reportable emissions event* to be consistent with the statutory language of HB 2912.

The commission revised the RQ for acetaldehyde, butenes, ethylene, propylene, and toluene from 5,000 pounds to 100 pounds for only the Houston/Galveston (HGA) and Beaumont/Port Arthur (BPA) nonattainment areas. The lower RQ recognizes the important role these compounds play in the formation of ozone, and the need for the commission to collect more detailed information on the periodic releases of these compounds in its efforts to attain the ozone standard. The commission revised the RQ for nitrogen oxide (NO) and nitrogen dioxide (NO_2) from ten pounds to 100 pounds. The commission recognizes that certain uncontrolled air emissions of NO and NO_2 equal to or greater than the ten-pound RQ may rarely require a response by the commission. The acronym CFR is expanded to Code of Federal Regulations. The commission revised §101.1(85)(C) as proposed to clarify that the RQ for opacity applies only to boilers and combustion turbines that burn certain fuels. The proposed definition of scheduled maintenance, startup, or shutdown activity and reporting and recordkeeping requirements in §101.201 and §101.211 have been revised to incorporate the reporting of excess opacity events.

To be consistent with the statutory language of HB 2912, the commission revised the term *reportable upset* to the more correct term *reportable emissions event*.

The commission is defining the new term *scheduled maintenance, startup, or shutdown activity*. As previously stated, HB 2912 provided new terms when addressing emissions events. THSC, §382.0215, refers to unscheduled maintenance, startup, or shutdown activity; therefore, to be consistent with the new statutory language, the commission is defining what is considered to be a scheduled maintenance, startup, or shutdown activity. As part of this definition, the commission is also clarifying that during the special situations in which there might be an excess opacity event when there has not been a release of any unauthorized compounds or mixtures, if the notification, recording, and reporting requirements are followed, the activity would be considered a scheduled maintenance, startup, or shutdown activity.

The commission is defining the term *site* in Chapter 101 as it has been adopted in the compliance history rules in 30 TAC Chapter 60. The commission has adopted rules concerning chronic excessive emissions events based on a review of the whole site, not just each facility at a site. To be consistent in the use of terminology between the Chapter 101 rules and the compliance history rules in Chapter 60, the commission has added the same definition of *site* as §60.2(a).

The commission has deleted the proposed definition of the term *unscheduled maintenance, startup, or shutdown activity* because the term is no longer being used in the rules affected by this adoption.

The commission is revising the definition of the term *upset* by adding the clarifying word *event* to the term. Furthermore, to minimize potential confusion with the *upset event* definition, the word "unscheduled" is being replaced with the phrase "unplanned or unanticipated." Finally, the commission has deleted the redundant phrase "emission of air contaminants."

Section 101.6--Upset Reporting and Recordkeeping Requirements

The commission is adopting the repeal of this section. The commission is amending the rule text from §101.6, as necessary, to conform with the requirements of HB 2912 and is adopting the amended text into §101.201.

Section 101.7--Maintenance, Start-up and Shutdown Reporting, Recordkeeping, and Operational Requirements

The commission is adopting the repeal of this section. The commission amended the rule text from §101.7, as necessary, to conform with the requirements of HB 2912 and is adopting the amended text into §101.211.

Section 101.11--Demonstrations

The commission is adopting the repeal of this section. The commission amended the rule text from §101.11, as necessary, to conform with the requirements of HB 2912 and is adopting the amended text in new §101.221 and §101.222.

Section 101.12--Temporary Exemptions During Drought Conditions

The commission is adopting the repeal of this section. The rule language, with minor administrative changes to conform to the format and style of the Texas Register, is adopted in new §101.224. The repeal and move to a new section is the result of a Chapter 101 formatting change.

Section 101.15--Petition for Variance

The commission is adopting the repeal of this section. The rule language, with minor administrative changes to conform to the format and style of the Texas Register, is adopted in new §101.231. The repeal and move to a new section is the result of a Chapter 101 formatting change.

Section 101.16--Effects of Acceptance of Variance or Permit

The commission is adopting the repeal of this section. The rule language, with minor administrative changes to conform to the format and style of the Texas Register, is adopted in new §101.232. The repeal and move to a new section is the result of a Chapter 101 formatting change.

Section 101.17--Transfers

The commission is adopting the repeal of this section. The rule language, with minor administrative changes to conform to the format and style of the Texas Register, is adopted in new §101.233. The repeal and move to a new section is the result of a Chapter 101 formatting change.

Section 101.201--Emissions Event Reporting and Recordkeeping Requirements

In an effort to be consistent with HB 2912, codified in THSC, §382.0215, concerning emissions events, the commission is replacing the term *upset* with the newly defined term *emissions event*. The commission revised the notification requirements in

§101.201(a)(2) and the reporting requirements in §101.201(b), to comply with the statutory requirement of HB 2912, requiring additional and more detailed information, when it is necessary to report an emissions event. The name of the owner or operator of the facility experiencing an emissions event and the facility's air account number are now required. When the commission changes to a central registry, the air account number will become a secondary identifier and the "regulated entity" number will become the primary identifier. Therefore, a reference to an air account number includes both the regulated entity number as well as the air account number. The owner or operator of a facility experiencing an emissions event must also provide the physical location of the point at which emissions to the atmosphere occurred. When reporting the processes and equipment involved in the emissions event, the initial notification can be limited to the common name of the process unit or area, the name of the facility which incurred the emissions event, and the common name of the emission point where the emissions were released into the atmosphere. However, the final record and report required in §101.201 should include some type of source identification. The source identification must include the common name for the equipment involved and the most precise commission recognized identifier. This identifier could include emission point numbers and facility identification numbers established for emissions inventories or preconstruction authorization requirements. An emission point number is the designation used by the agency to identify the point from which emissions of air contaminants are released to the atmosphere. Emission point numbers are typically established for a facility either through the permitting process or in conjunction with the air emissions inventory for a facility. A facility identification number is the designation established by the agency to identify the facility that is the source of air contaminants. Facility identification numbers are also typically established for a facility either through the permitting process or in conjunction with the emissions inventory for a facility. Similar new recordkeeping and reporting requirements are being adopted for the rules concerning scheduled maintenance, startup, and shutdown activities in §101.211(a) and (b). When reporting and recording the date and time of the emissions event, the date and time recorded should be when the emissions event was discovered, not when it is believed that the emissions event started. In §101.201(a)(2)(F) and (b)(6) the estimated duration of the emissions event is required. The requirement to provide the cause of the emissions event has been relocated from §101.201(a)(2)(D) to §101.201(a)(2)(I) and from §101.201(b)(4) to §101.201(b)(10). The commission is simply reorganizing the order of the information being provided and does not intend any change to this requirement.

In the notification requirements of §101.201(a)(2) and (3) and the reporting requirements in §101.201(b), the commission is making a grammatical correction concerning the reporting of the compound descriptive type of the compounds release. The term *exceed* is replaced with a more correct phrase *have equaled or exceeded*. The commission is also clarifying the language that when reporting the estimated quantities of the compounds released, the reported numbers should be the total estimated quantities that include both the authorized emissions limit and the total amount of emissions emitted. The commission is clarifying §101.201(a)(2)(H) and (b)(8) to state that opacity must be included in notifications submitted under to §101.201. The commission recognizes that a determination of the quantity and nature of emissions are not directly obtainable when opacity readings are the basis for determining that an unauthorized emission has occurred. Therefore, the owner or operator of the facility may use good engineering judgement, which may consist of an evaluation of air pollution control devices and other relevant process parameters, including consideration of previous stack testing results in conjunction with process knowledge at the time of the emissions event. These same corrections and clarifications are being made in new §101.211(a) and (b) regarding scheduled maintenance, startup, and shutdown reporting and recordkeeping requirements. The commission notification forms for emissions events and scheduled maintenance, startup, and shutdown activities will also be updated to reflect these requirements. For final reports, the commission requires owners or operators to provide the basis used to determine the quantity of emissions, including the method of calculation (e.g., the emission factors obtained from the EPA emissions factor document, AP-42, information from prior testing, engineering calculations, etc.). Finally, new THSC, §382.0216(b)(3)(H), added by HB 2912, requires that the owner or operator provide any additional information necessary to evaluate the emissions event. This requirement has been incorporated into §101.201(b)(12), which concerns final recordkeeping of all reportable and non-reportable emissions events.

In the proposed §101.201(a)(4), the commission replaced the word *report* with the word *provide*. This change was for clarification only and did not impose any new requirements. The change in terminology is necessary to more clearly state that the source must provide additional information upon request of the executive director. In the adoption, the commission further clarified the language to state that when requested to provide additional information, an owner or operator must provide the information in writing and within the timeframes established in the request.

The commission deleted the language that was contained in the repealed §101.6(a)(5) that stated that "Any spill or discharge required to be reported under §§327.1 - 327.5, and 327.31 of this title (relating to Spill Prevention and Control), is not required to be reported under paragraphs (1) and (2) of this subsection." In its place, the commission has continued to allow the initial notification required to be submitted under these new rules to be satisfied by reporting under 30 TAC §327.3 (relating to Notification Requirements) in recognition of the spirit of HB 2912 provisions relating to minimization of duplicative reporting where that is possible, and because the data elements required to be included in the notification under both rules are compatible with such combined reporting. The commission is requiring the report, that is to be submitted within two weeks after an emissions event, be submitted electronically as the required data elements of the spill rules and these new emissions events rules vary considerably, and because HB 2912 expressly requires electronic reporting related to emissions events. The commission has retained the exemption to the requirement to report electronically for small businesses.

The commission is clarifying §101.201(b) to specify that an owner or operator of a facility must create a final record of all reportable and non-reportable emissions events. This revision reflects the commission's existing practice and is consistent with guidance that staff has provided to members of the regulated community.

New §101.201(c) and (f), as adopted, incorporates the language in repealed §101.6(c) and (e), respectively, with minor changes to reflect the new terminology in HB 2912.

The commission is making three revisions to the language in §101.201(d) and §101.211(d). First, the language concerning data return was revised to make it clear that a CEMS must have a data return such that the CEMS completes at least one operating cycle in each successive 15-minute interval. An operating cycle includes sampling, analyzing, and recording of the data. Second, the rule language was revised to clarify that this exemption is only for boilers and combustion turbines which are fueled by natural gas, coal, lignite, wood, or fuel oil containing hazardous air pollutants at a concentration of less than 0.02% by weight. Finally, the subsection was revised to implement a provision in HB 2912, THSC, §382.0215(c), and now provides that an owner or operator of a combustion turbine or boiler burning the previously listed fuels, and that is equipped with a CEMS, is exempt from creating, maintaining, and submitting final records of the reportable and non-reportable emissions events under subsections (b) and (c), as long as the initial notification submitted under subsection (a) contains the information required under subsection (b).

Opacity measurements of emissions alone cannot be used to predict the quantity or nature of the air contaminants being emitted. Facilities that experience an excess opacity event which does not also have unauthorized emissions of compounds or mixtures will have a difficult time complying with the reporting requirements to report the nature and quantity of air contaminants emitted as required by HB 2912. Requiring separate reporting for these excess opacity events (no unauthorized emissions of compounds or mixtures) will allow for appropriate reporting based on the information of the event available to the owner or operator of the facility. Because the commission acknowledges that there are special situations in which there can be an opacity exceedance when there has not been a release of any unauthorized compounds or mixtures, the commission is adding new §101.201(e). This subsection describes what an excess opacity event is and establishes a notification requirement for such events when the owner or operator of the facility is not already required to provide a notification under §101.201(a)(2) or (3). The data elements for this notification are similar to those required by §101.201(a)(3) for boilers and combustion turbines that burn certain fuel. An excess opacity event is an event with an opacity reading equal to 15 additional percentage points above the applicable opacity limit, averaged over a six-minute period. An emissions event with excessive opacity must be reported as an emissions event under §101.201(a).

The commission is adopting new §101.201(g) to implement the requirement of THSC, §382.0216(k), that on and after January 1, 2003, final reports required under §101.201 must be submitted electronically to the commission. The commission is currently developing a method by which this data will be received and will provide updates as the 2003 deadline approaches. Until January 1, 2003, businesses may provide notifications and reports by any viable means, which meet the time frames required in the rules. Consistent with the statutory language in THSC, §382.0215(f), the rule includes an exemption from electronic reporting for businesses which meet the small business definition in THSC, §382.0365(g)(2). Although exempt from electronic reporting, a small business will still be required to provide notifications and final reports in accordance with the requirements of the rules. The commission invited comments and specific suggestions for an alternative reporting scheme to be used in times of technical difficulty of the electronic reporting system once it is established.

To facilitate a smooth transition into electronic reporting, the commission has established a phased approach to the requirement for submitting emissions events information by electronic means. This approach will enable affected businesses in Texas to establish procedures for electronic submission of required information related to emissions events. The first phase, starting on January 1, 2003, establishes that reports required to be submitted within two weeks of the end of the event under §101.201(c), and notifications required under §101.201(e), be submitted electronically using an online form via a commission-established secure web server. The second phase, starting on January 1, 2004, establishes that notifications required to be submitted within 24 hours of discovery under §101.201(a) be submitted utilizing that same electronic means. Although the requirement for initial reports to be submitted electronically begins in 2004, an owner or operator of a facility which experiences a reportable emissions event which also requires an initial notification under §327.3 of this title, is not required to report the event electronically provided that the owner complies with the requirements in §327.3 as well as the requirements of subsections (a) and (c).

The commission is adopting new §101.201(h) to implement THSC, §382.0216(i), which requires the commission to initiate enforcement actions against owners and operators who fail to report an reportable emissions event, for such failure to report, and for the underlying emissions event itself. New §101.201(h) also includes the statutory language in new THSC, §382.0216(i), that the requirement to initiate enforcement does not apply where an owner or operator reports an emissions event and the report was incomplete, inaccurate, or untimely, unless the owner or operator knowingly or intentionally falsified the information in the report. The commission also clarifies that incomplete, inaccurate, or untimely reports are not sanctioned by this language and continue to be violations of §101.201(a)(2) and (3), (b), and (e), and the commission may initiate enforcement for such violations.

Section 101.211--Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements

In an effort to improve readability and to be consistent with the statutory requirements of HB 2912, the commission has replaced the phrase "maintenance, startup, or shutdown" with the newly defined term *scheduled maintenance, startup, or shutdown activity*, found in THSC, §382.0215(a). The commission has made this change in several places in §101.211. The change reflects the intentional distinction between scheduled and unscheduled maintenance, startup, or shutdown activities.

In addition to the changes to §101.211 discussed earlier in this preamble, the commission changed the language in new §101.211(a) to clarify that any event for which notification required by this section was not submitted, or which the estimated emissions submitted to the commission were exceeded, is considered an unscheduled maintenance, startup, or shutdown activity, and therefore, is subject to the reporting requirements of §101.201 and the criteria specified in §101.222(a) and (b). This clarification is consistent with the requirements of HB 2912 and clarifies the commission's practice in place since the 1997 amendments to the rule. Because the commission acknowledges that there are special situations in which there can be an opacity exceedance when there has not been a release of any unauthorized compounds or mixtures, the commission is modifying §101.211(a). This subsection establishes a notification

requirement for excess opacity events resulting from scheduled maintenance, startup, and shutdown activities when the owner or operator of the facility is not already required to provide a notification under §101.211(a)(1). The data elements for this notification are similar to those required by §101.211(a)(1) except estimated opacity is required instead of compound-specific information. An excess opacity event is an event with an opacity reading equal to or exceeding 15 additional percentage points above the applicable opacity limit, averaged over a six-minute period. An emissions event with excessive opacity must be reported as an emissions event under §101.201(a). The commission recognizes that determinations of the quantity and nature of emissions are not directly obtainable when opacity readings are the basis for determining that an unauthorized emission has occurred. Therefore, the owner or operator of the facility may use good engineering judgement, which may consist of an evaluation of air pollution control devices and other relevant process parameters, including consideration of previous stack testing results in conjunction with process knowledge at the time of the scheduled maintenance, startup, or shutdown activity.

The commission changed the language in §101.211(a)(1)(E) to clarify that the date and time of the maintenance, startup, or shutdown in the notification of an activity is considered to be the expected date and time. For the final reporting and recordkeeping purposes, the event date and time should be the actual event date and time. Furthermore, the commission clarified that final records must be completed as soon as practicable, but not later than two weeks after the end of the activity instead of the start of the activity. For shutdowns, the end of the activity would be the cessation of operation of a facility for any purpose.

The commission modified §101.211(b) to clarify that the requirement to submit a final record also applies to opacity exceedances from boilers and combustion turbines referenced in the definition of RQ, and not just to activities that result from unauthorized emissions.

The commission added new §101.211(c) to clarify that if the information provided in the initial notification is different than what is recorded as the final record, the owner or operator must submit the revised information within two weeks after the end of the activity. The owner or operator of a source must submit a final report for any scheduled maintenance, startup, or shutdown activity where an initial notification was provided even if the unauthorized emissions did not actually exceed an RQ. Final reports are necessary to track information collected about maintenance, startup, and shutdown activities in the commission's centralized database, and to provide closure to initial reports of such activities.

Section 101.221--Operational Requirements

As explained later in this preamble, the commission is not adopting proposed §101.221(a), which was proposed as, "No person shall cause, suffer, or allow unauthorized emissions."

As previously stated, Chapter 101 was reformatted. Thus, the commission moved the language in repealed §101.7(a) to new §101.221(a) without any changes. New §101.221 primarily concerns operational requirements of sources; therefore, the language relating to the operation of pollution emission capture equipment and abatement equipment in repealed §101.7(a), was moved to new §101.221.

The commission modified §101.221(a) by renaming the word "normal" to clarify that pollution capture equipment and abatement equipment must be maintained in good working order and operated properly during all facility operations.

The commission moved, without any changes, the operational requirements concerning smoke generators and other devices used to train inspectors in the evaluation of visible emissions from repealed §101.11(c) into new §101.221(b); and moved the operational requirements concerning equipment, machines, devices, flues, and or contrivances to be used at a domestic residence from repealed §101.11(d) into new §101.221(c). Similarly, the commission moved the rule language concerning sources which cannot be controlled or reduced due to a lack of technological knowledge from repealed §101.11(e) into new §101.221(d). The existing rule language relating to the burden of proof to demonstrate that the exemption criteria have been met is on the owner or operator of the source, was moved from repealed §101.11(f) into new §101.221(e), with the addition of a sentence to cover opacity events. The minor changes concern revision of rule citations and replacement of the term *upsets* with the new term *emissions events*. The commission also revised §101.221(e) to clarify that the owner or operator of a facility must satisfy the burden of proof as a condition to unauthorized emissions being considered not excessive and exempt from compliance with authorized emissions limitations. The commission moved the rule language relating to the commission's power to require corrective action as necessary to minimize emissions from repealed §101.7(g), into new §101.221(f), without revisions.

Section 101.222--Demonstrations

The commission moved the rule language from repealed §101.11(a) and (b) to new §101.222(b) and (c), respectively. As done in other sections of this rulemaking, the commission replaced the terms *upset* and *maintenance, startup, or shutdown* with the terms *emissions events* and *scheduled maintenance, startup, or shutdown activity*, respectively, to be consistent with the statutory changes of HB 2912.

The commission added new §101.222 to establish criteria to determine when a facility has had excessive emissions events, to determine whether emissions events that are not considered excessive are exemptible, to determine when emissions from scheduled startup, shutdown, and maintenance activities are exemptible, and to establish the criteria for exempting opacity events, and opacity events that result from scheduled maintenance, startup, and shutdown activities. THSC, §382.0216(b), requires the commission to establish criteria to determine when emissions events are considered excessive. The criteria must include: 1) the frequency of the facility's emissions events; 2) the cause of the emissions event; 3) the quantity and impact on human health or the environment of the emissions event; 4) the duration of the emissions event; 5) the percentage of a facility's total annual operating hours during which emissions events occur; and 6) the need for startup, shutdown, and maintenance activities.

The commission incorporated these criteria in §101.222(a) as the criteria the executive director will use to evaluate when emissions events are considered excessive. The executive director will conduct evaluations on a case-by-case basis to determine if a facility has excessive emissions events. Case-by-case determinations are necessary because the rules in Chapter 101 apply statewide to all types of facilities. The commission does not have the resources to develop case-specific criteria limits for each of

the different types of facilities in the state which have the potential to emit air contaminants. In addition, case-by-case reviews allow for a more thorough evaluation of all relevant information about an emissions event.

Furthermore, THSC, §382.0216(f), states that "The commission by rule may establish an affirmative defense to a commission enforcement action if the emissions event meets criteria defined by commission rule. In establishing rules under this subsection, the commission at a minimum must require consideration of the factors listed in Subsections (b)(1) - (6)." This affirmative defense parallels existing commission practice of evaluating factors previously listed in repealed §101.11(a). In reviewing the criteria provided in HB 2912, which was codified in THSC, §382.0216(b)(1) - (6), the commission determined that most of those factors used to determine when emissions events are excessive were already included in the rules. These criteria are incorporated directly from repealed §101.11(a)(1) - (9). New §101.222(b)(1) includes the requirement that the emissions event must be properly reported, which was part of repealed §101.11(a). New requirements in §101.222(b)(2) - (9) are identical to repealed §101.11(a)(1) - (8). Section 101.222(b)(10) is a statutory requirement from HB 2912 that requires the facility owner or operator to review the percentage of a facility's total annual operating hours during which unauthorized emissions occurred to determine that the percentage was not unreasonably high. The language in repealed §101.11(a)(9), which was a test of whether the emissions from an event caused or contributed to a condition of air pollution, was expanded to include a prohibition of exceeding the national ambient air quality standards (NAAQS) or a prevention of significant deterioration (PSD) increment, and codified in new §101.222(a)(11).

The commission moved the criteria for scheduled maintenance, startup, or shutdown activities from repealed §101.11(b) to new §101.222(c), with two minor changes, both comparable to those previously discussed with respect to §101.222(b)(1) and (11). Under new §101.222(c)(1), the commission restated the requirement of proper reporting originally found in §101.11(b), moved repealed §101.11(b)(1) - (8) to new §101.222(c)(2) - (9), and added the prohibition of exceeding the NAAQS or a PSD increment to parallel the same requirement in §101.222(b)(11). In an effort to remove redundant rule language, the phrase "air emissions limitations established in permits, rules, and orders of the commission, or as authorized by TCAA, §382.0518(g)" was replaced with "authorized emission limitation."

The commission is adding new §101.222(d) and (e) to establish the criteria for exempting opacity events and opacity events that result from scheduled maintenance, startup, and shutdown activities. The criteria are similar to the exemption criteria in §101.222(b) and (c), except they do not include the criteria that the event was caused by a sudden breakdown of equipment or process beyond the control of the owner or operator, and the event did not cause or contribute to an exceedance of NAAQS or PSD increments, because opacity can occur without a sudden breakdown or without contributing to such exceedances. In addition, the criterion regarding the percentage of a facility's total operating hours during which unauthorized emissions occurred was not included in these new subsections because opacity is not an air contaminant.

The commission is adding new §101.222(f) to clarify that if the commission finds a frequent or recurring pattern of emissions events; scheduled maintenance, startup or shutdown activities; opacity events; and opacity events that result from scheduled maintenance, startup, and shutdown activities, the commission may pursue enforcement notwithstanding the exemptions described in §101.222(b) - (e). If a frequent or recurring pattern develops, the commission is specifically retaining its authority to seek corrective actions and penalties, as appropriate, for not just the event that leads the commission to find a frequent or recurring pattern, but also for each of the events that is a part of the frequent or recurring pattern. A frequent or recurring pattern of events may include events with emissions that were previously individually exempt.

Section 101.223--Actions to Reduce Excessive Emissions

Since the proposal of this rule, the commission has changed the title of the section from "Excessive Emissions Events" to "Actions to Reduce Excessive Emissions." New §101.223 also establishes the framework in which the commission will determine that a site has had chronic excessive emissions events.

When the executive director determines that a facility has excessive emissions events, the executive director will provide written notification to the owner or operator, providing a description of the emissions events that caused the determination to be made and the time period during which the evaluation of those emissions events took place. The owner or operator must then take action to reduce emissions, either in the form of a CAP; or, if the emissions are sufficiently frequent, quantifiable, and predictable, the owner or operator may file a letter of intent to obtain authorization from the commission for the emissions.

The commission set minimum requirements for a CAP in new §101.223(a)(1). At a minimum the CAP must identify the cause or causes of each emissions event in question, including all contributing factors that led to each emissions event; specify the control devices or other measures that are reasonably designed to prevent or minimize similar emissions events in the future; identify operational changes the owner or operator will take to prevent or minimize similar emissions events; and specify time frames within which the owner or operator will implement the components of the CAP. The time frame, or implementation schedule, of the CAP will be enforceable by the commission. The commission is requiring in §101.223(a)(2) that in any case, the owner or operator must obtain commission approval of an approved CAP within 120 days of initial filing of the original CAP.

THSC, §382.0216(d), requires specific dates concerning the review and approval of CAPs. If the commission does not disapprove a plan within 45 days, the plan is deemed approved. Within this 45-day period, if the commission provides written notification of disapproval, the owner or operator will have 15 days to respond, unless another deadline is specified. Written notification by the commission should identify deficiencies in the CAP and reasons for disapproval of the CAP. The owner or operator may request a written approval of the CAP, in which case the commission must take a final written action within 120 days. Finally, if the commission determines that the approved CAP is inadequate to prevent or minimize emissions and emissions events, the commission may request that the owner or operator revise the CAP. An approved CAP under §101.223(a)(2) is not an authorization for unauthorized emissions.

THSC, §382.0216(c), specifies timelines for the filing of a permit application or obtaining authorization if a permit by rule or standard permit is feasible. The owner or operator will have 30 days to file a letter of intent to obtain authorization for the emissions. If authorization is to be obtained by a permit application, the application must be filed within 120 days after filing the letter of intent.

If the permitting option is chosen, the emissions must meet permitting criteria established in 30 TAC Chapter 116. If permitting criteria cannot be met, the owner or operator must file a CAP. For emissions authorizations through a permit by rule or a standard permit, the authorization must be obtained within 120 days after filing the letter of intent. If the commission denies any of these requests for authorization, the owner or operator must file for a CAP within 45 days after receiving notice of the commission denial.

Finally, the commission adds new §101.223(b) to describe when a site may be considered to have chronic excessive emissions events. The executive director may forward excessive emissions events determinations to the commission for consideration of whether to issue an order finding that the site has chronic excessive emissions events. This section establishes the following criteria for the commission to consider in determining whether a site has chronic excessive emissions events: 1) the size, nature, and complexity of the site's operations; 2) the frequency of the emissions events at the site; and 3) the reason or reasons for excessive emissions event determination(s) at the site. THSC, §382.0216(j), requires the commission to account for and consider chronic excessive emissions events and emissions event for which the commission has initiated enforcement in its review of an entity's compliance history.

THSC, §382.0216(g), states: "A person may not claim an affirmative defense to a commission enforcement action if the person failed to take corrective action under a CAP approved by the commission within the time prescribed by the commission and an emissions event recurs because of that failure." The commission added new §101.223(c) to incorporate this statutory language.

The commission added §101.223(d) to clarify that nothing in this section limits the commission's ability to bring enforcement actions for violations of commission rules, including enforcement actions to require actions to reduce emissions from excessive emissions events.

Section 101.224--Temporary Exemptions During Drought Conditions

The commission moved the language in repealed §101.12 into new §101.224, without changing the intent of the rule. The commission made only two minor revisions to the language. First, the name of the commission's air permitting division was revised from Office of Air Quality, New Source Review Division to Office of Permitting, Remediation, and Registration, Air Permits Division. Second, the word "utilize" was replaced with the more grammatically correct word "use."

Section 101.231--Petition for Variance

The commission moved the language in repealed §101.15 into new §101.231, without changing the intent of the rule. The only revision to the section was to replace "Texas Natural Resource Conservation Commission (TNRCC or commission)" with "commission" to facilitate the commission name change required by HB 2912, §18.01.

Section 101.232--Effect of Acceptance of Variance or Permit

The commission moved the language in repealed §101.16 into new §101.232, without changing the intent of the rule. The only revisions are grammatical and stylistic and include: changing "pursuant to" to "under;" changing "TNRCC" to "commission;" and "Act" to "TCAA."

Section 101.233--Variance Transfers

The commission moved the language in repealed §101.17 into new §101.233, without changing the intent of the rule. The only revisions to the existing language were to replace the phrase "Texas Natural Resource Conservation Commission (TNRCC or commission)" with the term "commission," to facilitate the commission name change required by HB 2912 and to revise the title of the section from "Transfers" to "Variance Transfers" to avoid confusion with provisions relating to transfer of permits.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking action in light of the regulatory impact analysis (RIA) requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a "major environmental rule." Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a). 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. The amendments implement certain requirements of HB 2912. Specifically, the amendments require additional reporting for each emissions event; require excess emission reports from certain boilers and combustion turbines to have all required reporting information to satisfy as final reports; establish an affirmative defense to an emissions event, including statutory limitations as to when that defense is unavailable, and clarify that the burden of proof for an affirmative defense is on the person claiming the defense; incorporate statutory requirements for filing a CAP or intent to obtain authorization for emissions, and associated required deadlines; create provisions for required contents of CAPs and commission approval and enforcement of CAPs; establish criteria for determining when emissions events are excessive; and define a process for the executive director to determine when excessive emissions events have occurred and criteria for the commission to consider in determining when an owner or operator has chronic excessive emissions events. In addition, the amendments revise the definition section, including a change to the RQ for seven specific compounds and revise the general format of Chapter 101. The amendments which implement HB 2912, §5.01 and §18.14, add new or more stringent requirements, and do not limit the commission's existing authority requiring reporting or permitting of emissions and authority to bring enforcement action under the THSC and Texas Water Code (TWC). The amendments will not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

In addition, Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an commission 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 commission instead of under a specific state law. The amendments do not exceed a standard set by federal law or exceed an express requirement of state law. Further, there is no contract or delegation agreement that covers the topic that is the subject of this rulemaking. As discussed in the STATUTORY AUTHORITY sections of this preamble, this rulemaking was not developed solely

under the general powers of the commission, but is authorized by the provisions cited in those sections to implement certain requirements of HB 2912 and modify the reporting requirements for specific air contaminants. Therefore, this rulemaking is not subject to the regulatory analysis provisions of §2001.0225(b), because the adopted rules do not meet any of the four applicability requirements.

The commission invited public comment regarding the draft RIA determination during the public comment period. No specific comments were received.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact analysis for this rulemaking action. The specific purpose of this rulemaking is to implement certain sections of HB 2912, modify the reportable quantities of ethylene and propylene, and revise the format of Chapter 101, as discussed elsewhere in this preamble. The amendments specifically implement the requirements of THSC, §382.0215 and §382.0216, regarding the reporting of upset and maintenance emissions. Promulgation and enforcement of the adopted rules would be neither a statutory nor a constitutional taking because they do not affect private real property. Specifically, the amendments do not affect private property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Therefore, these rules do not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq*.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). No new sources of air contaminants will be authorized and the revisions will maintain the same level of emissions control as the existing rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 CFR, to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

The commission solicited comments on the consistency of the proposed rulemaking with the CMP during the public comment period, however, no specific comments were received.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 101 contains applicable requirements under 30 TAC Chapter 122, *Federal Operating Permits*; therefore, owners or operators subject to the Federal Operating Permit Program must, consistent with the permit revision process in Chapter 122, revise their operating permits to include the revised Chapter 101 requirements for each emissions unit at their sites affected by these revisions.

HEARING AND COMMENTERS

A public hearing on this proposal was held in Austin, Texas, on May 21, 2002, at 10:00 a.m., at the Texas Natural Resource Conservation Commission, 12100 Park 35 Circle, Building F, Room 2210. Five persons attended the hearing, but none registered to speak. The comment period was scheduled to close at 5:00 p.m. on May 28, 2002, however, at the request of the EPA, the comment period was extended until 5:00 p.m. on June 10, 2002. Written comments were received from the following commenters: Environmental Defense and Public Citizen on behalf of the Alliance for Clean Texas (ACT); Association of Electric Companies of Texas, Inc. (AECT); Alamo Cement Company, Ltd. (Alamo); Association of Texas Intrastate Natural Gas Pipelines (ATINGP); Birch & Becker, L.L.P. on behalf of the City of Garland, Greenville Electric Utility System, and San Miguel Electric Cooperative, Inc. (Birch); BP Products North America, Inc. (BP); Brown McCarroll, L.L.P on behalf of the Texas Oil and Gas Association and other clients (Brown McCarroll); Capitol Aggregates (Capitol); Thompson & Knight, L.L.P. on behalf of Chaparral Steel Midlothian, L.P. (Chaparral); City Public Service of San Antonio (CPS); Dow Chemical Company (Dow); Eastman Chemical Company, Texas Operations (Eastman); EPA; ExxonMobil Production Company (ExxonMobil-Production); ExxonMobil Downstream/Chemical (ExxonMobil-Downstream); Harris County Public Health and Environmental Services Pollution Control Division (Harris County Public Health); Occidental Chemical Corporation (OxyChem); Reliant Energy, Incorporated (Reliant); the Honorable Scott Hochberg, Texas State Representative, District 132 (Representative Hochberg); Sierra Club, Houston Regional Group (Sierra-Houston); Texas Chemical Council (TCC); Baker Botts, L.L.P. on behalf of the Texas Industry Project (TIP); and TXI Operations, L.P. (TXI).

RESPONSE TO COMMENTS

ACT, Birch, EPA, Harris County Public Health, and OxyChem expressed general support of the proposal. None of the commenters expressed general opposition to the proposal. ACT, Alamo, AECT, ATINGP, BP, Birch, Brown McCarroll, Capitol, Chaparral, CPS, Eastman, EPA, ExxonMobil, ExxonMobil-Downstream, Harris County Public Health, OxyChem, Reliant, Representative Hochberg, Sierra-Houston, TCC, TIP, and TXI suggested changes and/or stated concerns regarding the rule language. In addition to their individual comments, BP endorsed the comments of the TCC; Eastman and ExxonMobil-Production endorsed the comments submitted by TIP; OxyChem endorsed the comments submitted by TCC and Brown McCarroll; and Reliant endorsed the comments submitted by AECT and TIP.

As a general comment, ACT stated that the proposed changes to Chapter 101 will do little, if anything, to improve the SIPs in HGA and BPA, and urged the commission to reconsider its proposal in light of the needs to further reduce emissions in these nonattainment areas.

The commission has not made any changes in response to these general comments. The primary goal of this rulemaking is to incorporate the statutory requirements of HB 2912, and revise definitions as necessary. Because some sections of Chapter 101 are being opened for revisions, the commission is taking the opportunity to revise the general format of Chapter 101. In addition, the definition of reportable quantity is being revised so that the commission can receive more timely data with regard to emissions of five highly-reactive VOCs. The commission disagrees that the rules will not improve SIPs in HGA and BPA because the commission expects additional reporting required by these rules to assist in the evaluation of ozone formation, including the sources of these emissions, so that appropriate emission levels and control strategies can be adopted to achieve attainment of the ozone standard in those areas. Further, the commission's position is that the rules provide an incentive to reduce emissions because emitters who do not timely report or do not meet the criteria of §101.222 may be subject to enforcement action and a determination that the emissions events are excessive, which may also form the basis for a determination that an owner or operator has had chronic excessive emissions events.

Brown McCarroll commented that it is surprising that the current rule proposal goes much further than the legislative mandate and, in fact, attempts to redefine the mandate to require the commission to add minor revisions to the existing rules, to implement a new set of rules and criteria for identifying and correcting excessive emissions events, to provide for the consideration of chronic excessive emissions events in an entity's compliance history, and for the commission to focus its regulatory attention on those persons who fail to report emissions and provide protection for persons who make a good faith attempt to report emissions and who attempt to correct emissions events. The rules actually would make fundamental changes that call into question virtually all prior commission permits, rules, or other authorizations granted under THSC, Chapter 382 (TCAA). Brown McCarroll commented that the proposed rules also provide for additional, burdensome requirements for reporting emissions events, none of which were mandated or supported by HB 2912. Finally, the proposal would dramatically increase the number of required records without any recognized benefit to the environment or any specific statutory mandate to require such records. Brown McCarroll stated that many of these proposed rule amendments are beyond the scope of HB 2912 and, thus, would violate the procedural requirements of the Texas Administrative Procedure Act (APA).

The commission disagrees with the commenter and has not made any specific changes in response to this comment. The primary author of this portion of HB 2912 has explained the intent of the legislation was to, at a minimum, have the commission evaluate all emission events according to the criteria of proposed §101.222. The commission does not consider the inclusion of new designations of excessive and chronic excessive emissions events to be only minor revisions. Although the commenter did not explain how these rules call into question virtually all prior commission permits, rules, or other THSC authorizations, the commission disagrees that these rules make fundamental changes to existing permits or other authorizations, nor any rules other than those which are the subject of this rulemaking. The rules as adopted do not affect air authorizations or other rules concerning permits, rules, or orders of the commission. The APA establishes the minimum standards of uniform practice and procedure for state agencies in rulemaking, and the commission has met those legal requirements.

As discussed elsewhere in this preamble, the commission acknowledges that there will be an increase in some reporting, particularly reports related to releases of the five compounds for which the RQ was lowered to 100 for the HGA and the BPA in §101.1(85)(A)(iii). As discussed earlier in this preamble, the commission finds that there is a recognized benefit to the environment by receiving such additional information. An increased number of reports as a result of changes to the rules will enable the commission to better evaluate the types of emission releases of concern when it receives timely information for the reportable emissions. The commission's concept is consistent with the protection of public health because it provides for incentives to reduce unauthorized emissions and minimization of emissions which are excessive emissions events.

Brown McCarroll commented that Texas Government Code, §2001.024(b), requires that a notice of proposed rulemaking which "amends any part of an existing rule" must set out the text of the entire part of the rule being amended, new language must be underlined, and deleted language must be bracketed and stricken through to ensure that persons potentially affected by the proposed changes can determine exactly the changes proposed by the commission. Brown McCarroll requested that the commission re-propose the amendments and revisions in a format that conforms to the statutory requirements of the APA and allow for additional consideration of public comment.

The commission disagrees that the format used to propose these rules does not conform to any requirements in the APA and therefore declines to re-propose the amendments. The commission followed Texas Register rules regarding formatting of the changes. Further, reorganization of the chapter was the result of the commission's quadrennial review of the chapter. That review suggested that the chapter be reorganized to have a more logical format, which necessitated repeal of old rules and proposal of new sections as explained in the proposal preamble. Further, a redline/strike out version of the commission's existing rules was available at all stakeholder meetings that clearly illustrated the specific proposed changes.

EPA commented that the public record should explain what safeguards are in place to prevent permitted facilities experiencing emissions events from substituting the reporting and recordkeeping provisions of Chapter 101 for reporting and recordkeeping requirements under the PSD and new source review regulations.

Through this rulemaking, the commission does not suggest or allow that Chapter 101 reporting act as a substitute for or in lieu of reporting required by federal permit or rule. The commission is sensitive to the burden of duplicative reporting and seeks to minimize any duplicative reporting whenever possible.

AECT, Brown McCarroll, and TCC agreed with the commission's initial estimate that not more than five emissions events would be considered excessive annually, while ACT objected to the low number. All commenters requested that the commission explain how it arrived at the estimated number of excessive emissions events of five to better understand how the commission plans to determine whether excessive emissions events have occurred. ACT urged the commission to reconsider its interpretation of the requirements of THSC, §382.0216 (b) and (c), in light of the language in HB 2912, §18.14. TCC expressed concern that if the rules are not substantially revised, most chemical plants will be

labeled as having excessive emissions events and suggested that the commission consider complexity of the plant, age of the equipment, and other factors as deemed appropriate by the legislature before making this determination, and classify events as "excessive" or "chronic" at the highest level of the commission. TCC further commented that the regulated entity should be afforded the opportunity to appeal the decision, and that the commission should clarify that for any isolated event to be "excessive," it would be an event that posed significant threat to health or the environment, excluding *force majeure*.

The commission revised §101.222 since proposal and expect that significantly more than five emissions events at facilities will be classified as excessive. The proposal contemplated that excessive emissions events would be limited to those that posed an imminent threat to public health or the environment. Based on historical examples, five of these types of events per year was a reasonable estimate. Since proposal, the commission has reconsidered its approach to determining when an emission event is "excessive." The commission intends to evaluate all emissions events against the criteria of §101.222(a) to determine whether an event or events are excessive. While more events are likely to be classified as excessive, the commission anticipates that not every nonexemptible event will rise to the level of being excessive. Based on past experience, the commission expects to receive several thousand notifications of reportable emissions events annually, and it would be impractical for the "highest level" of the commission to evaluate each emissions event. Each emissions event will be reviewed on a case-by-case basis primarily at the regional office level considering the criteria as adopted in §101.222.

HB 2912 did not contemplate a separate appeal process regarding the executive director's decision on whether each emissions event is excessive. Rather, the intent was for facilities with excessive emissions events to quickly implement a CAP. Owners and operators who disagree with these determinations can seek review with commission staff. The commission declines to make other changes to criteria suggested by these comments because the commission finds that the criteria in HB 2912 is sufficient for determining whether an emissions event is excessive.

Section 101.1--Definitions

Birch commented that the commission uses the term "facility" in several places in the proposed rules. For convenience and to improve the readability of the rules, Birch suggested that the commission also add the THSC definition of "facility" to the definitions in §101.1.

The commission declines to make the suggested change because the definition of "facility" in THSC, §382.003(6), is sufficient, as are other terms defined in the statute.

ACT supported the addition of a definition of "authorized emission" in proposed §101.1(4). ExxonMobil-Downstream, Brown McCarroll, ATINGP, and Reliant commented that the changes to the definition of "unauthorized" in proposed §101.1(106) and the new definition of "authorized" in proposed §101.1(4) are substantial changes and a significant departure from past commission practice or current permitting practices. AECT commented that the proposed new and revised definitions will increase the scope of the upset, maintenance, startup, and shutdown rules such that every unscheduled excursion of a process or operation would be an upset without providing any added protection to human health or the environment. Brown McCarroll commented that the proposed rule "ignores and completely misconstrues" the statutory requirement that emissions of air contaminants "cause or contribute" to air pollution for such emissions to be unauthorized and recommended that the commission delete the proposed definition changes and leave the existing definitions and underlying policy in place. Dow, AECT, TIP, ExxonMobil, and ExxonMobil-Downstream suggested that the definition of "authorized emissions" be revised to include the phrase "that do not exceed any applicable air emissions limitation in a permit, rule, or order of the commission or THSC, §382.0518(g)." In addition, ExxonMobil-Production suggested that using "authorized," the term which is being defined, as part of the definition itself, does not provide a definition of "authorized" and should not be used.

In the proposed rules, the commission proposed to add a new definition of the term *authorized emissions*, to modify the existing definition of "unauthorized emissions," and to add new §101.221(a) that would prohibit a person from causing, suffering, or allowing unauthorized emissions. The commission received extensive comments raising a number of different issues relating to these proposed revisions. Although these proposed rule changes are within the commission's authority to adopt because they would interpret and implement the TCAA, they are not required by THSC, §382.0215 and §382.0216, as added by HB 2912. Given the limited purpose of this rulemaking, the commission has determined that it is not necessary to adopt the proposed new definition of "authorized emissions" and the proposed changes to the definition of "unauthorized emissions" at this time. This bifurcation will allow for future consideration of the issues raised by the commenters as well as provide future opportunities for the commission to deliberate the issues, such as at a commission work session, if appropriate.

TIP commented that the way commission now claims to interpret "unauthorized emissions" is confusing to the regulated community and does not make sense because the total emissions of an "emissions event" that are below the level in the maximum allowable emission rate table (MAERT) may not even reach the authorized emissions "limit." ExxonMobil-Downstream commented that any emissions that do not exceed the permit MAERT are authorized emissions because these emissions have already gone through evaluation. Dow suggested that the emission rate(s) presented on Table 1(a) of a permit application are the key representations in the application. TCC requested that the definition of authorized emissions be expanded so that it is clear that all routine emissions from a facility are authorized, including startup, shutdown, and maintenance emissions, as long as the emissions are below emissions limitations established by permit, rule, or order of the commission.

The commission disagrees with the comments and declines to make any of the recommended changes. Permit limits are based upon representations made by an applicant and the representations become conditions of the permit under 30 TAC §116.116(a). The commission relies on representations to indicate the worst-case scenario in which the facility expects to operate. Physical construction and facility operations form the basis upon which a health impacts review is conducted and a permit issued with appropriate emission controls. Therefore, emissions that exceed permitted emission limits or differ in the nature of the emissions (different chemical composition and resulting compositional quantity), the method of control (fully operational best available control technology), or the source (specific location) of emissions from what was represented

will potentially affect the impacts of the emissions and type of controls required, and the commission therefore does not consider such emissions to be authorized.

ACT commented that creation of a definition for "authorized emissions" is a positive step for clarifying exactly what emissions are allowed under commission's rules and authorizations. However, ACT urged that CO_2 and methane should not be on the list of presumptively authorized emissions because emissions of these gases contribute to global warming. ACT stated that Texas should at least begin to collect reliable data regarding the emission of these gases. Conversely, ATINGP commented that the list of air contaminants deemed authorized in the definition of "authorized emissions" is too narrow and limited, and recommended adding "and any other component that is not causing a condition of air pollution as defined in THSC, §382.003(3)" to the definition of authorized emissions. Chaparral commented that the commission's new definition of "authorized emissions" is misguided in limiting CO_2, water, nitrogen, methane, ethane, noble gases, hydrogen, and oxygen as "authorized emissions" for purposes of Subchapter F only. Chaparral suggested that because the commission does not routinely authorize emissions of these substances in its permit actions, rules, or orders, the commission should consider them "authorized" for all of the commission's rules and modify the rule accordingly. Chaparral also recommended clarifying that authorized emissions are emissions, other than insignificant emissions, of source-specific air contaminants regulated by the commission. Finally, Chaparral suggested the commission confirm that the authorized emissions of certain classes of air contaminants, such as particulate matter and VOCs, include the unspeciated components of those air contaminants.

The commission has not made any changes to these comments. The commission adopted the list of air contaminants in the definition of unauthorized emissions in the 1997 and 2000 versions of the rule and declines to add or delete any of the listed air contaminants. The commission disagrees that determining an air contaminant to be unauthorized is the appropriate method of collecting data for CO_2 and methane. The commission has not determined that reporting of these emissions beyond what is required in the emissions inventory is necessary for controlling the quality of the state's air. Unspeciated components of particulate matter and VOCs are similarly not blanketly authorized because the commission needs speciation information to fully evaluate whether an emissions event is excessive and to evaluate impacts.

TCC commented that the commission should also clarify in the preamble that certain emissions which are "exempted by rule" are "authorized."

Emissions may be authorized by the commission in a number of ways, including through permits by rule and other rules that allow emissions.

CPS questioned if being "exempt from compliance" means that an event is authorized, if so, would a startup, shutdown, or maintenance event that is properly reported and meets the listed demonstrations in §101.222 be considered "authorized."

The terms "exempt from compliance" and "authorized" have different meanings that relate to emissions from an event, and not the event itself. Consistent with the statute, a facility must have authorization for emissions prior to its construction or modification by one of several means identified in the statute and implemented by the commission. The commission has not included upset and many maintenance emissions in permits because of the unpredictable nature of emissions, vast range of possible events, and varying kinds of impact scenarios that could occur. The very nature of an upset event generally precludes any emissions-specific health or environmental impacts assessment from occurring prior to the release of air contaminants. In the case of an emissions event, the commission must decide how to evaluate the unauthorized emissions that occurred during the event. Emissions that are "exempt from compliance" are not penalized by the commission after an emissions event has occurred or after a maintenance, startup, or shutdown event is complete, while emissions that are authorized are not subject to the reporting requirements and evaluation under Chapter 101. In the case of a maintenance, startup, or shutdown activity that is properly reported and meets the demonstration criteria in §101.222, the activity would not be authorized, but would be exempt from compliance with applicable emissions limits.

TIP objected to the lack of notice given by commission in the proposed rule package regarding removal of the reference to "emission limitation" found in the current definition of "unauthorized emissions." TIP commented that the preamble does not refer to "exceeding any limitation," and did not explain the reason for its deletion, and thus, is inconsistent with the APA. Furthermore, this proposed change is inconsistent with the current permitting rules of Chapter 116, in that Chapter 116 permit applications have never required a catalogue of all possible operating scenarios that constitute "normal" operations and the regulations do not contemplate that they should. Reliant commented that the commission should not change the definition of "unauthorized emission" nor add a definition of "authorized emission." Reliant also stated the proposed rule preamble did not address the reason for the changes to the definitions of "authorized" and "unauthorized emissions."

The commission received extensive comments raising a number of different issues relating to the proposed definitions of "authorized emissions" and "unauthorized emissions." Although these proposed rule changes are within the commission's authority to adopt because they would interpret and implement the TCAA, they are not required by THSC, §382.0215 and §382.0216, as added by HB 2912. Given the limited purpose of this rulemaking, the commission has determined that it is not necessary to adopt the proposed new definition of "authorized emissions" and the proposed changes to the definition of "unauthorized emissions" at this time. This bifurcation will allow for future consideration of the issues raised by the commenters as well as provide future opportunities for the commission to deliberate the issues, such as at a commission work session, if appropriate.

TIP commented that the proposed regulatory changes are directly contrary to the "primary intent" behind the 1997 revisions to the U/M rules adopting the RQ concept, which the commission explained was "to reduce the number of reports to the commission and allow the commission to concentrate on events that were more significant and had the most likelihood of affecting persons and property off-site from the source of the upset."

The changes to the rules as adopted result from implementing the statutory changes required by HB 2912. HB 2912 changed the reporting requirements to allow the commission to have increased information to evaluate emissions events and intended to curb failure to report emissions events. Therefore, the commission expects some increase in reporting as a result of these rule changes. The commission is lowering the RQ for ethylene, butenes, and propylene and establishing a 100-pound RQ for

acetaldehyde and toluene because of the important role these compounds play in the formation of ozone, and the need for the commission to collect more detailed information on the periodic releases of these compounds in its efforts to attain the ozone standard, as discussed in more detail later in this preamble. These changes may also result in increased reporting, but the need to collect this information supports this additional burden on industry and commission resources.

ATINGP requested the commission to add an effective date provision making the new definitions effective prospectively.

The requested change is unnecessary because the rules will be self-implementing and will not apply retroactively. In other words, the rules will apply to emissions events that occur on and after the effective date of the rules.

Sierra-Houston questioned if fugitive emissions are included in the §101.1(26) definition of emissions event.

Unauthorized emissions may result from fugitive emissions from a piece of equipment or component. For example, a complete failure of a component such that the component can no longer serve its functional purpose would generally be considered an emissions event. Similarly, a process degassing from a blown-out valve would be an emissions event. However, if the packing around the stem develops a seep and gas is escaping out the hole but the component is still in service, this would not be an emissions event, but instead would be a component fugitive leak.

Sierra-Houston and HCPCD commented that the phrase "emission point" in the §101.1(26) definition of emissions event needs to be defined or clarified. HCPCD suggested that the term "emissions point" should not necessarily refer to an identified and represented emission point included in a permit application or permit by rule registration information and that may have been assigned an emission point number. Additionally, HCPCD commented that it is possible to experience an emissions event from a scheduled maintenance, startup, or shutdown activity. Dow and ExxonMobil-Downstream commented that the rule or preamble should clarify that an emission event is a single event that occurs at a facility and suggested that the words "single" or "discrete" could be added prior to the words "upset" and "unscheduled" to clarify this definition. ExxonMobil-Downstream and TIP commented that the commission should substitute the term "facility" for the term "emissions point" in the definition of emissions event. TIP also commented that if the commission is compelled to use "emissions point" because the term was used in HB 2912, then it should define "emissions point" to be a "facility."

The commission declines to make the suggested changes because the term "emission point" is a part of the statutory definition of emissions event. THSC contained a definition of "facility" at the time that §382.0215(a) was added, and the legislature chose not to use that term in defining the term "emission event." The commission interprets the term "emission point" to mean the localized place where emissions enter the atmosphere. This could include equipment meeting the definition of a "facility" such as a compressor or flare, for example, but it could also include the point where a pipeline break has occurred. Therefore, the commission is not making the suggested changes. An emissions event may be comprised of either a single episode of unauthorized emissions or a series of discrete episodes of unauthorized emissions over a period of time where the cause of each episode is identical or related.

A maintenance, startup, or shutdown activity is either scheduled or unscheduled. If, after a maintenance activity is conducted, the actual emissions exceeded the estimated emissions submitted in the notification, then the event would not be considered a scheduled maintenance, startup, or shutdown activity.

ACT commented that the definition of "federally enforceable" in §101.1(33) does not appear to include the limitations and conditions in federal operating permits issued under Chapter 122. ACT suggested revising the definition to read: "All limitations and conditions which are enforceable by EPA administrator, including those requirements developed under 40 Code of Federal Regulations (CFR) Parts 60 and 61, requirements within any applicable state implementation plan (SIP), any requirements incorporated in a federal operating permit issued pursuant to 30 TAC Chapter 122, any permit requirements established under 40 CFR §52.21 or under regulations approved under 40 CFR Part 51, Subpart 1, including operating and preconstruction permits issued under the approved program that is incorporated into the SIP and that expressly required adherence to any permit issued under such program."

As stated in the proposal, various administrative corrections are being made to definitions in §101.1, so that the rule language will conform to commission and Texas Register formatting and style standards. Two such changes are being made to §101.1(33) as proposed and the commission does not intend any change to the meaning of this definition by this rulemaking. Because these comments are beyond the scope of this rulemaking, the commission has not changed the rule in response to these comments.

ExxonMobil-Production commented that with the proposed creation of the new term "reportable emission event," the §101.1(83) definition of the term "reportable upset" should be deleted as it is redundant and confusing.

The commission agrees and has adopted the term "reportable emissions event" and deleted the term "reportable upset."

ATINGP recommended that the RQs for the five specified compounds remain the same and not be changed by this rulemaking as these changes are premature. CPS commented that there was no rationale provided for reducing the RQ for propylene and ethylene to 100 pounds from 5,000 pounds, and wanted to know if there was new evidence that these particular chemicals are more harmful than others that are listed. TCC commented that the reduction to a 100-pound threshold is arbitrary, and expressed concern that the commission has proposed to establish 100-pound RQs for these compounds without offering modeling or other specific scientific basis or evidence for such a drastic change.

ACT requested that the commission lower the RQ for additional species to gain an even fuller understanding of the true extent and impact of upset and maintenance, startup, and shutdown emissions. Specifically, the commission should ensure that the RQ is set at no more than 100 pounds for the 12 highly-reactive VOCs. ACT supported the RQ for highly-reactive VOCs set even lower, specifically at a *de minimis* of one to ten pounds, and requested that the commission modify its proposed rule accordingly. In addition to lowering the RQs for highly-reactive VOCs to 100 pounds or less, ACT suggested that the commission lower the RQs from the current levels for other VOC species, including all C3-C10 alkanes and their isomers, as well as C2-C4 alcohols and any isomers. ACT suggested that the commission should set RQs of 1,000 pounds or less for all isomers of the following air contaminants: propane, butane, pentane, hexane, heptane, octane, nonane, and decane, ethanol, propanol, and butanol.

TIP commented that the commission should replace the number "100" from new §101.1(85)(A)(i)(III)(-b-), (-c-), (-g-), (-n-), and (-o-), with the number "5,000" in its place. Dow suggested lowering the RQ for ethylene, propylene, and butenes to 1,000 pounds, and to retain the RQ of 1,000 pounds for acetaldehyde and toluene to enable the commission to have quick access to upset and maintenance, startup, and shutdown events in the 1,000 to 5,000 pound range and likely would not place extra burden on the regional offices and regulated community. ExxonMobil-Downstream disagreed with the proposed lowering of the RQs. ExxonMobil-Downstream suggested that the commission adopt an RQ of 1,000 pounds for ethylene, propylene, and butenes and reevaluate the justification for a lower RQ for these compounds and for toluene and acetaldehyde at a later time after evaluation of data obtained under the interim level. ExxonMobil-Downstream commented that the commission should give consideration to what is an appropriate level of significance for each compound, and what is the degree of information obtained for the resources required.

ExxonMobil-Production commented that to be consistent with the reasoning for the proposal (lowering the RQ to 100 pounds for substances such as ethylene, and adding an RQ of 100 pounds for toluene), specific substances in EPA tables 302.4 and 355 Appendix A (found in 40 CFR 302 and 40 CFR 355, respectively) that are deemed important to air quality should instead be added to the list in §101.1(85)(A)(i)(III) and that §101.1(85)(A)(i)(I) and (II) should then be deleted because additional reporting of substances not identified as important to the commission's air quality goals is redundant with reporting already required by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Emergency Planning and Community Right-to-Know Act (EPCRA) for the protection of public health. In addition to being listed in §101.1(85)(A)(i)(III), reasonable RQs for these substances should be set. As an example, ExxonMobil-Production suggested that the RQ for benzene should be raised to 100 pounds.

EPA and Sierra-Houston supported the proposed reduction of the RQs for ethylene and propylene from 5,000 pounds to 100 pounds. HCPCD supported lowering the RQ of certain VOCs when appropriate, stating it is reasonable to lower VOC RQs based on ozone formation reactivities for ozone nonattainment areas.

The commission has not made any changes in response to these comments. As stated in the proposal, the lower RQ for the five highly-reactive VOCs recognizes the important role those compounds play in the formation of ozone, and the need for the commission to collect more detailed information on the periodic releases of these compounds in its efforts to attain the ozone standard. The commission invited comment on the appropriate levels for the ethylene, butenes, acetaldehyde, toluene, and propylene RQs and the geographical location of these RQs to allow the commission to collect sufficient and meaningful data related to periodic releases. The proposal to change the RQ for five compounds reflects the default RQ of 100 pounds found in §101.1(85)(A)(ii) for any compounds not specifically listed; the default RQ of 100 already applies to the seven remaining highly-reactive VOCs. The commission's monitoring data and evaluation of ozone formation supports the need to have this information reported to the commission at these RQs so that the staff has the temporal information to evaluate releases of these compounds.

In the past year, the commission conducted a scientific evaluation based in large part on aircraft data collected by the Texas 2000 Air Quality Study (TexAQS). The TexAQS, a comprehensive research project conducted in August and September 2000 involving more than 40 research organizations and over 200 scientists, studied ground-level ozone air pollution in the HGA and east Texas regions. The study revealed that while NO_x emissions from industrial sources were generally correctly accounted for, industrial VOC emissions were likely significantly understated in earlier emissions inventories. The study also showed that surface monitors were insufficient in capturing the phenomenon of ozone plumes downwind of industrial facilities. On four separate days, ozone levels exceeding 125 parts per billion (ppb), the current one-hour ozone NAAQS, were recorded by aircraft instruments that were missed by surface monitoring equipment.

Preliminary results from the scientific evaluation of TexAQS data were summarized in a memorandum, dated February 28, 2002, which is available at *ftp://ftp.tceq.state.tx.us/pub/AirQuality/AirQualityPlanningAssessment/Modeling/HGAQSE/Reports_2002Feb/TNRCC/exsummary_20020228.pdf*. Analysis showed that plumes stemming from HGA's industrial areas produce ozone very rapidly due to the collocation of large NO_x and VOC emissions from industrial facilities. Initial efforts were focused on the most remarkable findings, that a select number of highly-reactive VOCs (ethylene, propylene, and 1, 3 butadiene) contributed to very large portions of reactivity observed airborne samples, and were previously under reported in the emissions inventory used in the December 2000 HGA SIP. As scientists completed more detailed analyses, other reactive VOCs, including isoprene, butenes, formaldehyde, acetaldehyde, toluene, pentenes, trimethylbenzenes, xylenes, and ethyltoluenes may be found to possibly contribute to ozone production in HGA. Other scientists have indicated that large amounts of less reactive VOC emissions have contributed to ozone production in HGA. At this time, commission staff has not been able to analyze the role of these additional VOCs in ozone production in HGA, but plans to conduct that analysis prior to the mid-course review SIP revision scheduled for proposal in 2003. Therefore, controls on upsets and routine industrial VOC emissions are necessary to address some of the elevated ozone levels observed in HGA.

Technical support documentation contains early results from ongoing analysis examining whether reductions in emissions of highly-reactive VOCs can replace the last 10% of industrial NO_x controls, while maintaining the integrity of the SIP by ensuring that the air quality specified in the approved December 2000 HGA SIP continues to be met. Several detailed analyses provide some directional support for the premise that it may be possible to achieve the same level of air quality benefits with additional reductions in industrial olefin emissions, specifically reductions of highly-reactive VOCs from industrial sources. See the June 21, 2002, issue of the *Texas Register* (27 TexReg 5394 and 5454) and the July 12, 2002, issue of the *Texas Register* (27 TexReg 6208) for further information about these analyses.

In addition, Dr. David Allen, professor at the University of Texas at Austin and member of the Interim Science Coordinating Committee (see *http://home.tceq.state.tx.us/air/aqp/airquality_techcom.html#topic2*), has performed sensitivity analyses using a simple photochemical "box" model designed to replicate ambient air conditions in HGA. These analyses indicate that episodic emissions of approximately 100 pounds of highly-reactive hydrocarbons can cause localized (one square kilometer area) increases in ozone concentration of approximately 50 ppb.

Because the background of normal emissions is approximately 90 ppb, an increase of 50 ppb can contribute to an exceedence of the one-hour standard. Thus, 100 pounds is a sufficient quantity to make a difference in formation of both ozone and transient high ozone events. Therefore, as discussed later in this preamble, requiring reporting of these compounds of particular interest at 100 pounds supports the lower RQ to assist the commission in its efforts to understand ozone formation and events and to develop appropriate controls for emissions of ozone precursor compounds. This information is necessary for both the current proposed HGA SIP revision and the mid-course review of the HGA SIP, a commitment made by the commission and a part of the federally-approved HGA SIP. The commission is not aware of any scientific information that supports the need at this time for an RQ in the range of one to ten pounds for highly-reactive VOCs.

While one of the principal reasons for the 1997 amendments to the rules which established the concept of a "reportable quantity" was to allow the commission to concentrate those resources on releases of unauthorized emissions that were the most significant, the monitoring data and evaluation of ozone formation supports the need to have additional information reported to the commission for these specific compounds so that the commission has the temporal information to evaluate releases of these compounds. Specifically, the commission needs detailed information which shows the emissions changes in hourly time frames (as opposed to reports stated in terms of daily, weekly, or annual time frames) to further the research in causation of ozone formation, including what kinds of releases cause transient high ozone. Without the detailed timely reporting of information about each release, the causes cannot be determined and will harm the commission's efforts to control them effectively. Information regarding quantity and duration of the release, in addition to details regarding type of facilities and compounds involved, how the release happened (such as at high or low pressure or temperature, etc.), needs to be immediately available for the commission's technical staff to use in this research rather than commission staff gathering information that is normally kept only on site under the requirement to record information. Under the current reported quantities, the technical staff has been unable to show a positive correlation between reported emissions and high ozone readings. By lowering the RQ, staff should be able to do a better job of predicting high ozone in the future to protect human health and the environment. Specifically, the commission primarily needs the information which shows the emissions changes in hourly time frames but reports stated in terms of daily, or weekly time frames will also further the research in causation of ozone formation. Although the reporting per event could be on a hourly, daily, weekly, or monthly basis, the earlier reporting of dates and duration of these emissions is critical in timely evaluation of these releases. Requiring reporting of these compounds of particular interest does not mean that the commission is no longer interested in the reporting of the substances on the lists referenced in §101.1(85)(A)(i)(I) and (II). The list of RQs, which is the basis of episodic emission reporting, is established using criteria for the protection of health and the prevention of nuisances, and the commission will continue to require reports of releases at or above these quantities.

The commission does not have data that supports lowering the RQ for other VOC species, including all C3 - C10 alkanes and their isomers, as well as C2 - C4 alcohols and any isomers, nor lowering RQs to 1,000 pounds or less for all isomers of the following air contaminants: propane, butane, pentane, hexane, heptane, octane, nonane, and decane, ethanol, propanol, and butanol. The C3 - C10 alkanes have a much lower reactivity level than the 12 identified highly-reactive VOCs, and therefore additional reporting of those would not assist in the evaluation of ozone formation and transient high ozone events. Further, the commission has not found data to demonstrate that alcohols play any significant role in ozone formation. Finally, the commission has not found that its concern regarding benzene releases warrants an increase in the RQ at this time.

ExxonMobil-Downstream commented that its evaluation for ethylene and propylene showed that a 1,000-pound RQ option would capture 78% of the data that a 100-pound RQ option would, but that 56% fewer reports would be required. Brown McCarroll commented that contrary to prior determinations, the proposal will increase the frequency of reporting and the amount of information required to be reported, and commented that the preamble fails to evaluate the costs and benefits of the increased reporting and does not compare those to the previously required staff report. Brown McCarroll also commented that the commission should have a means to utilize the information at the time it is reported and that the commission should provide evidence that small quantities of the compounds will result in measurable changes in ozone formation. Oxychem commented that the current rules require that facilities maintain records of non-reportable emissions events, therefore, data should already be available for review by commission staff. Oxychem suggested that a review of the existing non-reportable emission event data be conducted, instead of raising the RQ's in this rule package.

The commission disagrees that there is no benefit to any increased reporting. For example, as discussed elsewhere in this preamble, the commission expects to receive useful data related to ozone formation by increased reporting of the emissions of the five compounds for which the RQ was lowered to 100 pounds in evaluating the issue of ozone formation. Achieving attainment in HGA as quickly as possible will benefit the health of all persons in HGA. The numbers provided by ExxonMobil-Production suggest that the commission may get a considerable amount of release data for evaluation from that company but no information was provided to show that other owners and operations would have similar reporting percentages. In particular, temporal reporting will save the commission and owners and operators resources necessary to make potentially numerous inspections of records to get hourly emissions data and other emissions data of concern for certain types of releases. The commission has conducted reviews of recordable data, but annual reviews of highly-reactive VOCs do not provide the commission's technical staff with timely data in a usable format for data analysis and photochemical modeling of ozone episodes.

The commission disagrees that the preamble fails to evaluate the costs and benefits of the increased reporting. There is no requirement to compare those estimates to any staff report. Further, the commission disagrees that there will be an artificial increase in paperwork requirements. To the contrary, HB 2912 requires electronic reporting.

ATINGP commented that the commission should postpone any change to the RQs for these compounds until it completes its studies on the role these highly-reactive VOCs play in the formation of ozone and then establish RQs based upon sound science, rather than adopt a default standard which would dramatically

increase the amount of reporting, recording, and cost of compliance on the regulated community that will be imposed by these rules, particularly if these standards are applied statewide. TCC commented that if the commission lowers the RQ to 100 pounds for certain substances, the RQ threshold should be reduced in phases, allowing industry time to implement technology to control these low-level releases. TCC suggested the commission consider adoption of a rule with new RQs at the 1,000-pound threshold and reduce to 100-pound RQs over a period of years, if appropriate. This would provide a balance of increased, immediate reporting and the effective utilization of commission and industry resources. Dow suggested retaining the RQ of 1,000 pounds for acetaldehyde and toluene and after a period of time, the commission could consider lowering the RQ values for these compounds to 100 pounds if it is determined that additional information is needed on these smaller events.

The commission has not made any changes in response to these comments. As discussed earlier in this preamble, the commission is committed to a mid-course review as part of the HGA SIP. To meet the deadline of mid-2004 for adoptions of a SIP revision, the commission cannot postpone the gathering of data needed to perform additional analyses. Reporting at lower RQs will only be available for about one year before SIP revisions are scheduled to be proposed.

Brown McCarroll commented that the proposal fails to provide any evidence that excess emissions of compounds in quantities ranging between the proposed RQ and the current RQ have any measurable or significant effect on ozone formation.

The commission has not changed the rules in response to these comments. As discussed earlier in this preamble, the commission has data that supports the finding that emissions of highly-reactive VOCs in amounts as low as 100 pounds have a measurable and significant effect on ozone formation. Because excess emissions can be in the range of 100 - 5,000 pounds, the commission needs the reporting of these events for the reasons explained earlier in this preamble.

Dow suggested that the commission consider collecting information on the quantity and duration of releases of these materials on a periodic basis through the existing emission inventory process and regulations. Eastman commented that companies are already required to maintain information on all episodic events, reporting at these lower RQs within 24 hours will significantly increase the number of reports to the regional offices. Eastman suggested that reporting be done on a routine basis, such as monthly during the May to September ozone season, to provide commission with data on these constituents from all releases, instead of lowering the RQ for this rule package.

The commission acknowledges that there will likely be an increase in reports of the compounds for which the RQ is lowered in the HGA and BPA areas. Commission staff is expected to use the information in two primary ways. First, the information will be used by the staff in various ozone formation evaluations, such as calculating back trajectories to sources of releases, as well as reviewing the reports for instances where immediate investigation may be necessary, as is currently part of the regional staff's responsibilities. Both of these reasons support reporting of the five compounds within 24 hours.

ACT urged the commission to set the RQ uniformly statewide to accurately categorize the emissions events across the state. Dow and Oxychem commented that the proposed lowering of the RQs to 100 pounds for all facilities in Texas should instead only be for ozone nonattainment areas. ATINGP, Eastman, and ExxonMobil-Downstream commented that the new lower RQs should be applicable only to HGA to avoid spending unnecessary resources by both industry and the commission.

The commission has revised the rule in response to these comments. Section 101.1(85)(A)(i)(III)(-b-), (-c-), (-g-), (-n-), and (-o-) are revised to apply only to the HGA and BPA areas. Both of these areas are nonattainment for the ozone NAAQS. Although the primary focus has been on the HGA ozone issues, the commission has similar concerns with regard to transport and formation of ozone in BPA, primarily because the types of emissions and industries which emit them are similar. Ambient monitoring data shows that, like HGA, BPA also experiences rapid increase in ozone concentration called ozone "spikes" or transient high ozone events. Since BPA also has high concentrations of industry like HGA, it is likely that the BPA ozone formation problems are very similar. Lower RQs will help the agency investigate this issue. Ambient monitoring data also indicates that transport from BPA may sometimes affect HGA; thus, emissions from industry in BPA can contribute to ozone formation in HGA.

The commission has not made any changes in response to the comment concerning phasing-in of the lowering of the RQ's. As discussed earlier in this preamble, the reporting of these compounds is necessary to further evaluate the formation of ozone, particularly in the ozone nonattainment areas of HGA and BPA. Since industry should already be controlling low-level releases, and recording these emissions, a phased-in reporting policy is not justified.

Alamo, ATINGP, Brown McCarroll, ExxonMobil, and TIP commented that NO_x should either be exempted from RQs or should be raised, either from 100 pounds to 5,000 pounds. Alamo, ATINGP, Brown McCarroll and TIP based their comments on EPA's recent statement that uncontrolled emissions of NO_x in amounts equal to or greater than ten pounds rarely require a government response. TIP furthermore commented that the ten-pound RQ for NO_x (the actual RQ is for NO and NO_2, not NO_x), under the U/M rules is merely the federal RQ incorporated by reference. Since the commission has proposed to vary from federal RQs for VOCs and because of the role now understood to be played by highly-reactive VOCs in ozone formation, there is no need for such a low RQ for NO_x. ATINGP commented that the commission should consider raising the RQ for NO_x as it completes its study of NO_x and highly-reactive VOCs in the HGA nonattainment area. ATINGP commented that the commission may find as a result of those studies that NO_x does not contribute as significantly as it had thought in the past to ozone formation in that region.

The commission revised the RQ for NO and NO_2 from ten pounds to 100 pounds. EPA recognizes that certain uncontrolled air emissions of NO and NO_2 equal to or greater than the ten-pound RQ may rarely require a government response. The commission agrees with this assessment because the commission's experience has been similar. Therefore, the commission is raising the RQ for NO and NO_2 from ten pounds to the default value of 100 pounds.

Oxychem commented that in general, it supports the commission's efforts to better define and consolidate its regulations relating to authorized and unauthorized emissions events. Specifically, Oxychem commended the commission on its proposed clarifications relating to reporting requirements and definitions of "scheduled" versus "unscheduled" maintenance.

The commission appreciates the comments in support of the rules.

AECT, ATINGP, Chaparral, Dow, ExxonMobil-Downstream, TCC, and TIP also commented on the definition of "scheduled maintenance, startup, or shutdown activity" in proposed §101.1(87). ATINGP, Chaparral, Dow, TIP, and Exxon Mobil Downstream commented that the proposed §101.1(87) is confusing, ambiguous, or unpredictable and should be clarified to address what the commission intends "scheduled" to mean. Chaparral commented that the definition of an "unscheduled maintenance, startup, or shutdown activity" in proposed §101.1(106) should be clearly limited to scheduled maintenance, startup, or shutdown activities that result in "unauthorized emissions" because as drafted, all scheduled maintenance, startup, and shutdown activities could be subject to the burdensome recording requirement in §101.211 even for routine activities that do not result in unauthorized emissions. ExxonMobil-Downsteam commented that "scheduled" should be defined as any maintenance, startup, or shutdown activity that is intentionally initiated.

No change was made in response to these comments, because the structure of the definition in §101.1(87), now renumbered as §101.1(86), as adopted was created from THSC, §382.0215(a), with some minor wording changes. The definition of "scheduled maintenance, startup, or shutdown activity" captures the statutory language describing maintenance, startup, or shutdown activities. All maintenance, startup, or shutdown activities as defined in these rules will result in unauthorized emissions. Activities that do not result in unauthorized emissions are not subject to the requirements of these rules. The commission disagrees that "intentionally initiated" is an appropriate definition for scheduled maintenance, startup, or shutdown activities because it could include all maintenance, startup, or shutdown activities.

TCC commented that the commission should recognize that requiring actual emissions to be below initial estimates for "scheduled" events will encourage over reporting as companies will likely be extremely conservative in providing estimates to the commission. TCC stated that initial reports are typically estimates based on best available information at the time, and suggested that penalizing companies for providing best available information is inappropriate. AECT requested that the commission clarify what will happen if a company predicts that a maintenance, startup, or shutdown activity will be either under all RQs or over an RQ and all reporting requirements are followed and reports a level of emissions that is greater than the actual emissions that ultimately occur.

The commission has not made any changes in response to these comments. The commission recognizes that overestimating emissions for scheduled maintenance, startup, or shutdown activities may occur as a result of owners and operators complying with the requirements of HB 2912. Continuing the commission's existing practice, the commission expects to evaluate information on notifications for scheduled maintenance, startup, and shutdown activities and may specify the amount, time, and duration of emissions that will be allowed during a scheduled maintenance, startup, or shutdown activity under §101.221(e). In the situation where a maintenance, startup, or shutdown activity generates fewer emissions than are reported in the ten-day notification, the commission expects the owner or operator to submit a final record within two weeks after the end of the scheduled activity to reflect accurate information required by §101.221(c) based on the activity as it occurred. Where emissions from the maintenance, startup, or shutdown activity exceed the predicted emissions estimates (and the reportable activity becomes an emission event, triggering the reporting requirements of §101.201, the owner or operator must report the emissions event within 24 hours of discovery of the emissions event (i.e., within 24 hours of discovering the emissions estimates were exceeded).

ATINGP urged the commission to discuss and explain its interpretation of the ten days in advance or "as soon as practicable prior to the scheduled activity" standard. Dow requested that the commission clarify that the term "scheduled" means planned in advance even in situations where the planning period is short.

The commission has not made any changes in response to these comments, because §101.211(a) requires a ten-day advance notice unless a scheduled maintenance, startup, or shutdown activity does not practically allow ten days for prior notification, such as maintenance or startup following an emissions event shutdown. Such activities require an owner or operator to provide advance notification as soon as practicable prior to the event. The commission interprets the term "scheduled" to include activities planned in advance.

ATINGP suggested incorporating the ten-day notification and "as soon as practicable" language into the definition for clarity and uniformity. Dow suggested revising the definition of scheduled maintenance, startup, or shutdown activities to clarify the prior notice and recordkeeping requirements. ExxonMobil-Downstream suggested removing the recordkeeping and reporting requirements from the definition.

The commission has not made any changes in response to the comments. The notice and reporting requirements in §101.211 clearly describe actions expected of owners and operators prior to and after a maintenance, startup, or shutdown activity to qualify the activity as a "scheduled maintenance, startup, or shutdown activity." Maintenance, startup, or shutdown activities that do not meet the definition in §101.1(86) as adopted (explicitly including the requirements of §101.211) are considered not to be scheduled maintenance, startup, or shutdown activities and, therefore, are emissions events.

TIP suggested modifying the proposed definition of "scheduled maintenance, startup, or shutdown activity" to read: "For activities with unauthorized emissions which are expected to exceed a RQ, a scheduled maintenance, startup or shutdown activity is an activity for which the owner or operator of the facility provides prior notice and a final report as required by §101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements); the notice or final report includes the information required in §101.211 of this title; and the actual unauthorized emissions from the activity do not exceed the emissions estimates submitted in the notice. For activities with unauthorized emissions which are not expected to, and do not exceed an RQ, a scheduled maintenance, startup, or shutdown activity is one that is recorded as required by §101.211 of this title."

The commission agrees and has made the suggested change to the definition to provide additional clarity.

Birch commented that there appears to be a typographical error in proposed §101.1(87)(B). In the proposed rule the last word in this section uses the conjunction "or," whereas the implementing language in HB 2912 §382.0215(a)(2), upon which this proposed provision of the rule is based, uses the word "and."

The rule has been revised and the commission has revised the definition of "scheduled maintenance, startup, or shutdown activity," renumbered as §101.1(86), based on other comments as discussed elsewhere in this preamble.

AECT suggested the commission delete the phrase "or final report" in paragraphs (1) and (2) of the definition of "scheduled maintenance, startup, or shutdown activity" because proposed §101.211 does not require a final report, but instead only requires prior notice.

Section 101.211 as adopted requires a final record to be submitted no later than two weeks after the end of the scheduled activity, and the commission declines to make the suggested change in §101.1(86).

ATINGP, Brown McCarroll, and TIP expressed concern with the impact of the use of newly defined term "site" at §101.1(88), as it impacts the proposed compliance history rules. ATINGP and TIP commented that the term "site" was overly broad and not clearly delineated. ATINGP stated: ". . . there is no statutory authority to support a determination of chronic excessive emissions events on a site-wide basis." TCC commented that the commission should clarify in the proposed definition of "site" that docks, for example, which are not physically adjacent to the operating plant are considered "connected with the regulated activity" for purposes of this rulemaking.

To address HB 2912 requirements concerning chronic excessive emissions events, the commission has adopted rule language stating that the determination for chronic excessive emissions events will be based on a review of a site. The commission does not believe that the term "site" is too broad nor is it unclear in it delineation. The term "site" has been clearly defined and is identical to the definition of "site" adopted by the commission in the compliance history rules in Chapter 60. Under the compliance history rules, chronic excessive emissions events at a site are components to be included in a person's compliance history specific to the site under review. The commenter's example of a dock which is not physically adjacent to the operating plant would be considered by the commission on a case-by-case basis to determine whether it is connected with the regulated activity. In this example, the review should include, but not be limited to: reviewing the operations of the dock (i.e., is the product from or to the operating plant only part of the dock's operation); reviewing the ownership of the land between the operating plant and the dock; reviewing the staffing of the dock (i.e., is it manned by different personnel or does operating plant personnel conduct dock operations as needed); and determining if the dock has a different agency account number.

Section 101.10--Emissions Inventory Requirements

ACT commented that HB 2912 requires that companies report total annual emissions from all emissions events in categories as established by commission rule. The commission should at the earliest possible date reflect the changes made in HB 2912 by amending §101.10.

The commission is revising the emission inventory guidance documents to reflect the fact that a total for all emissions events must be reported during the next annual emission inventory. Section 101.10 was not proposed for revision and therefore this comment is beyond the scope of this rulemaking.

Section 101.201--Emissions Event Reporting and Recordkeeping Requirements

CPS commented that the requirement to report emissions events within 24 hours after the discovery of an event seems to be unnecessary when commission offices are closed on the weekends and holidays. CPS recommended that it would be more reasonable to allow for reporting the event the next business day.

The purpose of the 24-hour notice is to enable the commission to assess what immediate action, if any, is appropriate for the event. In addition, the commission does respond to incidents 24 hours a day. The commission has not made any changes to the rule in response to this comment.

TCC commented that the commission should revise §101.201(a)(2) and (3), and §101.211(a)(1) and (2) from "referenced in the definition of reportable quantity" to "listed in the definition of reportable quantity" for clarity.

Due to other changes to the adopted rules discussed later in this preamble, the commission has removed the referenced language from §101.201(a)(2) and (3) and §101.211(a)(1) and (2).

AECT requested that in §101.201(a)(2)(C), the agency clarify what is meant by the term "the location of the emissions" to specify whether it refers to the name of the unit, piece of equipment, or area where the emissions event occurred; or whether it refers to the metes and the bounds description of the particular piece of equipment, or area where the emissions event occurred.

The commission has revised the rule to clarify that this data element is intended to identify the geographic location of the point of air contaminant emissions into the atmosphere. This information is necessary to allow the commission to know where the facility, or where at a large complex, the emissions point can be found. The owner or operator should provide the best available information when describing the location of the emissions to the atmosphere.

Sierra-Houston commented that it is not clear what "the most precise commission recognized identifier" is considered by the commission, and recommended that for consistency the term "emission point number" should be required.

The most precise agency recognized identifier is a three-tiered description of the source of the emissions which includes: the process unit that contains the facility, the facility which is the origin of the air contaminants, and the emission point number from which the emissions are released into the atmosphere. The commission establishes the facility identification number and the emissions point number in the emissions inventory and permitting programs.

ACT supported all of the proposed changes to the content of the initial notification for reportable emissions events. Alamo, Brown McCarroll, Dow, Capitol, Eastman, ExxonMobil-Downstream, and TIP commented that the additional information being required under the initial notification is too detailed to be included in an initial report, specifically the source identification and authorized emission limits requirements. These elements are better suited for the two-week follow-up report. In the final report, all the additional information would be provided and will provide the commission with information needed to complete a review of the release. TIP also commented that the language "and the authorized emission limits" should be deleted from proposed §101.201(a)(2)(1). Also, the language "to the extent possible," should be added to the beginning of proposed §101.201(a)(2)(J).

The commission agrees in part with the commenters and has revised the initial reporting requirements appropriately to make them more suitable for knowledge reasonably expected to be on

hand shortly after an emissions event is discovered. The commission recognizes that some of the information should be more complete in the two-week report, but the commission does need to understand the situation immediately and the required information will be useful to the commission to evaluate a response to the situation. The owner or operator of the facility must know the authorization limit to recognize when an emissions event occurs and the commission retains this requirement for the initial notification.

The commission has also included the phrase "at a minimum" in §101.201(a) to clarify that the initial notification contains a subset of the final report data elements, and that a regulated entity may elect to provide all the necessary information required of a final report with the initial notification. However, for those required to report electronically, the information required in the final report must be submitted electronically.

TCC questioned what the term "commission identifiers" means, suggested the commission should have clarified the possible options for consideration and should indicate possible options where identifiers are not typically employed (pipelines between sites, for example). TCC commented that these requirements are not dictated by any statutory provision and detailed identifying information should not be required in the initial report, but should be provided as appropriate in final reports.

The commission has revised §101.201(a)(2)(E) to add clarity to the identifiers required to be reported. The commission considers the proper identification of the facility involved in the event as a critical data element due to the need to review the events at a facility to determine if the emissions event is excessive. However, the commission agrees with the commenter that the initial notification need not contain as detailed information as what is required in the final report and has modified the rule language accordingly.

CPS commented that in §101.201(a)(2)(F), the commission asks for the date and time of the discovery of the emissions event. CPS recommended that the requirement should be the actual emission event times, thus causing less confusion and providing more agreement among the various required reports.

The commission agrees that the best report would be that which identifies the exact time that an event began and will accept that information in the report, but unless a continuous emissions monitor is employed, that time is generally unknown. The commission has not made changes based on this comment.

Alamo, Capitol, Chaparral, and TXI expressed concern that opacity is an indicator of emissions, and therefore cannot be used directly as a determination of compliance with particulate emission limits and there is no process knowledge or testing which links opacity and emission rates. Alamo requested that the proposed rules be amended to provide that an owner or operator of a cement manufacturing facility which experiences an excess opacity must include in both the initial notification and the two-week report only the estimated opacity during the emissions event and the authorized opacity limit. Chaparral and TIP requested the commission clarify what is intended to be reported and/or recorded when the RQ for opacity is exceeded. TXI also suggested that HB 2912 does not require quantification of emissions during opacity events.

The commission acknowledges that opacity has long been established as an indicator of emissions, and thus various rules and permits establish acceptable opacity limits from a source. When opacity exceeds the specified limit, it is unauthorized and the owner or operator must reduce or modify emissions and/or operations to bring the opacity back to an authorized level. The commission agrees that opacity cannot be used directly as a determination of compliance with respect to what is expected to be emitted or what was emitted. The commission also acknowledges that an opacity exceedance may occur without a release of any unauthorized compound or mixture. The commission interprets THSC, §382.0215, to require reporting of actual releases of compounds and mixtures when unauthorized air contaminants are emitted to the atmosphere during emission events which equal or exceed an RQ. The commission has modified §101.201 to clarify that for emissions events that have actual releases of unauthorized air contaminants, recordkeeping or reporting of the nature and quantity of air contaminants released is required. When an owner or operator experiences an opacity exceedance without a release of unauthorized compounds or mixtures, the commission modified the rules to allow reporting of opacity only in lieu of reporting the nature and quantity of the authorized air contaminants which were emitted during the event. The commission recognizes that a determination of the quantity and nature of emissions are not directly obtainable when opacity readings are the basis for determining that an unauthorized emission has occurred. Owners and operators of a facility should use good engineering judgment, which may consist of an evaluation of air pollution control devices and other relevant process parameters, including consideration of previous stack testing results in conjunction with process knowledge at the time of an emissions event or scheduled maintenance, startup, or shutdown activity.

Capitol and TXI commented that because emissions event notification is likely to be incorporated as an applicable requirement under Chapter 122, the proposal to require sources to estimate mass emissions and to speciate emissions during opacity events puts cement operators in an untenable position.

As previously stated, because opacity exceedances can occur without a release of unauthorized compounds or mixtures, the commission modified the rules to allow reporting of opacity only in lieu of reporting the nature and quantity of all air contaminants which were emitted during the event. However, when a release of unauthorized compounds or mixtures occurs, owners and operators should have sufficient process knowledge, testing data, and/or monitoring data to be able to make reasonable estimates of the compounds or mixtures of compounds emitted and the quantity of each, and must comply with the notification and reporting requirements of §101.201 and §101.211, as applicable.

TCC and TIP commented that reporting of total quantities rather than the amount above the RQ is inconsistent with federal requirements in CERCLA and EPCRA, and unnecessarily increases the reporting burden. TCC also commented that reporting of total quantities for all emissions events is misleading, as the interested public may not recognize that in certain cases, the bulk of the emissions reported might indeed be "authorized" emissions and if total emission reporting is required, releases at a large, complex plant with large quantities of permitted emissions will appear to be unfavorable if compared to a smaller plant with the same RQ exceedance but with lower authorized limits.

The commission disagrees with the commenters that CERCLA and EPCRA reporting only mandates that quantities above the RQ are reported. CERCLA and EPCRA both use the RQ as a trigger for reporting, but the submitted report is required to contain the total quantity of contaminant spilled or emitted. In addition, reporting requirements differ based on specific regulatory

requirements, and to some extent, the needs of various governmental agencies with jurisdiction. The commission is keenly interested in minimizing reporting requirements whenever possible, but the CERCLA and EPCRA reporting requirements do not overlap with the Chapter 101 requirements in all respects.

Reporting total emissions that occur during an emissions event is a valid method of reporting. An interested person can easily use the emission limit (usually in pounds per hour), the duration of the event, and the total quantity of emissions to determine the hourly average emissions that occurred during the event. Such information is meaningful and does not tend to portray emissions events inaccurately or unfairly. Therefore, the commission declines to modify the requirement to report total emissions.

ExxonMobil-Downstream commented that the requirement in §101.201(a)(2)(I) is not practical and is not readily determinable by persons potentially making the initial notification. Given the complex nature of determining what the authorized emissions actually are, ExxonMobil-Downstream has often given conservative guidance to its operators to report upset emissions that exceed basic operating guidelines.

The commission disagrees with this comment, as knowledge of the limit is expressly needed by the owner or operator to know when an event exceeds an authorized limit or a reportable threshold.

Regarding proposed §101.201(a)(2)(J), the requirement that notifications for reportable emissions events must include "the basis used for determining the quantity of air contaminants emitted," TCC suggested the commission clarify that detailed calculations are not required for every reportable event, and recognize that quantities reported for emissions events are often based on technical judgment. TCC also commented that for calculations that involve proprietary information such as catalyst activity levels, companies do not want such information released to a public webpage and requested the commission to clarify that confidential information does not have to be submitted to justify the basis of any calculation or estimate, or that if such information is deemed necessary, the commission should agree to hold the information confidential.

The commission concurs that providing the basis of emissions estimates is not necessary for initial notifications and has deleted this requirement from the rule. The commission will continue to hold confidential information submitted confidential in accordance with THSC, §382.041, subject to the requirements of the Texas Public Information Act, codified in Texas Government Code, Chapter 551.

ACT supported all of the proposed changes to the content of the final record of all reportable and non-reportable emissions events. AECT, Brown McCarroll, Dow, ExxonMobil-Downstream, Reliant, and TCC commented that the proposed language in §101.201(a)(2)(L) and (3)(K) which requires "any additional information necessary to evaluate the emissions event against the criteria listed in §101.222(a) of this title" is broad, vague, ambiguous, and essentially requires that entities demonstrate why every emissions event is excusable within the final report two-week time frame. TCC and TIP commented that mandatory inclusion of the demonstration criteria for every event would dramatically increase the information needed and the administrative burden for both the commission (in terms of review time) and industry.

Brown McCarroll, TIP, ExxonMobil-Downstream, and Alamo objected to the context into which the HB 2912 evaluation information requirement was proposed, citing that THSC, §382.0215(b)(3)(H), does not attach the evaluation information requirement in any way to the exemption demonstration criteria in proposed §101.222(a). These commenters pointed out that current commission rules require that an entity provide that information if requested by the commission. Dow requested the commission revise §101.201(b)(12) and (c) to clarify that documentation of the criteria in §101.222(a) is required only upon request by the executive director. Brown McCarroll also suggested that the new requirements are purely punitive in nature and that this recordkeeping requirement is of no benefit when there is adequate authority under the existing rules for the commission to ask for such demonstrations when and if there is a need to review the information.

Accordingly, Brown McCarroll requested that the commission specify what a person must include in the initial notification and provide a rational basis as to why that information is necessary to be reported immediately. Alternatively, Brown McCarroll and TCC requested that the commission delete this requirement and continue to require this information on a case-by-case basis, based on the commission's judgment regarding the seriousness of the emission event or the cause of the event. AECT and Reliant requested that proposed §101.201(a)(2)(L) and (3)(K), and (b)(12) be deleted. AECT suggested that those subsections be replaced with a provision that either specifically states what additional information the commission will need to determine whether an emissions event meets the criteria in §101.222(a) or specifies that the commission may request additional information as it deems necessary. TCC also requested clarification to verify that submission of demonstration criteria will be on an "upon requested" basis. Alamo requested that §101.201(a)(2)(L) be amended to read as follows: "Any additional information necessary to evaluate the emissions event. For initial notifications this requirement is optional. However, if the initial notification is used to satisfy the requirements of subsection (c) of this section, the information in this subparagraph is required." Alamo also requested that §101.201(a)(3)(K) be amended to read: "Any additional information necessary to evaluate the emissions event. For initial notifications this requirement is optional. However, if the initial notification is used to satisfy the requirements of subsection (c) of this section, the information in this subparagraph is required." Finally, Alamo requested that §101.201(b)(12) be amended to read: "Any additional information necessary to evaluate the emissions event."

ExxonMobil-Downstream commented that the time required to fully develop the information required in §101.222(a) to meet the exemption will likely take longer than the two weeks after the emission event, and that the information should not be required in the final report, but should be provided to the commission in response to a follow-up request, with a time requirement negotiated as reasonable given the complexity of the event. TIP suggested that the commission include the concept of supplementing information. As proposed, TIP stated that there is no way to supplement a two-week report to provide additional information to the commission, and that HB 2912 does not preclude allowing companies to supplement the information provided in the two-week report. TIP suggested that the following language be added to the end of proposed §101.201(b)(12): "Notwithstanding this subparagraph, an addendum to the final record may be submitted to the commission within 45 days following the end of the two-week period that begins at the end of an emissions event. This time may be extended by the executive director in a showing of good cause."

The commission has made changes to the rule language in response to these comments. The commission's experience is that for 80% to 90% of the initial reports, the information reported is sufficient for the initial evaluation and possible investigation of impacts on surrounding areas. In those cases where additional information is needed, the commission will continue its practice to request such information. The commission agrees that the statutory provision in THSC, §382.0215(b)(3)(H), regarding initial reporting does not directly link the evaluation information requirement to the demonstration criteria implemented in adopted §101.222(a). Therefore, the commission has deleted proposed §101.201(a)(2)(L) and (3)(K). The commission also revised §101.201(b)(12) by deleting the proposed language "against the criteria listed in §101.222(a) of this title."

The commission disagrees with the concept of adding an option to extend the two-week deadline in §101.201(b) and accordingly has not made changes to the rule in response to this comment. Although HB 2912 did not preclude allowing supplemental information to the two-week report, the commission disagrees that an additional 45-day extendable time frame is appropriate and believes the other changes and existing mechanism to ask for supplemental information sufficiently address this issue.

Brown McCarroll commented that additional enforcement problems would be associated with the requirement in proposed §101.201(a)(2)(L) in that if a company fails to include information in the record, then the company would be subject to a violation for failing to properly report or record an emission event, failing to meet the exemption criteria, and exceeding the underlying emission limit. Brown McCarroll stated that a single event resulting in three violations would have a dramatic and unfair effect on a company's compliance history.

Failure to meet exemption criteria is not a separate violation. If an owner or operator does not meet all criteria, the violation would be for exceeding the underlying emission limit. If the emissions event is properly reported or recorded, and the event is not exempt, then only one violation results.

ACT requested that the commission clarify in the rule that any record of any reportable or non-reportable emissions event that is maintained on-site be made accessible to the public through the commission under the Texas Public Information Act upon request.

The commission has not made any changes in response to this comment. As stated in the adoption preamble to the rulemaking revising these rules in 2000, the commission currently requires and will continue to require that owners or operators of air pollution sources keep records of all unauthorized emissions. These records are available to the public through the commission. For sources subject to Title V permitting, all records of deviations will be available in commission files.

ACT commented that in §101.201(a)(4), the change from "report" to "provide" in this section suggests that it is acceptable for the information requested by the executive director to be provided in other than written form. So that such information will be accessible to the public, ACT requested that the rule be amended to read "{t}he owner or operator of a facility experiencing an emissions event must provide, in writing, additional or more detailed information. . .."

The commission agrees that when the commission requests additional information, a response from the owner or operator of the facility should be made in writing, including documents sent via email or facsimile transmission. Therefore, the suggested wording change has been made.

ACT requested that the commission require all facilities to additionally submit, with the final record, the information described in §101.201(e), which is currently required only if requested by the executive director or any air pollution control commission with jurisdiction.

The commission has not made any changes in response to this comment. The commission's experience is that for most reports, the information submitted in the final report is sufficient to make a determination regarding the event. The commission typically issues requests under §101.201(f) in situations where additional technical study is needed to understand the underlying cause of an emissions event.

ATINGP commented that the recordkeeping and report generating requirements of the new emission event rules concerning spills and discharges will be a burden on the regulated community and a requirement to report the same event twice is overly burdensome, and urged the commission to reinstate the exemption provided in repealed §101.6(a)(5). Alternatively, ATINGP suggested the commission adopt a practical solution and modify the forms for spills and emissions event reporting to allow specific information to be provided for each program so that one form can be submitted to satisfy reports under both. Brown McCarroll commented that the proposed rules assert that this exemption is not allowed without providing any authority or reasoning to support this assertion, and stated that nothing in the legislation or legislative history indicates this exemption should be removed.

The commission agrees with the commenter's alternative suggestion and is taking steps to make the initial notifications under §101.201 as non-duplicative as possible between initial notification and final report. Further, the commission is reinstating the option of fulfilling the initial notification required under the emissions event rules to be satisfied by proper reporting under the initial notification requirements of the spill rules in §327.3. However, final report requirements of §101.201 and §101.211 still apply and reporting under §327.3 will not satisfy this reporting requirement due to the difference in reporting requirements of the two rules.

TIP commented that the new language in §101.201(d) and §101.211(d) appears to require sources currently using federal reports to comply with the proposed emissions events rules to rewrite their federal reports to match the emissions event information requirements. TIP commented that the requirement will effectively nullify the exemption because other state and federal excess emissions reports do not, and foreseeably will not, be required to contain all of the required U/M reporting information. TIP objected to the proposed change and commented that the commission should delete the following language from §101.210(d): "Excess emissions reports that may satisfy other state or federal requirements, and which are used to satisfy this subsection must, at a minimum, contain the information required in subsection (b) of this section." CPS commented that the proposed language needs to be clear that owners or operators of boilers or combustion turbines equipped with opacity monitors (in addition to CEMs) are covered in the exemption from reporting in §101.201(d) and §101.211(d).

The commission has reviewed the statutory language again and agrees with the suggestion to remove the last sentence of proposed §101.201(d) and has modified the rule accordingly. The commission has also modified the proposed rule to clarify that

episodic event reports required by other state or federal regulations can be used for the final record/report, as long as the initial notification submitted under §101.201(a) contains all of the information required under §101.201(b). Concerning the comment about opacity monitors, reporting of opacity, which is only an indicator to emissions and cannot determine the nature or quantity of emission, does not meet the requirements set out in THSC, §382.0215.

ACT supported the ability to require technical evaluations of emissions events that include at least an analysis of the probable root cause of each emissions event and any necessary action to prevent or minimize recurrence. ACT requested that the commission describe how frequently it has requested technical evaluation of emissions events in the last five years. ACT urged the commission to make these technical evaluations a routine requirement for every event, and to require them as part of the information submitted with the final record of an emissions event under §101.201(b) to better inform the facility's management of available options and, possibly, promote voluntary actions to prevent the recurrence of similar events.

The rule requires an owner or operator to provide information about the primary cause of an emissions event. Fortunately, for most emissions events, the root cause is fairly easy to discern. The rule also requires an owner or operator to submit the results of a more detailed technical analysis when the root cause is not as readily discernable. The commission has not tracked its past history of requesting technical analyses, which are commonly requested when an enforcement action is brought against a company for an emissions event that was determined not to be exempt.

AECT, Brown McCarroll, CPS, Dow, Exxon Mobil, ExxonMobil-Downstream, Oxychem, Reliant, and Sierra-Houston all expressed concerns over the requirement to report events electronically. Most of the commenters' concerns focused on the practical problems associated with submitting initial reports by electronic means. Many of the commenters suggested that only the final report need be submitted electronically.

The commission agrees that the shift to electronic reporting is a major change, and has therefore, implemented a phased-in approach to facilitate the change in reporting emissions events. The commission will require final reports that are required to be submitted under §101.201(b) and excess opacity event notifications under §101.201(e) to be submitted electronically January 1, 2003, in accordance with the statutory directive, and require electronic reporting of initial notifications beginning no later than January 1, 2004. This phased time frame will enable the regulated community to better prepare for the new reporting mechanism and will allow the commission to better develop its system. Several commenters also stated a need for a backup plan for submittal of information in the event that the electronic interface is unavailable. The commission has added rule language to clarify electronic reporting and to provide an alternative in case of a technical failure by the commission's equipment which might impede submittal by the regulated community.

ACT supported the commission's approach of actively pursuing enforcement for failure to report emissions events. Brown McCarroll commented that the language in proposed §101.201(g), "if an owner or operator of a facility fails to report an emissions event, the commission will initiate enforcement for such failure to report and for the underlying emissions event itself," would subject owners and operators to enforcement for failure to report emissions events that are not otherwise required to be reported under §101.201. Brown McCarroll recommended that subsection (g) be revised to clarify that it only applies to reportable events. TCC commented that the commission's proposal contradicts the legislative language by adding in proposed §101.201(g): "Incomplete, inaccurate, or untimely reports are not sanctioned . . . and continue to be violations . . . and the commission may initiate enforcement for such violations." TCC further stated that commission should not pursue enforcement action for those paperwork errors related to good faith reporting of emissions events. In addition, TCC suggested that the commission utilize a standard reporting form, recognized by all of the commission's regional offices to provide consistency and clarity among the regions and possibly reduce unintended errors and omissions.

The commission has modified the proposed rule in response to comments to reflect that §101.201(h) applies only to emissions events that are required to be reported. The commission disagrees that the clarifying second sentence of §101.201(h) as adopted contradicts legislative intent. The legislature clearly sought for the commission to have more information and that it be more accurate. To meet the legislative mandate for annual reporting on emissions events as established in THSC, §382.0215(g), and consistent with existing practice and the prior rule, the commission expects notifications and final reports submitted under these rules to be reasonably complete, accurate, and timely.

Section 101.211--Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements

ACT, ExxonMobil, and TCC commented that clarification is needed in §101.211(a) to clearly determine what constitutes adequate prior notification for scheduled maintenance activities. ACT questioned the need to allow for advance notification for scheduled maintenance, startup, or shutdown activities of less than ten days, because such events are supposed to be "scheduled."

The commission believes the current language is sufficiently clear as to what notification is expected prior to any scheduled maintenance, startup, or shutdown activities, and has not made any changes in response to these comments. Facilities having maintenance, startup, or shutdown events requiring a long lead time should easily be able to provide the ten-day notice. However, since March 8, 1991, the commission has, for special situations, allowed notifications of less than ten days prior to a maintenance, startup, or shutdown activity. The commission acknowledges that certain situations do not allow for the ten-day prior notification, such as maintenance or startup following an emissions event. These special conditions still require prior notification to be given as soon as practicable prior to the actual maintenance or startup event occurring.

AECT commented that the proposed §101.211(a)(1)(C) and (2)(C), and (b)(3) read, "the location of the scheduled maintenance, startup, and shutdown" activity. AECT requested that the commission clarify what is meant by this term, and asked if the location meant that the name of the unit, piece of equipment, or area where the scheduled maintenance, startup, or shutdown activity occurred; or if the location meant the metes and bounds description of the unit, particular piece of equipment, or area where the scheduled maintenance, startup, or shutdown activity occurred.

The commission's understanding of the term "location of the scheduled maintenance, startup, or shutdown activity" means the information necessary to geographically locate the source of the emissions into the atmosphere, such that a reasonable person could find the site and the general location of the event on the site. Specific information about the process unit, the facility, and the actual emission point (if different than the facility) further supports this concept.

TCC commented that the commission should revise proposed §101.211(a)(1)(I) to add the term "if applicable" to read, "where opacity will be estimated if applicable."

As previously stated, reporting only opacity does not provide the commission the information necessary to evaluate the event except for situations where only opacity is expected to exceed an authorized limit, and there are not any unauthorized emissions of any compounds or mixtures. The commission has revised §101.211 to reflect appropriate opacity reporting.

ACT requested that the rules clarify that any on-site final record of scheduled maintenance, startup, and shutdown activities with unauthorized emissions be made available to the public through the commission upon request under the Texas Public Information Act.

The commission has not made any changes in response to this comment because all records of scheduled maintenance events at sources with issued Chapter 122 permits will be available publically as a result of federal operating permit requirements. As stated in the adoption preamble to the rulemaking revising these rules in 2000, the commission currently requires and will continue to require that owners or operators of air pollution sources keep records of all unauthorized emissions. These records are available to the public through the commission. For sources subject to Title V permitting, all records of deviations will be available in commission files.

ACT supported the addition of §101.211(c) to allow for better tracking of actual emissions during maintenance, startup, and shutdown activities and provide closure to initial notifications of such activities. ACT also supported the authority of the executive director under §101.211(e) to specify the amount, time, and duration of emissions that will be allowed during scheduled maintenance, startup, or shutdown activity and the authority to request a technical plan. ACT requested that the commission describe how frequently it has used this authority in the last five years and how frequently it has requested technical plans from facilities. Furthermore, ACT urged the commission to routinely exercise this authority and systematically limit the number of concurrent maintenance, startup, or shutdown activities in any single region of the state.

The commission has traditionally addressed maintenance, startup, and shutdown activities on a case-by-case basis, and the commission does not track the use of its authority in the manner suggested by the commenter. The implementation of electronic reporting and the commission's required annual reporting to the legislature on emissions events should improve the ability to track these activities in the future. After receipt of a notification, regional staff often contact the owner or operator to obtain any additional information necessary and request technical plans and emissions reductions. The commission estimates that 80% to 90% of final reports for maintenance, startup, or shutdown activities contain enough information to make an exemption determination. Therefore, the commission has not required a technical plan for every maintenance, startup, or shutdown activity under §101.211(e).

Section 101.221--Operational Requirements

ACT, AECT, ATINGP, Brown McCarroll, and Chaparral commented on proposed §101.221(a). ACT supported the addition of §101.221(a), which codifies existing commission policy and adds clarity for the public and regulated community. Brown McCarroll opposed proposed §101.221(a), and stated the commission completely misinterpreted the statutory prohibition under THSC, §382.085(b), which only prohibits emissions in excess of a limit established by permit, rule, or order. Brown McCarroll also stated that the proposed rule is not consistent with the commission's prior implementation of the THSC and "fundamentally changes the regulatory landscape." AECT commented that the proposed §101.221(a) is unnecessary and that "it goes without saying then, that persons are prohibited from causing, suffering, allowing, or permitting emissions that they are not authorized to emit." AECT commented that §101.221(a) would result in an additional violation being cited by the commission in any enforcement regarding any emissions event, and for which the reporting and recordkeeping requirements have not been met, and stated that HB 2912 does not support the proposed rule. AECT further suggested that proposed §101.222 would preclude an owner or operator from obtaining an exemption from a violation of proposed §101.221(a), and requested that the commission delete the proposed rule or specify in the preamble that §101.221(a) will not be cited in enforcement actions as an independent violation. ATINGP commented that the changes to the definitions of "authorized" and "unauthorized" make a large category of emissions previously "authorized" under prior rules and statutory provisions "unauthorized," and combined with this new regulatory prohibition against the release of "unauthorized emissions" underscores the need to study the impact of these new definitions on the air quality regulatory program as it has developed over the past 30 years. ATINGP recommended that the commission strike §101.221(a) until such time as it is able to assess the impact the new definitions of "authorized" and "unauthorized"' emissions has on the air quality program as previously discussed. Chaparral commented that the provision is overly broad and that it does not take into account insignificant or *de minimis* emissions and emissions from sources that are not regulated by the commission. Chaparral also pointed out that the commission expressly exempts "insignificant increases at a permitted facility" from the definition of "modification" in §116.10(9). Chaparral expressed concern that the executive director may claim that the unspeciated components of a class of contaminants such as particulate matter and VOCs are not "authorized emissions" and thus violate this overly broad provision, and suggested that such an interpretation and action would exceed the commission's authority.

As stated earlier in this preamble, the commission proposed to add a new definition of the term "authorized emissions," to modify the existing definition of "unauthorized emissions" and to add new §101.221(a) that would prohibit a person from causing, suffering, or allowing unauthorized emissions. The commission received extensive comments raising a number of different issues relating to these proposed revisions. Although these proposed rule changes are within the commission's authority to adopt because they would interpret and implement the TCAA, they are not required by THSC, §382.0215 and §382.0216, as added by HB 2912. Given the limited purpose of this rulemaking, the commission has determined that it is not necessary to adopt these

proposed revisions at this time. This bifurcation will allow for future consideration of the issues raised by the commenters as well as provide future opportunities for the commission to deliberate the issues, such as at a commission work session, if appropriate.

ExxonMobil-Downstream commented that the concept of *de minimis* emissions is missing from this proposed regulation and that *de minimis* emissions are exempt from permitting through a permit by rule to avoid unnecessary recordkeeping and reporting for trivial emissions events and maintenance, startup, and shutdown activities. ExxonMobil-Production recommended the commission define a new term "*de minimis* emissions event" as "maintenance of ancillary equipment (as defined in 40 CFR 63.761) or other emissions events which results in a release of less than 20 pounds of any air contaminant listed in §101.1(85), Reportable Quantity, per single event because these emissions events are exempt from the recordkeeping requirements in §101.201 and §101.211." ExxonMobil-Downstream also stated that requiring separate recordkeeping for these minor emissions events is also redundant for many industrial sites that are already subject to federal or state leak detection and repair programs. Dow commented that a low emission rate cutoff for emissions events and scheduled maintenance, startup, and shutdown activities needs to be added to this rule, and suggested that any individual activity with an emission rate of less than 0.5 pounds be exempt from the recordkeeping requirements imposed by the existing General Air Rules and these proposed amendments.

The commission has already defined *de minimis* facilities and/or sources in Chapter 116. That authorization allows facilities or sources that meet the conditions of one or more of the paragraphs in §116.119(a) to be considered *de minimis*, which means that registration or authorization prior to construction is not required. Because this concept is already utilized in the commission air rules, a separate definition of *de minimis* emissions is not necessary for these rules and would cause confusion as to when and what emissions are *de minimis*. If any emissions are from *de minimis* sources, or facilities that are authorized by a permit by rule, then the owner or operator can calculate whether emissions from those sources meet the *de minimis* threshold or emission limit, respectively, and determine whether the emissions are authorized and reportable or recordable. Furthermore, in comments to past rule revisions concerning the commission's upset and maintenance rules, EPA has commented that all unauthorized emissions must be recorded.

TCC commented that the commission should revise §101.221(a) to strike the word "permit" for clarity as follows: "No person shall cause, suffer, or allow unauthorized emissions."

The commission removed §101.221(a) as proposed, as explained elsewhere in this preamble, and therefore has not made the proposed change.

ACT commented that the commission should modify §101.221(b) to require that pollution control equipment be required to be maintained in good working order and operated properly during all facility operations, not just during "normal" operations. TCC commented that the commission should revise §101.221(b) by deleting the word "normal" and inserting language similar to that in old §101.11(3) ("and operated in a manner consistent with good practice for minimizing emissions"), and commented that the commission should not attempt to oversimplify operations by categorizing operations as either "normal" or "abnormal" and should instead focus on "authorization" of emission.

The commission's response to these comments is much the same as provided in the response to comments made in adopting the July 23, 2000 version of the rules, in that "good practice" designates a narrower range of industry practices accepted by regulators. The commission concurs with the deletion of the word "normal" and has revised the rule accordingly.

TCC commented that the commission should clarify in the preamble that this rulemaking is not intended to force a shutdown of facility or avoidance of maintenance activities simply because of the existence of emissions.

The commission's intent regarding reduction of emissions and pollution prevention has not changed. As previously stated, the commission expects that minimization of emissions could include shutting down a facility or that portion of a facility in upset, but only if that shutdown would not result in more emissions than continued operation at a reduced level. The commission does not expect a facility to shut down if the shutdown would compromise safety or could lead to a catastrophic failure of equipment and structures. Owners and operators must be fully prepared to justify their choice of actions and should have the means to minimize the unauthorized emissions to the extent that the source comes back into compliance with emission limitations as soon as practicable. The commission encourages the use of preventive maintenance and other necessary maintenance to result in decreased emissions events. Maintenance done with proper planning can be conducted with few unauthorized emissions.

Chaparral commented that the reference to "this section" at the end of §101.221(f) be changed to "section 101.222" because a report or record of an emissions event is not necessarily an admission that the facility emitted unauthorized emissions. Chaparral stated that although the owner or operator has the burden of proof to demonstrate that unauthorized emissions are exempt under §101.222, subsection (f) does not affect the commission's burden of proof to establish that the facility emitted unauthorized emission, i.e., this provision does not shift such burden to the owner or operator.

The commission agrees that the exemption is contained in §101.222 and has revised the rule in response to this comment.

ACT supported the commission's power to require corrective action as necessary to minimize emissions, as currently found in §101.7(g) and proposed in §101.221(g), under authority predating HB 2912. ACT requested that the commission describe how frequently it has required such corrective action in the last five years.

The commission has typically required corrective action in any case where an emissions event was cited as a violation. Corrective actions have ranged in complexity from providing training to the regulated entity's employees on proper procedures to prevent emissions events to complex engineering studies followed by a series of scheduled requirements to bring about major changes at a site. Corrective actions have traditionally been documented in response to a notice of violation (NOV) or codified in enforcement orders and have not been independently tracked outside of the enforcement process. In many cases, the commission has required the owner or operator to obtain authorization for the unauthorized emissions from maintenance, startup, and shutdown activities.

Section 101.222--Demonstrations

Representative Hochberg commented that the commission does not have the authority to exempt any emissions from the requirements of the bill. Representative Hochberg commented that HB 2912 envisioned only two categories of emissions events, excessive and non-excessive, and stated that the intent of the legislation was to significantly reduce emissions from emissions events by requiring a facility to either correct the problem or include the emissions in the facility's permit. To avoid overburdening the commission with increased paperwork due to the more stringent requirements, THSC, §382.0216(d), provides that "a corrective action plan shall be deemed approved 45 days after filing, if the commission has not disapproved the plan." This subsection indicates that the legislation anticipated that many more than five facilities would be required to file a CAP for an excessive emissions event on an annual basis. Representative Hochberg suggested the commission eliminate proposed §101.222 allowing for exemptions, and instead evaluate emissions events above an RQ according to the criteria of proposed §101.223 to determine whether the event, either taken alone or in combination with other events, is excessive. If the emissions event is determined to be excessive, the facility should be required to take action to reduce emissions or to include the emissions in its permit. Citing the Federal Clean Air Act requirement for continuous compliance with emission limitations, ACT stated that the commission does not have the authority to exempt emissions from compliance with emission limitations. ACT expressed a belief that the current and proposed rules are illegal and inconsistent with HB 2912 for three reasons: 1) the rules create an exemption rather than an affirmative defense; 2) the rules create an exemption to injunctive relief as well as penalties; and 3) the rules, as interpreted by the commission, exempt facilities from EPA and citizen enforcement.

The commission made changes in response to these comments. See the discussion elsewhere in this RESPONSE TO COMMENTS. Under the subheading *Section 101.222--Demonstrations* and in the SECTION BY SECTION DISCUSSION of this preamble for a detailed description of the changes made to this section. Section 101.222 as adopted is structured to first require all emissions events to be evaluated against criteria in §101.222(a) to determine whether each event is excessive. The six criteria in §101.222(a) as adopted mirror the criteria listed in THSC, §382.0216(b)(1) - (6). Events deemed excessive will not be exempt from compliance. Events not deemed excessive will only be exempt from compliance if the owner or operator satisfies the criteria in §101.222(b). The commission intends to continue its practice of requiring owners and operators with nonexemptible events to address the cause of the event and implement measures that will minimize the recurrence of similar events in the future. The traditional method of requiring such measures is through the enforcement process. Facilities with excessive emissions events must comply with the corrective action plan and authorization requirements in §101.223 upon notification by the executive director.

Sierra-Houston recommend that the term "all" be added after the phrase "operator complies with" in §101.222(a), to emphasize that all information must be provided or the exemption cannot be granted.

The commission declines to make the suggested change because the term "all" was already in the language of §101.222(b) as proposed.

ATINGP commented that under the proposed definition of "unauthorized emissions," unauthorized emissions could occur even if no authorized emissions limit is exceeded, and proposed §101.222(a) and (b) would not provide an exemption for unauthorized emissions that are below an authorized emissions limit. ATINGP requested §101.222(a) and (b) be revised by adding the phrase "and the emissions from such emissions events are not unauthorized emissions, as that term is defined in §101.1 of this title (relating to Definitions)" to exempt unauthorized emissions even if no authorized emission limit is exceeded.

As discussed elsewhere in this preamble, the commission is not adopting the proposed changes to the definition of "unauthorized emissions."

EPA commented that it considers all excess emissions, scheduled or otherwise, to be violations of the emission limitation, permitted level, or regulation. EPA also recognized that emissions events may be caused by circumstances entirely beyond the control of the owner or operator, that the imposition of penalties in these situations may not be appropriate, and stated that the regulating commission may exercise "enforcement discretion" in such cases and provide in its rules for an affirmative defense to enforcement actions for civil penalties for emissions events if the owner or operator can demonstrate that certain criteria have been met when evaluated. EPA and ACT recommended that the commission revise §101.222(a) and (b) to provide an affirmative defense for claims for civil penalties in enforcement actions for noncompliance with authorized emission limitations, if the owner or operator complies with the demonstration criteria.

The commission has not made any changes in response to these comments. The commission will review all emissions events against the requirements of §101.222(a) to determine if the emissions events are excessive, and therefore, not exempt. Facilities with excessive emissions events must comply with the CAP requirements in §101.223 upon notification by the executive director. Any emissions events which are not excessive, but do not satisfy all the criteria in §101.222(b) are not exempt and may be subject to an enforcement action, including penalties and appropriate requirements to minimize the recurrence of similar events in the future. The commission's past experience has been that the exemption criteria now located in §101.222(b) and (c) for emissions events and scheduled maintenance, startup, and shutdown activities operate much like an affirmative defense in enforcement actions.

TCC commented that the commission should not unjustly penalize companies who are making an honest effort to comply; use enforcement discretion for those events for which the regulated entity is actively seeking commission authorization; recognize that some repairs take considerable time such as a leaking preheater, which may require fabrication of new equipment; revise the demonstration criteria; or recognize that the demonstration criteria are not necessarily applicable to planned maintenance events.

The commission has not made any changes in response to these comments. The commission encourages "honest efforts to comply" but recognizes that efforts attempting compliance do not always equate to maintaining compliance. In the context of an enforcement action, the commission's penalty policy allows reductions in proposed penalties for a respondent's good faith efforts to comply, depending on the timing of the efforts. The commission acknowledges that some repairs take more time to complete than others, but the owner or operator should consider such lead

time in operational decisions. The duty to comply with applicable regulatory requirements remains with owners and operators of facilities. The "demonstration criteria" explicitly are applicable to planned maintenance, startup, and shutdown activities where such activities are not otherwise allowed by commission permit, rule, or order.

TCC commented that to focus on the impact of emissions rather than the number of emissions events, §101.222(a)(3) should be revised to read "the air pollution control equipment . . . was maintained . . . consistent with good practice for minimizing emissions and reducing the impact of emissions events."

The commission agrees that the impact of emissions is an important focus but disagrees with the remainder of the comment and declines to make the suggested change. As previously discussed, the commission's response to these comments is much the same as provided in the response to comments made in adopting the July 23, 2000 version of the rules, in that "good practice" designates a narrow range of industry practices accepted by regulators.

Sierra-Houston and EPA commented that the terms "frequent" and "unreasonably high" in §101.222(a)(8) and (9), respectively, need to be more specifically defined to avoid inconsistencies in practice.

The terms "frequent" and "unreasonably high" are not defined by statute and are left to the commission to interpret. The most appropriate way to evaluate excessive emissions events and exemption determinations is through a case-by-case review. Thus, "frequent" and "unreasonably high" will also be determined on a case-by-case review. Case-by-case determinations are subject to internal review, and coordination between regional and central office personnel which serves to minimize any inconsistencies in practice. The commission's practice is also to discuss the event with facility owners or operators for further information to develop the case-by-case review.

ACT commented that the "cause or contribute to a condition of air pollution" language in §101.222(a)(10) does not capture the intent of HB 2912 that the commission consider the impact on human health or the environment, and suggested that the provision be amended to read "unauthorized emissions did not cause or contribute to a condition of air pollution or otherwise adversely affect human health or the environment."

No change was made in response to this comment. The commission agrees that THSC, §382.0216(b)(3), requires the commission to consider in determining whether an emissions event is excessive "the quantity and impact on human health or the environment of the emissions event," and the commission will consider in its review as required by §101.222 whether the event caused or contributed to a condition of air pollution.

EPA commented that §101.221(a)(10) and §101.222(b)(8) should be revised to read, "unauthorized emissions did not cause or contribute to an exceedance of the NAAQS or PSD increments or a condition of air pollution."

The commission agrees with the comment and has made the suggested change to §101.222(b)(11) and (c)(9) because it clarifies existing statutory requirements.

ACT commented that the provisions of §101.222(b) for exemption of unauthorized emissions for scheduled maintenance, startup, or shutdown activities are outside the commission's authority, because scheduled maintenance, startup, or shutdown activities were specifically excluded from the definition of emissions event, and because EPA policy does not recognize an affirmative defense for scheduled maintenance, startup, or shutdown emissions. Therefore, ACT commented that the commission should delete the provisions of §101.122(b) and should make every effort to ensure that regular, scheduled maintenance, startup, and shutdown emissions are reflected in permits. To the extent they are not reflected in permits, the commission should clarify that such emissions are illegal.

The commission has not made any changes in response to this comment. Owners and operators must focus increased attention to the information provided in the notifications required by §101.211(a) for maintenance, startup, and shutdown activities. The commission recognizes that maintenance, startup, and shutdown activities are necessary and may involve unauthorized emissions, and therefore the commission's focus is requiring better estimates in advance of expected emissions and requiring increased actions to minimize and control such emissions. EPA also recognizes that all excess emissions during maintenance, startup, and shutdown activities are violations of applicable emissions limits, but takes the position that it is inequitable to penalize a source for occurances beyond owner or operator control. EPA's approval of the 2000 revisions to these rules (65 FR 70792) states that a source has the burden of proving that the excess emissions were due to circumstances entirely beyond the control of the owner or operator. Unscheduled maintenance, startup, and shutdown activities are the equivalent of an emissions event and should be reported or recorded as an emissions event under §101.201. In a concurrent rulemaking regarding rules in 30 TAC Chapter 116, in this issue of the *Texas Register*, the commission is not adopting proposed rules for permitting of maintenance, startup, and shutdown emissions because the commission has determined that it is appropriate to pursue resolution of various issues listed in that rulemaking before proceeding with further rulemaking regarding these types of emissions.

Section 101.223--Actions to Reduce Excessive Emissions

TCC commented that in general there should be clarity around what constitutes an "excessive" versus a "chronic" event. TCC suggested that "excessive" refers to the quantity of emissions and "chronic" refers to the frequency.

Excessive emissions events and chronic excessive emissions events are related and excessive emissions events may become chronic excessive emissions events. The commission has established a set of criteria that define when an emissions event becomes an excessive emissions event. Furthermore, when excessive emissions events become of such magnitude or frequency or cause an impact, the commission may determine that they are chronic excessive emissions events.

ACT, ATINGP, Birch, and Sierra-Houston commented that the commission should define what is excessive in a predictable and objective manner. Because these determinations are made on a case-by-case basis, the outcome is unpredictable and subject to the discretion of the executive director, and each determination is cost and resource intensive for the commission and the regulated entity. Birch and ACT further commented that to meet the intent of HB 2912, the rules should establish industry-specific objective standards for determining when emissions events are excessive to allow the regulated industry to determine its compliance status. ACT cited the Sunset Commission recommendation that the commission would set the allowable number of upsets that can occur each year and establish exemptions for events that occurred for documentable reasons. ACT urged the

commission to set presumptive standards tight enough so that a substantially higher number than four facilities would be found to have excessive emissions events. ACT proposed the commission rank each facility annually in terms of total number of reported events, tons of event-related emissions, and a toxicity weighted total of event-related emissions, and consider the top 10% of facilities in each category as having excessive emissions events, unless a facility can make a demonstration that its emissions were not excessive considering the statutory criteria. Brown McCarroll, Dow, and TIP commented in support of commission's view that case-by-case determinations are necessary to determine whether excessive emissions events have occurred. In addition, TIP supported the commission's position that developing case-specific evaluation criteria is not in the best interest of commission or the regulated community.

In making the excessive determination, the executive director will consider all the excessive emissions event criteria listed in §101.222(a) on a case-by-case basis and declines to make changes suggested in these comments. Developing records from all industries or industry types to make an objective standard for each specific type of event to serve as rule criteria would be an impossible task considering the diversity of industry types to which the rules apply and all of the possible (and by definition unplanned) scenarios which could arise. The commission will continue its practice of conducting case-by-case determinations of upset, maintenance, startup, and shutdown events because the case-by-case method is the most equitable and flexible approach to evaluating episodic emissions. The commission expects that evaluating all emissions events using the §101.222 criteria will result in more emissions events being deemed excessive than described in the proposed version of the rule.

ATINGP suggested the commission clarify its intended procedure for a regulated entity to respond and to provide information to the executive director that an emission event is not excessive.

The commission's current practice of notifying owners and operators prior to issuing written NOVs will continue. The typical situation involves discussion with the owner or operator prior to issuance of a letter from the executive director through the regional office stating that an emissions event is excessive or that enforcement action will be initiated. Owners and operators should be forthcoming with information responsive to requests by regional office personnel so that information supporting a conclusion that an emissions event is not excessive can be appropriately and timely considered. Furthermore, an owner or operator should take advantage of the final report to document fully the circumstances of the event. Finally, an owner or operator will have ample opportunities to challenge an exemption determination through the enforcement process.

Brown McCarroll and Chaparral commented that the commission should establish an appeal process by which an owner or operator can challenge the executive director's determination that emissions events are excessive and define when a decision constitutes final commission action. Brown McCarroll commented that delegation of determining when emissions events are excessive to the executive director without an appeal process to the commission is not supported in the legislation, and explained that if an appeal is not provided, then entities subject to these staff level determinations would be compelled to file an appeal to district court to preserve their rights and obtain relief. Chaparral stated that without an opportunity for a hearing, such a determination and its ensuring requirements would constitute a taking of property in violation of the owner/operator's right to due process.

If an emissions event is excessive, the owner or operator will have an opportunity to challenge the executive director's excessive determination through the enforcement process. HB 2912 did not contemplate a separate appeal process regarding the executive director's decision on whether each emissions event is excessive. Rather, the intent was for facilities with excessive emissions events to quickly implement a CAP independent of any enforcement action the commission might take. The excessive emissions event determination is not a final action of the commission which is appealable to district court, and therefore, owners and operators who disagree with these determinations can seek review with commission staff. Because this determination is not a final action by the commission, it cannot be considered a takings.

ATINGP requested that the commission revise §101.223(a) by adding a new criteria that relates to the complexity of the facility at which the emissions event occurred because it is easier for emissions events to occur at a facility that is more complex than at one that is not as complex.

Complex facilities should be operated, designed, and maintained with the most care because of the increased opportunities for resulting potential impacts from unauthorized emissions. The commission disagrees with the suggested modification and declines to make the change because most of the failures leading to emissions events are caused by problems involving individual pieces of equipment which would be the same for a complex or simple facility (i.e., a pump at a complex petroleum refinery is much the same as any other pump of the same type whether the pump is located at a petroleum refinery or a small natural gas pumping station). Complexity is, however, a factor for the commission to consider in finding that a site has chronic excessive emissions events under §101.223(b).

Birch commented that different regional offices might have different standards for evaluating emissions events and that the commission should provide for uniformity in enforcement of excessive emissions events. Brown McCarroll and Oxychem proposed that the determinations of excessive emissions events be made in the commission's central office, rather than in the regional offices, to ensure consistency in the commission's interpretations and expected impact of the rules as described in the preamble. Oxychem also suggested notification by regional personnel to the central office that a site may be experiencing excessive emissions events; notification to the site that its emissions are being reviewed; review of the potential excessive emission event(s) by a team of personnel, including central office enforcement and permitting personnel and a regional contact that is familiar with the site; and issuance of a determination, as described in the proposed rules, to the affected site.

The commission provides uniformity in enforcement of all violations through use of its enforcement initiation criteria and penalty policy. The commission declines to centralize determinations of excessive emissions events because of workload concerns and because adequate communication and interaction between the regional and central office staff exist to minimize any inconsistency. Ongoing training provided by the central staff to regional personnel keeps the regional staff updated on recent interpretations and actions of the commission. In addition, regional office staff frequently consult with central office staff to coordinate responses to ensure consistency.

Brown McCarroll requested that if the commission intends that a single emission event may be determined to be excessive, then

the commission explain its rationale and basis for making that determination and make that explanation available for public comment.

As previously stated, the commission revised §101.222, and expects many more emissions events will be classified as excessive than under the proposed version of the rule. Based on the language of the adopted rules, all reported emissions events will be reviewed to determine if they are excessive and to determine if they should be considered exempt from compliance with emissions limitations. If the commission determines that any one of the criteria listed in §101.222(a) for excessive emissions events has been met, an event would be considered excessive.

Oxychem commented that §101.223(a)(3) is not clear and should be replaced with "the actual magnitude and impact on human health or the environment of the emissions event."

Section 101.223(a)(3) has been removed and the language has been incorporated into §101.222(b)(11), which now reads, "unauthorized emissions did not cause or contribute to an exceedance of the national ambient air quality standards or prevention of significant deterioriation increments or a condition of air pollution."

Oxychem commented that the proposed §101.223(a)(6) concerning "the need for startup, shutdown, and maintenance activities" is confusing and recommended the commission clarify the rule. Oxychem interpreted the language to mean the commission would ask whether the facility conducted adequate activities such as appropriate maintenance or shutting down to minimize the magnitude of the events, and if an event occurred during a startup or shutdown, questioned whether the facility had adequate controls in place to minimize emissions. Oxychem recommended substituting the following language in §101.223(a)(6): "the ability (or lack thereof) to control emissions during startup and shutdown events, and/or the presence (or lack of) adequate controls or procedures to control emissions from maintenance activities."

Although the commission is not adopting §101.223(a)(6) as proposed, the concept of "the need for startup, shutdown, and maintenance activities" in proposed §101.223(a)(6) has been incorporated into §101.222(b)(4) and (9) and (c)(3) and (5), which relate to maintaining and operating air pollution control equipment or processes in a manner consistent with good practice for minimizing emissions and reducing the number of emissions events, and frequent or recurring pattern indicative of inadequate design, operation, or maintenance. The commission has not made any changes in response to these comments.

Brown McCarroll commented that proposed §101.223(b) properly provides that excessive emissions events determinations apply to a "facility," and requested the commission to allow additional public comment if the commission intends that multiple emissions events at a site will trigger an excessive emissions event determination when emissions events are not from the same facility.

The statutory language supports the commission's interpretation that one or more emissions events at a facility may be determined to be excessive. Evaluation of multiple emissions events at a site is limited to considering chronic excessive emissions events.

TIP and Brown McCarroll commented that proposed §101.223(b) does not provide a mechanism for submitting a revised CAP if the CAP is disapproved, amended, or revised, including instances when alternate methods would be as effective and less costly, and asked the commission to clarify a process for revising CAPs. TIP suggested adding the following language before the last sentence in proposed §101.223(b)(2): "If disapproved, the commission shall notify in writing the owner or operator of a facility within 60 days of its disapproval determination. Such notice shall provide a list of deficiencies in the CAP and/or the basis for disapproval. The owner or operator shall revise the CAP in an effort to address the deficiencies listed in the disapproval notification or the disapproval basis, and submit to the commission the revised CAP within 60 days after receiving the disapproval notification."

The commission agrees that the owner or operator of the facility should be notified of the reasons and basis for disapproval and has modified §101.223(a)(2) to require the executive director to identify, in a written response, any deficiencies in the CAP and the basis for CAP disapproval. Through this mechanism, the commission anticipates owners and operators will resubmit a CAP with revisions to address deficiencies and reasons for disapproval. Clear statutory timelines and the commission's interest in achieving timely corrective actions do not support allowing multiple revisions and rounds of discussion to execute a CAP. Owners and operators must obtain approval of a CAP within 120 days after initial submission to the commission. The commission encourages owners and operators to discuss a proposed CAP prior to filing the CAP with the regional office. The commission, therefore, declines to make the other changes suggested by the commenters.

Dow suggested that the commission establish, through policy or rule, a step of notifying the owner or operator of the excessive events determination prior to the written notification contemplated by §101.223(b) and providing the facility with 15 to 30 days to appeal the decision before the time clock starts for submitting CAPs or permit amendments.

The commission's current practice of notifying owners and operators prior to issuing written NOVs will continue. The typical situation involves discussion with the owner or operator prior to issuance of a letter from the executive director through the regional office stating that an emissions event is excessive or that enforcement action will be initiated. HB 2912 did not contemplate a separate appeal process regarding the executive director's decision on whether each emissions event is excessive. Rather, the intent was for facilities with excessive emissions events to quickly implement a CAP independent of any enforcement action that the agency might take.

ATINGP, Dow, ExxonMobil-Downstream, Reliant, and TIP generally commented that the executive director should provide a facility with a positive determination of excessive emissions events within a certain period of time ranging between six and 18 months. ATINGP and Dow further suggested that events should default to a classification of "not excessive" if no determination is made within the specified time frame. Reasons given for this suggestion were the significant impact on a site's compliance history, other permit activity, and the importance that the determination of whether an emission event is excessive be made on a timely basis, (i.e., not left to uncertainty). ATINGP stated that these proposed changes would not preclude the executive director from considering an event with others at a later time to evaluate the "the frequency of a facility's emissions events," but would provide closure that at the time of a specific emissions event, no such pattern of excessive frequency exists.

An automatic cutoff time limit is not appropriate and is not supported by HB 2912 or the TCAA. Although the commission receives several thousand reports annually, many more emissions events are recorded. The commission reviews such events either when reported as deviations under Title V or during another scheduled investigation. Events even at levels below an RQ may present a pattern indicative of inadequate design, operation, or maintenance and may be excessive. Also, some operational problems that result in emissions events that occur periodically over time are not recognized as such until a trend analysis is performed by regional personnel. The commission's review and action on recordable emissions events will not necessarily occur within the suggested time frames. Additionally, the commission is not subject to a statute of limitations for bringing enforcement actions and declines to impose such limits in this or any context. The purpose of HB 2912 as stated in §18.14 of the bill with respect to emissions events clearly was not to limit the existing enforcement authority of the commission.

TIP recommended adding the following language between the first and second sentences of proposed §101.223(b): "The written notification shall contain, at a minimum, a description of the emissions events that caused the determination to be made, and the time period during which the evaluation of those emissions events using the criteria in subsection (a) of this section took place."

The commission agrees with the suggested additional language and has modified §101.223(a) as adopted because this information will allow the facility to quickly identify areas for improvement that need to be incorporated into the CAP.

AECT requested that the proposed §101.223(b) be revised to clarify that the described action would be focused on the emissions from the excessive emissions event and not emissions from normal operations.

The commission disagrees with the suggested change. The purpose of a CAP or obtaining permit authorization is to require changes at a facility to eliminate the cause(s) of excessive emissions events or to obtain authorization for the emissions after review for best available control technology and predicted impacts. In either case, control or modification of normal operations may be exactly what is required to meet the purpose.

TIP and TCC commented that §101.223(b)(2) should be revised or deleted, and stated that §101.223(b)(2) allows the commission to unilaterally revise a CAP if, after implementation begins, the commission finds the plan is inadequate to prevent or minimize emissions or emissions events. TCC stated that the provision goes beyond the statutory requirement and subjects the regulated entity to unreasonable second-guessing on a plan that has been negotiated in good faith, and expressed concern that commission staff could potentially use the proposed language to reopen a CAP simply because of the commission's failure to act within the 45-day time period stipulated by the legislature. TIP suggested that proposed §101.223(b)(2) needs to allow a facility to propose and submit a revised CAP within a certain time frame following an inadequacy determination by commission. Therefore, the last sentence of proposed §101.223(b)(2) should be deleted and replaced with the language, "If the commission finds, after implementation of a CAP, that a CAP is inadequate to prevent or minimize emissions or emissions events, the commission shall notify the owner or operator of a facility of the inadequacy in writing. The owner or operator of a facility shall have 30 days to submit to the commission a revised CAP. If the revised CAP remains, in the opinion of the commission, inadequate to prevent or minimize emissions or emissions events, the commission and the owner or operator of a facility submitting the revised CAP shall work together as expeditiously as possible to develop an adequate CAP."

The commission agrees that when the commission determines that a CAP is inadequate to prevent or minimize emissions, the commission should notify the owner or operator of the facility and provide an opportunity for the owner or operator to modify the existing CAP or submit a new CAP for approval. However, the commission declines to make the suggested change because the proposed language could lead to a potentially never-ending discussion without a deadline for resolution. The commission has changed §101.223(a)(2) to state: "The commission may require the owner or operator to revise a CAP . . ." and to clarify that deficiencies and reasons for an inadequacy determination be provided to the owner or operator in writing. Additionally, the commission has added the following sentence to §101.223(a)(2), "If the commission finds a CAP inadequate to prevent or minimize emissions or emissions events after implementation of a CAP begins, an owner or operator must file an amended CAP within 60 days after written notification by the executive director." The commission has not changed the time frame for obtaining an approved CAP from 120 days after the CAP is initially submitted because 120 days is an adequate time for CAP development to achieve the necessary corrections.

AECT requested that the second sentence of proposed §101.223(b)(1) be revised to provide that the 60-day period may be extended as appropriate by the executive director to allow an extension of more than 15 days in limited circumstances where that may be necessary and appropriate. TCC suggested the commission extend the deadline for submitting a CAP from 60 to 90 days because placing an arbitrary CAP deadline for any or all possible excessive emissions events without regulatory flexibility will inhibit the development of a good CAP and because the schedules for CAP development and implementation should be formed from agreed-upon expectations to meet individual case-specific situations.

The commission believes that 75 days is sufficient time to provide prompt response to address causes of the emissions events and provide remedies which meet the legislative intent. Complex CAPs can be structured in such a way that additional actions or investigations can be incorporated as actions under the CAP. Actions required to be completed under a CAP will not necessarily all be completed within 75 days.

ExxonMobil-Downstream commented that §101.223(b)(1) implies that the executive director is specifying the CAP option and should be revised to clarify that the choice of submitting a CAP or filing a letter of intent to seek authorization for the emissions is a decision made by the owner or operator.

The commission agrees that clarification to the proposed rule is warranted and has modified §101.223(a)(1) to indicate "when a CAP is required" that the provisions regarding CAPs will apply. The commission recognizes that when emissions from emissions events are sufficiently frequent, quantifiable, and predictable, the facility owner or operator has a choice between filing a CAP or requesting permit authorization. However, if the commission determines that the emissions are not sufficiently frequent, quantifiable, or predictable, the facility must file a CAP.

ExxonMobil-Downstream and TIP commented that proposed §101.223(b)(3) should allow an owner or operator of a facility to

have the same amount of time to submit a CAP following an excessive event determination as following denial of authorization of emissions from emissions events. TIP also commented that the 60-day deadline for submitting a proposed CAP should run from date of the election, not the date of receipt of the written notification informing a facility of having excessive emissions events, and proposed §101.223(b)(1) should be revised to reflect this. Sierra-Houston commented that the 120-day limit for filing a permit application after a determination of excessive emissions events is too long, and suggested that the deadline be reduced to 90 days.

The time lines in the proposed rule are appropriate to allow ample opportunity to develop an effective course of action or response and the commission declines to make any of the suggested changes.

ExxonMobil-Downstream commented that the proposed rules confuse the roles of the commission and the facility with respect to requirement of CAPs. ExxonMobil-Downstream expressed a belief that the commission is authorized to decide that a CAP is inadequate, but is not authorized to revise the CAP. The commission may require instead that the owner or operator revise the CAP. ExxonMobil-Downstream suggested the commission revise §101.223(b)(2) to distinguish these functions.

The commission agrees that the owner or operator bears the responsibility to revise the CAP when required to do so by the commission or executive director, and has revised the rule to reflect this clarification.

ExxonMobil-Downstream commented that §101.223(b)(2) states, "An owner or operator must obtain commission approval of a CAP no later than 120 days after initial filing of the CAP." Similarly, §101.223(b)(3)(B) states, "If the intended authorization is a permit by rule or standard permit, the owner or operator must obtain authorization within 120 days after filing of the letter of intent." ExxonMobil-Downstream also commented that an owner or operator has no control over commission timing and should not be held accountable for such.

The commission has not made any changes in response to this comment, because the commission believes that 120 days is sufficient time to obtain commission approval of a CAP, especially considering the 45-day automatic approval provision in THSC, §382.0216(d) that requires the commission to disapprove any unacceptable CAPs before the 45th day. THSC, §382.0216(c), requires the 120-day time frame for obtaining authorization after filing the letter of intent.

ExxonMobil-Downstream commented that proposed language in §101.223(b)(2) is confusing. Unless the request for written approval was submitted with the CAP initially, the commission could take longer to approve the CAP than the owner or operator has to obtain approval. Additionally, Exxon Mobil-Downstream stated that no one would likely submit a CAP and presume to proceed without written approval given the legal obligations of the situation, so the 45-day automatic approval assumption is of questionable value.

As provided in HB 2912, codified in THSC, §382.0216, a CAP is deemed approved if the commission does not disapprove the CAP within 45 days after it is submitted. If the commission disapproves a CAP, the facility will receive notice of the reasons and basis for disapproval.

Sierra-Houston commented that the requirement to disapprove a CAP within 45 days or it is deemed approved is too short, due to the work load of the commission.

The 45-day time frame is a requirement imposed by HB 2912 and the commission declines to change the time frame, notwithstanding the workload of the commission.

ExxonMobil-Downstream commented that with respect to §101.223(b)(3), 15 days is not sufficient time for review of the options and obtaining approval from management, especially for a more complex and extensive CAP. An owner or operator should be given at least 30 days following notification from the executive director that action must be taken to evaluate options and select whether to submit a CAP or seek authorization.

The commission concurs that 15 days may be too limiting for more complex CAPs and has changed the time frame in §101.223(a)(3) from 15 days to 30 days.

TIP commented that a facility must be able to seek authorization for excessive emissions events when it reasonably believes the emissions are sufficiently frequent, quantifiable, and predictable to be authorized, not when the emissions are sufficiently frequent, quantifiable, and predictable to be authorized based on an objective standard, and requested the commission to add "in the reasonable judgment of the owner or operator of a facility," after the word "predictable," in proposed §101.223(b), (b)(3), and (c).

The commission does not agree that the suggested language is necessary, but recognizes that a facility is able to seek authorization for emissions that are sufficiently frequent, quantifiable, and predictable in the judgment of the commission. The commission has not made any changes in response to this comment.

Brown McCarroll, TIP, and ATINGP expressed concern with the impact of the use of "site" in proposed §101.1(88) as it impacts the proposed compliance history rules. ATINGP, TCC and TIP expressed concern that the term "site" was overly broad and not clearly delineated. ATINGP stated that there is no statutory authority to support a determination of chronic excessive emissions events on a site-wide basis. ATINGP, Dow, and TIP requested the commission to revise the provisions related to findings of "chronic excessive emissions events" to provide that they are facility-based and not site-wide determinations. Dow commented that a large complex site could have only two excessive emissions events from different pieces of equipment and be labeled as chronic. Dow, Oxychem, and TIP commented that excessive emissions events should be from the same piece of equipment and have the same cause before they can be evaluated to be chronic. TIP commented that the proposed language in §101.223(c) does not make it clear whether multiple excessive emissions events have to be the same violation of the same requirement from the same source, or whether the "site" simply has to have multiple emissions events classified as "excessive." TIP suggested the commission revise the first sentence of §101.223(c) by adding "for a facility" between "determination" and "under."

To address HB 2912 requirements concerning chronic excessive emissions events, the commission decided that the determination for chronic will be based on a review of the site, not just each facility at a site. TCAA, §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 an *entity's* compliance history." Because the statute uses the

term "entity," the commission disagrees that the chronic determination is facility-based. The commission does not believe that the term "site" is too broad nor is it unclear in its delineation. The term "site" has been clearly defined and is identical to the term "site" as recently adopted by the commission in the Chapter 60 compliance history rules. Under the compliance history rules, chronic excessive emissions events at a site are components to be included in a person's compliance history specific to the site under review. The commission has removed the language that when a site receives more than one excessive emissions event determination within a five-year period it is considered chronic. The commission has determined that when reviewing excessive emissions on a site-wide basis, two excessive emissions events at a facility in five years could be too restrictive in the determination of chronic. Therefore, when determining whether a facility has had chronic excessive emissions events, the commission will consider the size, nature, and complexity of the site's operation; the frequency of the emissions events at the site; and the reasons for the excessive emissions event determinations at the site. This determination will be based on a case-by-case review of the emissions events at the site. The commission does not agree that emissions events must be identical, or that emissions must emanate from the same piece of equipment or that emissions must have the same cause, before a chronic assessment under §101.223(b) is appropriate. A site may experience emissions events that are not directly attributable to the same piece of facility equipment, or to the exact same immediate cause, but that could indicate a chronic pattern.

Birch, TCC, AECT, ATINGP, TIP, Chaparral, Brown McCarroll commented on the trigger for review of excessive emissions events as chronic as any two excessive emissions events in a five-year period in proposed §101.223(c). Birch commented the commission has not provided adequate standards for establishing when excessive emissions events are chronic. TCC commented that the language in the preamble is inconsistent with the proposed rule language. TCC, AECT, and ATINGP commented that the occurrence of two excessive emissions events does not constitute "chronic." AECT explained that in the dictionary, "chronic" is defined as "marked by frequent occurrence," and that to be "frequent" requires more than two events. ATINGP encouraged the commission to incorporate a standard that indicates that a finding of chronic excessive emissions events will be found at a facility when the owner/operator has "a trend or pattern of excessive emissions events and a blatant disregard for compliance." TIP commented that if the commission plans to interpret new proposed §101.223(c) as allowing a chronic excessive emissions events determination to be made on a site-wide, multi-emissions point basis, two excessive emissions events is far too low a criterion to establish a pattern of "chronic" behavior, especially for a large plant. Chaparral and Brown McCarroll commented that the commission's proposal, to deem that more than one excessive emissions event in a five-year period as "chronic," is inconsistent with HB 2912. Chaparral stated that to be chronic, excessive events must frequently recur or persist for a long duration. Brown McCarroll commented that the proposal provides absolutely no explanation as to why two such determinations constitutes a chronic situation, and that by use of the word "chronic," the legislature meant this term to apply to sites that have excessive emissions events on a habitual or recurring basis. TCC commented that in general there should be clarity around what constitutes an "excessive" versus a "chronic" event. TCC suggested that "excessive" refers to the quantity of emissions and "chronic" refers to the frequency.

With the changes to §101.222(a) as adopted regarding excessive emissions events, and the commission's expectation that the number of excessive events will be significant, defining "chronic" as "two or more excessive emissions events at a site in a five-year period" is not appropriate. Since proposal, the commission added to the criteria for review of chronic excessive emissions events, the reason or reasons for excessive emissions event determination(s) at the site. A chronic assessment is best made on a case-by-case review of the size, nature, and complexity of the site's operations; the frequency of the excessive emissions events at a site; and the underlying reasons for the excessive emissions events.

Excessive emissions events and chronic excessive emissions events are related in that excessive emissions events may become chronic excessive emissions events. TCAA, §382.0216, established and the commission adopts a set of criteria that define when an emissions event is excessive. Chronic excessive emissions events are excessive emissions events that occur in such a magnitude or frequency or that cause an impact that the commission determines is unacceptable.

ACT expressed concern that the proposed definition of excessive emissions event sets such a high bar that few, if any, emissions events will be classified as excessive each year.

With the changes to §101.222(a) as adopted, the commission believes that many more than a few emissions events will be classified as excessive on an annual basis.

Oxychem suggested §101.223(c) should be modified to set the limit for the executive director to recommend to the commission that a site be considered chronic at more than one excessive emissions events determination for the same cause within a one-year period.

Because assessment of emissions events is best made on a case-by-case basis, the commission has removed its proposed reference to a specific number of events within a certain time frame and declines to establish a specific number of excessive emissions events that will trigger a chronic assessment. The commission has not made any change in response to this comment.

ExxonMobil-Production proposed that the number of excessive emissions events to be considered as possibly chronic be the site complexity factor as proposed in the compliance history rules, with a minimum of two, in a five-year period.

Because the site complexity factor in the proposed compliance history rules in Chapter 60 has a specific meaning beyond the air quality program to which the emissions events rules are limited, the commission does not see that factor as an appropriate basis for considering whether a site has chronic excessive emissions events. The commission is retaining the size, nature, and complexity of the site operations in the criteria that the commission will evaluate in determining whether a site has chronic excessive emissions events and the frequency of the excessive emissions events at the site, and has added consideration of the reasons for the excessive events determinations.

Brown McCarroll commented that it does not understand why a second CAP is required when it is not mandated and the underlying excessive emissions events determinations have already been addressed through a CAP. ATINGP commented that the statute only requires that the determination of chronic excessive emissions events be included in the regulated entity's compliance history. Brown McCarroll and ATINGP requested that the

commission delete the requirement in proposed §101.223(c) for CAPs and permitting of emissions.

The commission agrees that a chronic determination only effects the entity's compliance history. The commission also agrees that the CAP associated with the excessive emissions event should be sufficient to address the underlying cause of the event, and that with a determination of chronic excessive emissions events, a second CAP is not necessary. The commission has deleted the requirement for a second CAP in §101.223(b).

Sierra-Houston commented that the word "may" in §101.223(c) should be replaced with the word "must," thus requiring the executive director to forward the determinations of excessive emissions events to the commission.

Section 101.223(c) has been revised and the trigger has been removed. However, as with all determinations regarding emissions events, they are made on a case-by-case basis. Upon a review of the excessive emissions event(s), a determination will be made by the executive director to recommend that the commission make a finding of chronic excessive emissions events. Only when the exexcutive director determines that emissions events may be chronic is there a reason for the commission to review these to consider whether these are chronic.

Brown McCarroll recommended that the commission insert the word "excessive" in front of "emissions events" in §101.223(c)(2) to more accurately implement the requirements of HB 2912.

The commission must be able to review all emissions events associated with the site in question. While a single emission event may not be deemed to be excessive, subsequent emissions events from the same site may indicate a problem by their recurring pattern and may result in an excessive determination. Therefore, the commission has not made the suggested change.

Section 101.224--Temporary Exemptions During Drought Conditions

TCC and Dow commented that the commission should consider providing temporary relief for weather conditions other than drought conditions. TCC provided an example that during the June 2001 flooding, some plants had switchgear failures which caused unplanned emissions at some facilities. Dow provided an example of a hurricane threatening the Texas gulf coast, where many facilities might opt to cease operations and would notify the commission in advance of their shutdown plans perhaps only a matter of hours prior to commencing shutdown actions. Dow stated that in these types of cases, perhaps the commission could consider just requiring a simple site-wide notification of the shutdown activity, and then collect the details via the two-week follow-up written report. TCC further stated that the commission should clarify that these types of events are unavoidable.

The commission does not believe that amending this section to provide temporary relief for weather conditions other than drought conditions is appropriate at this time. The commission performed a rules review of Chapter 101 in 1998, and identified several areas for amendment. One suggested amendment included the reformatting of Chapter 101 to improve rule clarity and ease of future rule revisions. As stated in this proposal, the rule language found in repealed §101.12, *Temporary Exemptions During Drought Conditions*; was moved to a new §101.224 and the new section retained its original title. The changes being made to language of this section were purely administrative; therefore, amending the section to address temporary relief for weather conditions other than drought conditions is out of the scope of this rulemaking action. However, the commission may consider this suggested amendment at a later rulemaking.

The commission does not agree that the use of §101.224 is the proper reporting avenue for floods and/or hurricanes. Reporting under §101.211 would be the proper way to report shutdown events made as a result of *force majeure* events beyond the control of the source, such as floods or hurricanes.

Section 101.233--Variance Transfers

Chaparral suggested renaming §101.233 to "Transfers of Variance" to avoid confusion with provisions relating to transfer of permits.

The commission agrees with the comment and has revised the title of the section to Variance Transfers.

SUBCHAPTER A. GENERAL RULES

30 TAC §101.1

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state air; §382.014, concerning Emission Inventory, which authorizes the commission to require a person whose activities cause emissions of air contaminants to submit information to enable the commission to develop an emissions inventory; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of emissions of air contaminants; §382.085, concerning Unauthorized Emissions Prohibited, which prohibits emissions except as authorized by commission rule or order; §382.0215, concerning Assessment of Emissions Due to Emissions Events, which authorizes the commission to collect and assess unauthorized emissions data due to emissions events; and §382.0216, concerning Regulation of Emissions Events, which authorizes the commission to establish criteria for determining when emissions events are excessive and to require facilities to take action to reduce emissions from excessive emissions events. The amendment is also adopted under Title 42 United States Code (42 USC), §7410(a)(F)(iii), which requires correlation of emissions reports and emission-related data by the state commission with any emission limitations or standards established under the FCAA, 42 USC, §§7401 *et seq*.

§101.1. Definitions.

Unless specifically defined in the TCAA or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA, the following terms, when used

in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Account--For those sources required to be permitted under Chapter 122 of this title (relating to Federal Operating Permits), all sources which are aggregated as a site. For all other sources, any combination of sources under common ownership or control and located on one or more contiguous properties, or properties contiguous except for intervening roads, railroads, rights-of-way, waterways, or similar divisions.

(2) Acid gas flare--A flare used exclusively for the incineration of hydrogen sulfide and other acidic gases derived from natural gas sweetening processes.

(3) Ambient air--That portion of the atmosphere, external to buildings, to which the general public has access.

(4) Background--Background concentration, the level of air contaminants that cannot be reduced by controlling emissions from man-made sources. It is determined by measuring levels in non-urban areas.

(5) Capture system--All equipment (including, but not limited to, hoods, ducts, fans, booths, ovens, dryers, etc.) that contains, collects, and transports an air pollutant to a control device.

(6) Captured facility--A manufacturing or production facility that generates an industrial solid waste or hazardous waste that is routinely stored, processed, or disposed of on a shared basis in an integrated waste management unit owned, operated by, and located within a contiguous manufacturing complex.

(7) Carbon adsorber--An add-on control device which uses activated carbon to adsorb volatile organic compounds from a gas stream.

(8) Carbon adsorption system--A carbon adsorber with an inlet and outlet for exhaust gases and a system to regenerate the saturated adsorbent.

(9) Coating--A material applied onto or impregnated into a substrate for protective, decorative, or functional purposes. Such materials include, but are not limited to, paints, varnishes, sealants, adhesives, thinners, diluents, inks, maskants, and temporary protective coatings.

(10) Cold solvent cleaning--A batch process that uses liquid solvent to remove soils from the surfaces of metal parts or to dry the parts by spraying, brushing, flushing, and/or immersion while maintaining the solvent below its boiling point. Wipe cleaning (hand cleaning) is not included in this definition.

(11) Combustion unit--Any boiler plant, furnace, incinerator, flare, engine, or other device or system used to oxidize solid, liquid, or gaseous fuels, but excluding motors and engines used in propelling land, water, and air vehicles.

(12) Commercial hazardous waste management facility--Any hazardous waste management facility that accepts hazardous waste or polychlorinated biphenyl compounds for a charge, except a captured facility which disposes only waste generated on-site or a facility that accepts waste only from other facilities owned or effectively controlled by the same person.

(13) Commercial incinerator--An incinerator used to dispose of waste material from retail and wholesale trade establishments.

(14) Commercial medical waste incinerator--A facility that accepts for incineration medical waste generated outside the property boundaries of the facility.

(15) Component--A piece of equipment, including, but not limited to, pumps, valves, compressors, and pressure relief valves, which has the potential to leak volatile organic compounds.

(16) Condensate--Liquids that result from the cooling and/or pressure changes of produced natural gas. Once these liquids are processed at gas plants or refineries or in any other manner, they are no longer considered condensates.

(17) Construction-demolition waste--Waste resulting from construction or demolition projects.

(18) Control system or control device--Any part, chemical, machine, equipment, contrivance, or combination of same, used to destroy, eliminate, reduce, or control the emission of air contaminants to the atmosphere.

(19) Conveyorized degreasing--A solvent cleaning process that uses an automated parts handling system, typically a conveyor, to automatically provide a continuous supply of metal parts to be cleaned or dried using either cold solvent or vaporized solvent. A conveyorized degreasing process is fully enclosed except for the conveyor inlet and exit portals.

(20) Criteria pollutant or standard--Any pollutant for which there is a national ambient air quality standard established under 40 Code of Federal Regulations Part 50.

(21) Custody transfer--The transfer of produced crude oil and/or condensate, after processing and/or treating in the producing operations, from storage tanks or automatic transfer facilities to pipelines or any other forms of transportation.

(22) *De minimis* impact--A change in ground level concentration of an air contaminant as a result of the operation of any new major stationary source or of the operation of any existing source which has undergone a major modification, which does not exceed the following specified amounts.
Figure: 30 TAC §101.1(22)

(23) Domestic wastes--The garbage and rubbish normally resulting from the functions of life within a residence.

(24) Emissions banking--A system for recording emissions reduction credits so they may be used or transferred for future use.

(25) Emissions event--Any upset event or unscheduled maintenance, startup, or shutdown activity that results in unauthorized emissions from an emissions point.

(26) Emissions reduction credit--Any stationary source emissions reduction which has been banked in accordance with Chapter 101, Subchapter H, Division 1 of this title (relating to Emission Credit Banking and Trading).

(27) Emissions reduction credit certificate--The certificate issued by the executive director which indicates the amount of qualified reduction available for use as offsets and the length of time the reduction is eligible for use.

(28) Emissions unit--Any part of a stationary source which emits, or would have the potential to emit, any pollutant subject to regulation under the FCAA.

(29) Exempt solvent--Those carbon compounds or mixtures of carbon compounds used as solvents which have been excluded from the definition of volatile organic compound.

(30) External floating roof--A cover or roof in an open top tank which rests upon or is floated upon the liquid being contained and is equipped with a single or double seal to close the space between the roof edge and tank shell. A double seal consists of two complete

and separate closure seals, one above the other, containing an enclosed space between them.

(31) Federal motor vehicle regulation--Control of Air Pollution from Motor Vehicles and Motor Vehicle Engines, 40 Code of Federal Regulations Part 85.

(32) Federally enforceable--All limitations and conditions which are enforceable by the EPA administrator, including those requirements developed under 40 Code of Federal Regulations (CFR) Parts 60 and 61; requirements within any applicable state implementation plan (SIP); and any permit requirements established under 40 CFR §52.21 or under regulations approved under 40 CFR Part 51, Subpart I, including operating permits issued under the approved program that is incorporated into the SIP and that expressly requires adherence to any permit issued under such program.

(33) Flare--An open combustion unit (i.e., lacking an enclosed combustion chamber) whose combustion air is provided by uncontrolled ambient air around the flame, and which is used as a control device. A flare may be equipped with a radiant heat shield (with or without a refractory lining), but is not equipped with a flame air control damping system to control the air/fuel mixture. In addition, a flare may also use auxiliary fuel. The combustion flame may be elevated or at ground level. A vapor combustor, as defined in this section, is not considered a flare.

(34) Fuel oil--Any oil meeting the American Society for Testing and Materials (ASTM) specifications for fuel oil in ASTM D396-01, Standard Specifications for Fuel Oils, revised 2001. This includes fuel oil grades 1, 1 (Low Sulfur), 2, 2 (Low Sulfur), 4 (Light), 4, 5 (Light), 5 (Heavy), and 6.

(35) Fugitive emission--Any gaseous or particulate contaminant entering the atmosphere which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening designed to direct or control its flow.

(36) Garbage--Solid waste consisting of putrescible animal and vegetable waste materials resulting from the handling, preparation, cooking, and consumption of food, including waste materials from markets, storage facilities, and handling and sale of produce and other food products.

(37) Gasoline--Any petroleum distillate having a Reid vapor pressure of four pounds per square inch (27.6 kilopascals) or greater, which is produced for use as a motor fuel, and is commonly called gasoline.

(38) Hazardous waste management facility--All contiguous land, including structures, appurtenances, and other improvements on the land, used for processing, storing, or disposing of hazardous waste. The term includes a publicly or privately owned hazardous waste management facility consisting of processing, storage, or disposal operational hazardous waste management units such as one or more landfills, surface impoundments, waste piles, incinerators, boilers, and industrial furnaces, including cement kilns, injection wells, salt dome waste containment caverns, land treatment facilities, or a combination of units.

(39) Hazardous waste management unit--A landfill, surface impoundment, waste pile, boiler, industrial furnace, incinerator, cement kiln, injection well, container, drum, salt dome waste containment cavern, or land treatment unit, or any other structure, vessel, appurtenance, or other improvement on land used to manage hazardous waste.

(40) Hazardous wastes--Any solid waste identified or listed as a hazardous waste by the administrator of the EPA under the federal Solid Waste Disposal Act, as amended by RCRA, 42 United States Code, §§6901 *et seq*., as amended.

(41) Heatset (used in offset lithographic printing)--Any operation where heat is required to evaporate ink oil from the printing ink. Hot air dryers are used to deliver the heat.

(42) High-bake coatings--Coatings designed to cure at temperatures above 194 degrees Fahrenheit.

(43) High-volume low-pressure spray guns--Equipment used to apply coatings by means of a spray gun which operates between 0.1 and 10.0 pounds per square inch gauge air pressure.

(44) Incinerator--An enclosed combustion apparatus and attachments which is used in the process of burning wastes for the primary purpose of reducing its volume and weight by removing the combustibles of the waste and which is equipped with a flue for conducting products of combustion to the atmosphere. Any combustion device which burns 10% or more of solid waste on a total British thermal unit (Btu) heat input basis averaged over any one-hour period shall be considered an incinerator. A combustion device without instrumentation or methodology to determine hourly flow rates of solid waste and burning 1.0% or more of solid waste on a total Btu heat input basis averaged annually shall also be considered an incinerator. An open-trench type (with closed ends) combustion unit may be considered an incinerator when approved by the executive director. Devices burning untreated wood scraps, waste wood, or sludge from the treatment of wastewater from the process mills as a primary fuel for heat recovery are not included under this definition. Combustion devices permitted under this title as combustion devices other than incinerators will not be considered incinerators for application of any regulations within this title provided they are installed and operated in compliance with the condition of all applicable permits.

(45) Industrial boiler--A boiler located on the site of a facility engaged in a manufacturing process where substances are transformed into new products, including the component parts of products, by mechanical or chemical processes.

(46) Industrial furnace--Cement kilns, lime kilns, aggregate kilns, phosphate kilns, coke ovens, blast furnaces, smelting, melting, or refining furnaces, including pyrometallurgical devices such as cupolas, reverberator furnaces, sintering machines, roasters, or foundry furnaces, titanium dioxide chloride process oxidation reactors, methane reforming furnaces, pulping recovery furnaces, combustion devices used in the recovery of sulfur values from spent sulfuric acid, and other devices the commission may list.

(47) Industrial solid waste--Solid waste resulting from, or incidental to, any process of industry or manufacturing, or mining or agricultural operations, classified as follows.

(A) Class 1 industrial solid waste or Class 1 waste is any industrial solid waste designated as Class 1 by the executive director as any industrial solid waste or mixture of industrial solid wastes that because of its concentration or physical or chemical characteristics is toxic, corrosive, flammable, a strong sensitizer or irritant, a generator of sudden pressure by decomposition, heat, or other means, and may pose a substantial present or potential danger to human health or the environment when improperly processed, stored, transported, or otherwise managed, including hazardous industrial waste, as defined in §335.1 and §335.505 of this title (relating to Definitions and Class 1 Waste Determination).

(B) Class 2 industrial solid waste is any individual solid waste or combination of industrial solid wastes that cannot be described as Class 1 or Class 3, as defined in §335.506 of this title (relating to Class 2 Waste Determination).

(C) Class 3 industrial solid waste is any inert and essentially insoluble industrial solid waste, including materials such as rock, brick, glass, dirt, and certain plastics and rubber, etc., that are not readily decomposable as defined in §335.507 of this title (relating to Class 3 Waste Determination).

(48) Internal floating cover--A cover or floating roof in a fixed roof tank which rests upon or is floated upon the liquid being contained, and is equipped with a closure seal or seals to close the space between the cover edge and tank shell.

(49) Leak--A volatile organic compound concentration greater than 10,000 parts per million by volume or the amount specified by applicable rule, whichever is lower; or the dripping or exuding of process fluid based on sight, smell, or sound.

(50) Liquid fuel--A liquid combustible mixture, not derived from hazardous waste, with a heating value of at least 5,000 British thermal units per pound.

(51) Liquid-mounted seal--A primary seal mounted in continuous contact with the liquid between the tank wall and the floating roof around the circumference of the tank.

(52) Maintenance area--A geographic region of the state previously designated nonattainment under the FCAA Amendments of 1990 and subsequently redesignated to attainment subject to the requirement to develop a maintenance plan under FCAA, §175A, as amended. The following are the maintenance areas within the state:

(A) Victoria Ozone Maintenance Area (60 FR 12453)--Victoria County; and

(B) Collin County Lead Maintenance Area (64 FR 55421 - 55425)--Portion of Collin County. Eastside: Starting at the intersection of South Fifth Street and the fence line approximately 1,000 feet south of the Exide property line going north to the intersection of South Fifth Street and Eubanks Street; Northside: Proceeding west on Eubanks to the Burlington Railroad tracks; Westside: Along the Burlington Railroad tracks to the fence line approximately 1,000 feet south of the Exide property line; Southside: Fence line approximately 1,000 feet south of the Exide property line.

(53) Maintenance plan--A revision to the applicable state implementation plan, meeting the requirements of FCAA, §175A.

(54) Marine vessel--Any watercraft used, or capable of being used, as a means of transportation on water, and that is constructed or adapted to carry, or that carries, oil, gasoline, or other volatile organic liquid in bulk as a cargo or cargo residue.

(55) Mechanical shoe seal--A metal sheet which is held vertically against the storage tank wall by springs or weighted levers and is connected by braces to the floating roof. A flexible coated fabric (envelope) spans the annular space between the metal sheet and the floating roof.

(56) Medical waste--Waste materials identified by the Texas Department of Health as "special waste from health care-related facilities" and those waste materials commingled and discarded with special waste from health care-related facilities.

(57) Metropolitan Planning Organization--That organization designated as being responsible, together with the state, for conducting the continuing, cooperative, and comprehensive planning process under 23 United States Code (USC), §134 and 49 USC, §1607.

(58) Mobile emissions reduction credit--The credit obtained from an enforceable, permanent, quantifiable, and surplus (to other federal and state regulations) emissions reduction generated by a mobile source as set forth in Chapter 114, Subchapter E or F of this title (relating to Low Emission Vehicle Fleet Requirements and Vehicle Retirement and Mobile Emission Reduction Credits), and which has been banked in accordance with Subchapter H, Division 1 of this chapter.

(59) Motor vehicle--A self-propelled vehicle designed for transporting persons or property on a street or highway.

(60) Motor vehicle fuel dispensing facility--Any site where gasoline is dispensed to motor vehicle fuel tanks from stationary storage tanks.

(61) Municipal solid waste--Solid waste resulting from, or incidental to, municipal, community, commercial, institutional, and recreational activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste except industrial solid waste.

(62) Municipal solid waste facility--All contiguous land, structures, other appurtenances, and improvements on the land used for processing, storing, or disposing of solid waste. A facility may be publicly or privately owned and may consist of several processing, storage, or disposal operational units, e.g., one or more landfills, surface impoundments, or combinations of them.

(63) Municipal solid waste landfill--A discrete area of land or an excavation that receives household waste and that is not a land application unit, surface impoundment, injection well, or waste pile, as those terms are defined under 40 Code of Federal Regulations §257.2. A municipal solid waste landfill (MSWLF) unit also may receive other types of RCRA Subtitle D wastes, such as commercial solid waste, nonhazardous sludge, conditionally exempt small-quantity generator waste, and industrial solid waste. Such a landfill may be publicly or privately owned. An MSWLF unit may be a new MSWLF unit, an existing MSWLF unit, or a lateral expansion.

(64) National ambient air quality standard--Those standards established under FCAA, §109, including standards for carbon monoxide, lead, nitrogen dioxide, ozone, inhalable particulate matter, and sulfur dioxide.

(65) Net ground-level concentration--The concentration of an air contaminant as measured at or beyond the property boundary minus the representative concentration flowing onto a property as measured at any point. Where there is no expected influence of the air contaminant flowing onto a property from other sources, the net ground level concentration may be determined by a measurement at or beyond the property boundary.

(66) New source--Any stationary source, the construction or modification of which was commenced after March 5, 1972.

(67) Nonattainment area--A defined region within the state which is designated by EPA as failing to meet the national ambient air quality standard for a pollutant for which a standard exists. The EPA will designate the area as nonattainment under the provisions of FCAA, §107(d). For the official list and boundaries of nonattainment areas, see 40 Code of Federal Regulations Part 81 and pertinent *Federal Register* (FR) notices. The following areas comprise the nonattainment areas within the state.

(A) Carbon monoxide (CO). El Paso CO nonattainment area (56 FR 56694)--Classified as a Moderate CO nonattainment area with a design value less than or equal to 12.7 parts per million. Portion of El Paso County. Portion of the city limits of El Paso: That portion of the City of El Paso bounded on the north by Highway 10 from Porfirio Diaz Street to Raynolds Street, Raynolds Street from Highway 10 to the Southern Pacific Railroad lines, the Southern Pacific Railroad lines from Raynolds Street to Highway 62, Highway 62 from the Southern

Pacific Railroad lines to Highway 20, and Highway 20 from Highway 62 to Polo Inn Road. Bounded on the east by Polo Inn Road from Highway 20 to the Texas-Mexico border. Bounded on the south by the Texas-Mexico border from Polo Inn Road to Porfirio Diaz Street. Bounded on the west by Porfirio Diaz Street from the Texas-Mexico border to Highway 10.

(B) Inhalable particulate matter (PM_{10}). El Paso PM_{10} nonattainment area (56 FR 56694)--Classified as a Moderate PM_{10} nonattainment area. Portion of El Paso County which comprises the El Paso city limit boundaries as they existed on November 15, 1990.

(C) Lead. No designated nonattainment areas.

(D) Nitrogen dioxide. No designated nonattainment areas.

(E) Ozone.

(i) Houston/Galveston ozone nonattainment area (56 FR 56694)--Classified as a Severe-17 ozone nonattainment area. Consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties.

(ii) El Paso ozone nonattainment area (56 FR 56694)--Classified as a Serious ozone nonattainment area. Consists of El Paso County.

(iii) Beaumont/Port Arthur ozone nonattainment area (61 FR 14496)--Classified as a Moderate ozone nonattainment area. Consists of Hardin, Jefferson, and Orange Counties.

(iv) Dallas/Fort Worth ozone nonattainment area (63 FR 8128)--Classified as a Serious ozone nonattainment area. Consists of Collin, Dallas, Denton, and Tarrant Counties.

(F) Sulfur dioxide. No designated nonattainment areas.

(68) Non-reportable emissions event--Any emissions event that is not a reportable emissions event as defined in this section.

(69) Opacity--The degree to which an emission of air contaminants obstructs the transmission of light expressed as the percentage of light obstructed as measured by an optical instrument or trained observer.

(70) Open-top vapor degreasing--A batch solvent cleaning process that is open to the air and which uses boiling solvent to create solvent vapor used to clean or dry metal parts through condensation of the hot solvent vapors on the colder metal parts.

(71) Outdoor burning--Any fire or smoke-producing process which is not conducted in a combustion unit.

(72) Particulate matter--Any material, except uncombined water, that exists as a solid or liquid in the atmosphere or in a gas stream at standard conditions.

(73) Particulate matter emissions--All finely-divided solid or liquid material, other than uncombined water, emitted to the ambient air as measured by EPA Reference Method 5, as specified at 40 Code of Federal Regulations (CFR) Part 60, Appendix A, modified to include particulate caught by an impinger train; by an equivalent or alternative method, as specified at 40 CFR Part 51; or by a test method specified in an approved state implementation plan.

(74) Petroleum refinery--Any facility engaged in producing gasoline, kerosene, distillate fuel oils, residual fuel oils, lubricants, or other products through distillation of crude oil, or through the redistillation, cracking, extraction, reforming, or other processing of unfinished petroleum derivatives.

(75) PM_{10}--Particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers as measured by a reference method based on 40 Code of Federal Regulations (CFR) Part 50, Appendix J and designated in accordance with 40 CFR Part 53, or by an equivalent method designated with that Part 53.

(76) PM_{10} emissions--Finely-divided solid or liquid material with an aerodynamic diameter less than or equal to a nominal ten micrometers emitted to the ambient air as measured by an applicable reference method, or an equivalent or alternative method specified in 40 Code of Federal Regulations Part 51, or by a test method specified in an approved state implementation plan.

(77) Polychlorinated biphenyl compound--A compound subject to 40 Code of Federal Regulations Part 761.

(78) Process or processes--Any action, operation, or treatment embracing chemical, commercial, industrial, or manufacturing factors such as combustion units, kilns, stills, dryers, roasters, and equipment used in connection therewith, and all other methods or forms of manufacturing or processing that may emit smoke, particulate matter, gaseous matter, or visible emissions.

(79) Process weight per hour--"Process weight" is the total weight of all materials introduced or recirculated into any specific process which may cause any discharge of air contaminants into the atmosphere. Solid fuels charged into the process will be considered as part of the process weight, but liquid and gaseous fuels and combustion air will not. The "process weight per hour" will be derived by dividing the total process weight by the number of hours in one complete operation from the beginning of any given process to the completion thereof, excluding any time during which the equipment used to conduct the process is idle. For continuous operation, the "process weight per hour" will be derived by dividing the total process weight for a 24-hour period by 24.

(80) Property--All land under common control or ownership coupled with all improvements on such land, and all fixed or movable objects on such land, or any vessel on the waters of this state.

(81) Reasonable further progress--Annual incremental reductions in emissions of the applicable air contaminant which are sufficient to provide for attainment of the applicable national ambient air quality standard in the designated nonattainment areas by the date required in the state implementation plan.

(82) Remote reservoir cold solvent cleaning--Any cold solvent cleaning operation in which liquid solvent is pumped to a sink-like work area that drains solvent back into an enclosed container while parts are being cleaned, allowing no solvent to pool in the work area.

(83) Reportable emissions event--Any emissions event which, in any 24-hour period, results in an unauthorized emission equal to or in excess of the reportable quantity as defined in this section.

(84) Reportable quantity (RQ)--Is as follows:

(A) for individual air contaminant compounds and specifically listed mixtures, either:

(i) the lowest of the quantities:

(I) listed in 40 Code of Federal Regulations (CFR) §302, Table 302.4, the column "final RQ";

(II) listed in 40 CFR §355, Appendix A, the column "Reportable Quantity"; or

(III) listed as follows:

(-a-) butanes (any isomer)--5,000 pounds;

(-b-) butenes (any isomer, except 1,3-butadiene)--5,000 pounds, except in the Houston/Galveston (HGA) and Beaumont/Port Arthur (BPA) ozone nonattainment areas as defined in paragraph (67)(E)(i) and (iii) of this section, where the RQ shall be 100 pounds;

(-c-) ethylene--5,000 pounds, except in the HGA and BPA ozone nonattainment areas as defined in paragraph (67)(E)(i) and (iii) of this section, where the RQ shall be 100 pounds;

(-d-) carbon monoxide--5,000 pounds;

(-e-) pentanes (any isomer)--5,000 pounds;

(-f-) propane--5,000 pounds;

(-g-) propylene--5,000 pounds, except in the HGA and BPA ozone nonattainment areas as defined in paragraph (67)(E)(i) and(iii) of this section, where the RQ shall be 100 pounds;

(-h-) ethanol--5,000 pounds;

(-i-) isopropyl alcohol--5,000 pounds;

(-j-) mineral spirits--5,000 pounds;

(-k-) hexanes (any isomer)--5,000 pounds;

(-l-) octanes (any isomer)--5,000 pounds;

(-m-) decanes (any isomer)--5,000 pounds;

(-n-) acetaldehyde--1,000 pounds, except in the HGA and BPA ozone nonattainment areas as defined in paragraph (67)(E)(i) and (iii) of this section, where the RQ shall be 100 pounds;

(-o-) toluene--1,000 pounds, except in the HGA and BPA ozone nonattainment areas as defined in paragraph (67)(E)(i) and (iii) of this section, where the RQ shall be 100 pounds;

(-p-) nitrogen oxide--100 pounds, which shall be used instead of the RQ provided in 40 CFR §302, Table 302.4, the column "final RQ"; or

(-q-) nitrogen dioxide--100 pounds, which shall be used instead of the RQ listed in 40 CFR §302, Table 302.4, the column "final RQ" or listed in 40 CFR §355, Appendix A, the column "Reportable Quantity";

(ii) if not listed in clause (i) of this subparagraph, 100 pounds;

(B) for mixtures of air contaminant compounds:

(i) where the relative amount of individual air contaminant compounds is known through common process knowledge or prior engineering analysis or testing, any amount of an individual air contaminant compound which equals or exceeds the amount specified in subparagraph (A) of this paragraph;

(ii) where the relative amount of individual air contaminant compounds in subparagraph (A)(i) of this paragraph is not known, any amount of the mixture which equals or exceeds the amount for any single air contaminant compound that is present in the mixture and listed in subparagraph (A)(i) of this paragraph;

(iii) where each of the individual air contaminant compounds listed in subparagraph (A)(i) of this paragraph are known to be less than 0.02% by weight of the mixture, and each of the other individual air contaminant compounds covered by subparagraph (A)(ii) of this paragraph are known to be less than 2.0% by weight of the mixture, any total amount of the mixture of air contaminant compounds greater than or equal to 5,000 pounds; or

(iv) where natural gas excluding methane and ethane, or air emissions from crude oil are known to be in an amount greater than or equal to 5,000 pounds or associated hydrogen sulfide and mercaptans in a total amount greater than 100 pounds, whichever occurs first;

(C) for opacity from boilers and combustion turbines fueled by natural gas, coal, lignite, wood, or fuel oil containing hazardous air pollutants at a concentration of less than 0.02% by weight, opacity that is equal to or exceeds 15 additional percentage points above the applicable limit, averaged over a six-minute period. Opacity is the only RQ applicable to boilers and combustion turbines described in this paragraph; and

(D) for facilities where air contaminant compounds are measured directly by a continuous emission monitoring system providing updated readings at a minimum 15-minute interval an amount, approved by the executive director based on any relevant conditions and a screening model, that would be reported prior to ground level concentrations reaching at any distance beyond the closest facility property line:

(i) less than one-half of any applicable ambient air standards; and

(ii) less than two times the concentration of applicable air emission limitations.

(85) Rubbish--Nonputrescible solid waste, consisting of both combustible and noncombustible waste materials. Combustible rubbish includes paper, rags, cartons, wood, excelsior, furniture, rubber, plastics, yard trimmings, leaves, and similar materials. Noncombustible rubbish includes glass, crockery, tin cans, aluminum cans, metal furniture, and like materials which will not burn at ordinary incinerator temperatures (1,600 degrees Fahrenheit to 1,800 degrees Fahrenheit).

(86) Scheduled maintenance, startup, or shutdown activity--For activities with unauthorized emissions which are expected to exceed a reportable quantity (RQ), a scheduled maintenance, startup, or shutdown activity is an activity for which the owner or operator of the facility provides timely prior notice and a final report as required by §101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements); the notice or final report includes the information required in §101.211 of this title; and the actual unauthorized emissions from the activity do not exceed the emissions estimates submitted in the initial notification. For activities with unauthorized emissions which are not expected to, and do not, exceed an RQ, a scheduled maintenance, startup, or shutdown activity is one that is recorded as required by §101.211 of this title. Expected excess opacity events as described in §101.201(e) of this title (relating to Emissions Event Reporting and Recordkeeping Requirements) resulting from scheduled maintenance, startup, or shutdown activities are those that provide prior notice (if required), and are recorded and reported as required by §101.211 of this title.

(87) Site--For the purposes of Subchapter F of this chapter, 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.

(88) Sludge--Any solid or semi-solid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant; water supply treatment plant, exclusive of the treated effluent from a wastewater treatment plant; or air pollution control equipment.

(89) Smoke--Small gas-born particles resulting from incomplete combustion consisting predominately of carbon and other combustible material and present in sufficient quantity to be visible.

(90) Solid waste--Garbage, rubbish, refuse, sludge from a waste water treatment plant, water supply treatment plant, or air pollution control equipment, and other discarded material, including solid, liquid, semisolid, or containerized gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations

and from community and institutional activities. The term does not include:

(A) solid or dissolved material in domestic sewage, or solid or dissolved material in irrigation return flows, or industrial discharges subject to regulation by permit issued under the Texas Water Code, Chapter 26;

(B) soil, dirt, rock, sand, and other natural or man-made inert solid materials used to fill land, if the object of the fill is to make the land suitable for the construction of surface improvements; or

(C) waste materials that result from activities associated with the exploration, development, or production of oil or gas, or geothermal resources, and other substance or material regulated by the Railroad Commission of Texas under the Natural Resources Code, §91.101, unless the waste, substance, or material results from activities associated with gasoline plants, natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants and is hazardous waste as defined by the administrator of the EPA under the federal Solid Waste Disposal Act, as amended by RCRA, as amended (42 United States Code, §§6901 *et seq*.).

(91) Sour crude--A crude oil which will emit a sour gas when in equilibrium at atmospheric pressure.

(92) Sour gas--Any natural gas containing more than 1.5 grains of hydrogen sulfide per 100 cubic feet, or more than 30 grains of total sulfur per 100 cubic feet.

(93) Source--A point of origin of air contaminants, whether privately or publicly owned or operated. Upon request of a source owner, the executive director shall determine whether multiple processes emitting air contaminants from a single point of emission will be treated as a single source or as multiple sources.

(94) Special waste from health care related facilities--A solid waste which if improperly treated or handled may serve to transmit infectious disease(s) and which is comprised of the following: animal waste, bulk blood and blood products, microbiological waste, pathological waste, and sharps.

(95) Standard conditions--A condition at a temperature of 68 degrees Fahrenheit (20 degrees Centigrade) and a pressure of 14.7 pounds per square inch absolute (101.3 kiloPascals). Pollutant concentrations from an incinerator will be corrected to a condition of 50% excess air if the incinerator is operating at greater than 50% excess air.

(96) Standard metropolitan statistical area--An area consisting of a county or one or more contiguous counties which is officially so designated by the United States Bureau of the Budget.

(97) Submerged fill pipe--A fill pipe that extends from the top of a tank to have a maximum clearance of six inches (15.2 centimeters) from the bottom or, when applied to a tank which is loaded from the side, that has a discharge opening entirely submerged when the pipe used to withdraw liquid from the tank can no longer withdraw liquid in normal operation.

(98) Sulfur compounds--All inorganic or organic chemicals having an atom or atoms of sulfur in their chemical structure.

(99) Sulfuric acid mist/sulfuric acid--Emissions of sulfuric acid mist and sulfuric acid are considered to be the same air contaminant calculated as H_2SO_4 and shall include sulfuric acid liquid mist, sulfur trioxide, and sulfuric acid vapor as measured by Test Method 8 in 40 Code of Federal Regulations Part 60, Appendix A.

(100) Sweet crude oil and gas--Those crude petroleum hydrocarbons that are not "sour" as defined in this section.

(101) Total suspended particulate--Particulate matter as measured by the method described in 40 Code of Federal Regulations Part 50, Appendix B.

(102) Transfer efficiency--The amount of coating solids deposited onto the surface or a part of product divided by the total amount of coating solids delivered to the coating application system.

(103) True vapor pressure--The absolute aggregate partial vapor pressure, measured in pounds per square inch absolute, of all volatile organic compounds at the temperature of storage, handling, or processing.

(104) Unauthorized emissions--Emissions of any air contaminant except carbon dioxide, water, nitrogen, methane, ethane, noble gases, hydrogen, and oxygen which exceeds any air emission limitation in a permit, rule, or order of the commission or as authorized by TCAA, §382.0518(g).

(105) Upset event--An unplanned or unanticipated occurrence or excursion of a process or operation that results in unauthorized emissions.

(106) Utility boiler--A boiler used to produce electric power, steam, or heated or cooled air, or other gases or fluids for sale.

(107) Vapor combustor--A partially enclosed combustion device used to destroy volatile organic compounds by smokeless combustion without extracting energy in the form of process heat or steam. The combustion flame may be partially visible, but at no time does the device operate with an uncontrolled flame. Auxiliary fuel and/or a flame air control damping system, which can operate at all times to control the air/fuel mixture to the combustor's flame zone, may be required to ensure smokeless combustion during operation.

(108) Vapor-mounted seal--A primary seal mounted so there is an annular space underneath the seal. The annular vapor space is bounded by the bottom of the primary seal, the tank wall, the liquid surface, and the floating roof or cover.

(109) Vent--Any duct, stack, chimney, flue, conduit, or other device used to conduct air contaminants into the atmosphere.

(110) Visible emissions--Particulate or gaseous matter which can be detected by the human eye. The radiant energy from an open flame shall not be considered a visible emission under this definition.

(111) Volatile organic compound--Any compound of carbon or mixture of carbon compounds excluding methane; ethane; 1,1,1-trichloroethane (methyl chloroform); methylene chloride (dichloromethane); perchloroethylene (tetrachloroethylene); trichlorofluoromethane (CFC-11); dichlorodifluoromethane (CFC-12); chlorodifluoromethane (HCFC-22); trifluoromethane (HFC-23); 1,1,2-trichloro-1,2,2-trifluoroethane (CFC-113); 1,2-dichloro-1,1,2,2-tetrafluoroethane (CFC-114); chloropentafluoroethane (CFC-115); 1,1,1-trifluoro-2,2-dichloroethane (HCFC-123); 2-chloro-1,1,1,2-tetrafluoroethane (HCFC-124); pentafluoroethane (HFC-125); 1,1,2,2-tetrafluoroethane (HFC-134); 1,1,1,2-tetrafluoroethane (HFC-134a); 1,1-dichloro-1-fluoroethane (HCFC-141b); 1-chloro-1,1-difluoroethane (HCFC-142b); 1,1,1-trifluoroethane (HFC-143a); 1,1-difluoroethane (HFC-152a); parachlorobenzotrifluoride (PCBTF); cyclic, branched, or linear completely methylated siloxanes; acetone; 3,3-dichloro-1,1,1,2,2-pentafluoropropane (HCFC-225ca); 1,3-dichloro-1,1,2,2,3-pentafluoropropane (HCFC-225cb); 1,1,1,2,3,4,4,5,5,5-decafluoropentane (HFC 43-10mee); difluoromethane (HFC-32); ethylfluoride (HFC-161); 1,1,1,3,3,3-hexafluoropropane (HFC-236fa); 1,1,2,2,3-pentafluoropropane (HFC-245ca); 1,1,2,3,3-pentafluoropropane (HFC-245ea);

1,1,1,2,3-pentafluoropropane (HFC-245eb); 1,1,1,3,3-pentafluoropropane (HFC-245fa); 1,1,1,2,3,3-hexafluoropropane (HFC-236ea); 1,1,1,3,3-pentafluorobutane (HFC-365mfc); chlorofluoromethane (HCFC-31); 1,2-dichloro-1,1,2-trifluoroethane (HCFC-123a); 1-chloro-1-fluoroethane (HCFC-151a); 1,1,1,2,2,3,3,4,4-nonafluoro-4-methoxybutane; 2-(difluoromethoxymethyl)-1,1,1,2,3,3,3-heptafluoropropane; 1-ethoxy-1,1,2,2,3,3,4,4,4-nonafluorobutane; 2-(ethoxydifluoromethyl)-1,1,1,2,3,3,3-heptafluoropropane; methyl acetate; carbon monoxide; carbon dioxide; carbonic acid; metallic carbides or carbonates; ammonium carbonate; and perfluorocarbon compounds which fall into these classes:

(A) cyclic, branched, or linear, completely fluorinated alkanes;

(B) cyclic, branched, or linear, completely fluorinated ethers with no unsaturations;

(C) cyclic, branched, or linear, completely fluorinated tertiary amines with no unsaturations; and

(D) sulfur-containing perfluorocarbons with no unsaturations and with sulfur bonds only to carbon and fluorine.

(112) Volatile organic compound (VOC) water separator--Any tank, box, sump, or other container in which any VOC, floating on or contained in water entering such tank, box, sump, or other container, is physically separated and removed from such water prior to outfall, drainage, or recovery of such water.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stephanie Bergeron
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Texas Commission on Environmental Quality
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For further information, please call: (512) 239-0348

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30 TAC §§101.6, 101.7, 101.11, 101.12, 101.15 - 101.17

STATUTORY AUTHORITY

The repeals are adopted under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under TCAA, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The repeals are also adopted under TCAA, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state air; §382.014, concerning Emission Inventory, which authorizes the commission to require a person whose activities cause emissions of air contaminants to submit information to enable the commission to develop an emissions inventory; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of emissions of air contaminants; §382.023, concerning Orders, which authorizes the commission to issue orders to carry out the purposes of TCAA; §382.025, concerning Orders Relating to Controlling Air Pollution, which authorizes the commission to order actions indicated by the circumstances to control a condition of air pollution; §382.028, concerning Variances, which authorizes the commission to grant variances; §382.0518(g), concerning Preconstruction Permits, which authorizes the commission to authorize emissions under preconstruction permits; §382.085, concerning Unauthorized Emissions Prohibited, which prohibits emissions except as authorized by commission rule or order; §382.0215, concerning Assessment of Emissions Due to Emissions Events, which authorizes the commission to collect and assess unauthorized emissions data due to emissions events; and §382.0216, concerning Regulation of Emissions Events, which authorizes the commission to establish criteria for determining when emissions events are excessive and to require facilities to take action to reduce emissions from excessive emissions events. The repeals are also adopted under 42 USC, §7410(a)(F)(iii), which requires correlation of emissions reports and emission-related data by the state commission with any emission limitations or standards established under the FCAA, 42 USC, §§7401 *et seq*.

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 F. EMISSIONS EVENTS AND SCHEDULED MAINTENANCE, STARTUP, AND SHUTDOWN ACTIVITIES

DIVISION 1. EMISSIONS EVENTS

30 TAC §101.201

STATUTORY AUTHORITY

The new section is adopted under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under TCAA, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The new section is also adopted under TCAA, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan,

which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.014, concerning Emission Inventory, which authorizes the commission to require a person whose activities cause emissions of air contaminants to submit information to enable the commission to develop an emissions inventory; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of emissions of air contaminants; §382.025, concerning Orders Relating to Controlling Air Pollution, which authorizes the commission to order actions indicated by the circumstances to control a condition of air pollution; §382.085, concerning Unauthorized Emissions Prohibited, which prohibits emissions except as authorized by commission rule or order; §382.0215, concerning Assessment of Emissions Due to Emissions Events, which authorizes the commission to collect and assess unauthorized emissions data due to emissions events; and §382.0216, concerning Regulation of Emissions Events, which authorizes the commission to establish criteria for determining when emissions events are excessive and to require facilities to take action to reduce emissions from excessive emissions events. The new section is also adopted under 42 USC, §7410(a)(F)(iii), which requires correlation of emissions reports and emission-related data by the state commission with any emission limitations or standards established under the FCAA, 42 USC, §§7401 *et seq*.

§101.201. Emissions Event Reporting and Recordkeeping Requirements.

(a) The following requirements for reportable emissions events shall apply.

(1) As soon as practicable, but not later than 24 hours after the discovery of an emissions event, the owner or operator of a facility shall:

(A) determine if the event is a reportable emissions event; and

(B) notify the commission office for the region in which the facility is located, and all appropriate local air pollution control agencies, if the emissions event is reportable.

(2) The notification for reportable emissions events for each facility, except for boilers or combustion turbines referenced in the definition of reportable quantity (RQ) in §101.1 of this title (relating to Definitions) shall at a minimum, identify:

(A) the name of the owner or operator of the facility experiencing an emissions event;

(B) the commission air account number of the facility experiencing an emissions event, if an account number exists;

(C) the physical location of the point at which emissions to the atmosphere occurred;

(D) the common name of the process unit or area, the common name of the facility which incurred the emissions event, and the common name of the emission point where the unauthorized emissions were released to the atmosphere;

(E) the date and time of the discovery of the emissions event;

(F) the estimated duration of the emissions event;

(G) the compound descriptive type of the individually listed compounds or mixtures of air contaminants, in the definition of RQ in §101.1 of this title, which are known through common process knowledge, past engineering analysis, or testing to have equaled or exceeded the RQ;

(H) the estimated total quantities and the authorized emissions limits for those compounds or mixtures described in subparagraph (G) of this paragraph, and, if applicable, the estimated opacity and the authorized opacity limit;

(I) the cause of the emissions event, if known; and

(J) the actions taken, or being taken, to correct the emissions event and minimize the emissions.

(3) The notification for reportable emissions events for boilers or combustion turbines referenced in the definition of RQ in §101.1 of this title shall identify:

(A) the name of the owner or operator of the facility experiencing an emissions event;

(B) the commission air account number of the facility experiencing an emissions event, if an account number exists;

(C) the physical location of the point from which the opacity occurred;

(D) the cause of the emissions event, if known;

(E) the common name of the process unit or area, the common name and the agency-established facility identification number of the facility that experienced the emissions event, and the common name and the agency-established emission point number where the unauthorized emissions were released to the atmosphere. Owners or operators of those facilities and emission points for which the agency has not established facility identification numbers or emission point numbers are not required to provide the facility identification number and emission point number in the report, but are required to provide the common names in the report;

(F) the date and time of the discovery of the emissions event;

(G) the estimated duration or expected duration of the emissions event;

(H) the estimated opacity;

(I) the authorized opacity limit for the source having the emissions event; and

(J) the actions taken, or being taken, to correct the emissions event and minimize the emissions.

(4) The owner or operator of a facility experiencing an emissions event must provide, in writing, additional or more detailed information on the emissions event when requested by the executive director or any air pollution control agency with jurisdiction, within the time frames established in the request.

(5) The owner or operator of a facility experiencing a reportable emissions event which also requires an initial notification under §327.3 of this title (relating to Notification Requirements) may satisfy the initial notification requirements of this section by complying with the requirements under §327.3 of this title.

(b) The owner or operator of a facility experiencing an emissions event shall create a final record of all reportable and non-reportable emissions events as soon as practicable, but no later than two weeks after the end of an emissions event. Final records shall be maintained on-site for a minimum of five years and be made readily available upon request to commission staff or personnel of any air pollution program with jurisdiction. If a site is not normally staffed, records of emissions events may be maintained at the staffed location within

Texas that is responsible for the day-to-day operations of the site. Such records shall identify:

(1) the name of the owner or operator of the facility experiencing an emissions event;

(2) the commission air account number of the facility experiencing an emissions event, if the account number exists;

(3) the physical location of the point at which emissions to the atmosphere occurred;

(4) the common name of the process unit or area, the common name and the agency-established facility identification number of the facility that experienced the emissions event, and the common name and the agency-established emission point number where the unauthorized emissions were released to the atmosphere. Owners or operators of those facilities and emission points for which the agency has not established facility identification numbers or emission point numbers are not required to provide the facility identification number and emission point number in the report, but are required to provide the common names in the report.

(5) the date and time of the discovery of the emissions event;

(6) the estimated duration of the emissions event;

(7) the compound descriptive type of all individually listed compounds or mixtures of air contaminants, in the definition of RQ in §101.1 of this title, which are known through common process knowledge or past engineering analysis or testing to have been released during the emissions event, except for boilers or combustion turbines referenced in the definition of RQ in §101.1 of this title;

(8) the estimated total quantities for those compounds or mixtures described in paragraph (7) of this subsection, the preconstruction authorization number or rule citation of the standard permit, permit by rule, or rule governing the facility involved in the emissions event, authorized emissions limits for the facility involved in the emissions events, and, if applicable, the estimated opacity and authorized opacity limit, except for boilers or combustion turbines referenced in the definition of RQ in §101.1 of this title which record only the authorized opacity limit and the estimated opacity during the emissions event;

(9) the basis used for determining the quantity of air contaminants emitted, except for boilers or combustion turbines referenced in the definition of RQ in §101.1 of this title;

(10) the cause of the emissions event;

(11) the actions taken, or being taken, to correct the emissions event and minimize the emissions; and

(12) any additional information necessary to evaluate the emissions event.

(c) For all reportable emissions events, if the information required in subsection (b) of this section differs from the information provided in the 24-hour notification under subsection (a) of this section, the owner or operator of the facility shall submit a copy of the final record to the commission office for the region in which the facility is located no later than two weeks after the end of the emissions event. If the owner or operator does not submit a record under this subsection, the information provided in the 24-hour notification under subsection (a) of this section will be the final record of the emissions event, provided the initial notification was submitted electronically in accordance with subsection (g) of this section.

(d) The owner or operator of a boiler or combustion turbine fueled by natural gas, coal, lignite, wood, or fuel oil containing hazardous air pollutants at a concentration of less than 0.02% by weight, that is equipped with a continuous emission monitoring system that completes a minimum of one operating cycle (sampling, analyzing, and data recording) for each successive 15-minute interval, and is required to submit excess emission reports by other state or federal requirements, is exempt from creating, maintaining, and submitting final records of reportable and non-reportable emissions events of the boiler or combustion turbine under subsections (b) and (c) of this section as long as the notice submitted under subsection (a) of this section contains the information required under subsection (b) of this section.

(e) An owner or operator of a facility has an excess opacity event when it has opacity reading(s) equal to or exceeding 15 additional percentage points above the applicable opacity limit, averaged over a six- minute period. As soon as practicable, but not later than 24 hours after the discovery of an excess opacity event where the owner or operator was not already required to provide a notification under subsection (a)(2) or (3) of this section, the owner or operator shall notify the commission office for the region in which the facility is located, and all appropriate local air pollution control agencies. In the notification, the owner or operator shall identify:

(1) the name of the owner or operator of the facility experiencing the excess opacity event;

(2) the commission air account number of the facility experiencing an excess opacity event, if an account number exists;

(3) the physical location of the excess opacity event;

(4) the common name of the process unit or area, the common name of the facility where the excess opacity event occurred, and the common name of the emission point where the excess opacity event occurred;

(5) the date and time of the discovery of the excess opacity event;

(6) the estimated duration of the excess opacity event;

(7) the estimated opacity;

(8) the authorized opacity limit for the source having the excess opacity event;

(9) the cause of the excess opacity event, if known; and

(10) the actions taken, or being taken, to correct the excess opacity event.

(f) The owner or operator of any facility subject to the provisions of this section shall perform, upon request by the executive director or any air pollution control agency with jurisdiction, a technical evaluation of each emissions event. The evaluation shall include at least an analysis of the probable causes of each emissions event and any necessary actions to prevent or minimize recurrence. The evaluation shall be submitted in writing to the executive director within 60 days from the date of request. The 60-day period may be extended by the executive director.

(g) On and after January 1, 2003, notifications and reports required in subsections (c) and (e) of this section shall be submitted electronically to the commission using the electronic forms provided by the commission. On and after January 1, 2004, notifications required in subsection (a) of this section shall be submitted electronically to the commission using electronic forms provided by the commission.

Notwithstanding the requirement to report initial notifications electronically after January 1, 2004, the owner or operator of a facility experiencing a reportable emissions event, which also requires an initial notification under §327.3 of this title, is not required to report the event electronically under this subsection provided the owner or operator complies with the requirements under §327.3 of this title and in subsections (a) and (c) of this section. Owners and operators must report emissions events electronically by using an online form on the commission's secure web server. In the event the commission's server is unavailable due to technical failures or scheduled maintenance, events may be reported via facsimile to the appropriate regional office. The commission will provide an alternative means of notification in the event that the commission's electronic reporting system is inoperative. Electronic notification and reporting is not required for small businesses which meet the small business definition in TCAA, §382.0365(g)(2). Small businesses shall provide notifications and reporting by any viable means which meet the time frames required by this section.

(h) In the event the owner or operator of a facility fails to report as required by subsection (a)(2) or (3), (b), or (e) of this section, the commission will initiate enforcement for such failure to report and for the underlying emissions event itself. This subsection does not apply where an owner or operator reports an emissions event and the report was incomplete, inaccurate, or untimely, unless the owner or operator knowingly or intentionally falsified the information in the report.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 2. MAINTENANCE, STARTUP, AND SHUTDOWN ACTIVITIES

30 TAC §101.211

STATUTORY AUTHORITY

The new section is adopted under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under TCAA, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The new section is also adopted under TCAA, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.014, concerning Emission Inventory, which authorizes the commission to require a person whose activities cause emissions of air contaminants to submit information to enable the commission to develop an emissions inventory; §382.016, concerning Monitoring Requirements: Examination of Records, which authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of emissions of air contaminants; §382.025, concerning Orders Relating to Controlling Air Pollution, which authorizes the commission to order actions indicated by the circumstances to control a condition of air pollution; §382.085, concerning Unauthorized Emissions Prohibited, which prohibits emissions except as authorized by commission rule or order; §382.0215, concerning Assessment of Emissions Due to Emissions Events, which authorizes the commission to collect and assess unauthorized emissions data due to emissions events; and §382.0216, concerning Regulation of Emissions Events, which authorizes the commission to establish criteria for determining when emissions events are excessive and to require facilities to take action to reduce emissions from excessive emissions events. The new section is also adopted under 42 USC, §7410(a)(F)(iii), which requires correlation of emissions reports and emission-related data by the state agency with any emission limitations or standards established under the FCAA, 42 USC, §§7401 *et seq*.

§101.211. Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements.

(a) The owner or operator of a facility conducting a scheduled maintenance, startup, or shutdown activity shall notify the commission office for the region in which the facility is located and all appropriate local air pollution control agencies at least ten days prior to any scheduled maintenance, startup, or shutdown activity which is expected to cause an unauthorized emission which equals or exceeds the reportable quantity (RQ) as defined in §101.1 of this title (relating to Definitions) in any 24-hour period and/or an activity where the owner or operator expects only an excess opacity event that is subject to §101.201(e) of this title (relating to Emissions Event Reporting and Recordkeeping Requirements). If notice cannot be given ten days prior to a scheduled maintenance, startup, or shutdown activity, notification shall be given as soon as practicable prior to the scheduled activity. Maintenance, startup, or shutdown activities where the actual emissions exceed the emissions in the notification or for which a notification was not submitted are emissions events. Excess opacity events where unauthorized emissions result are emissions events. Owners and operators of facilities that exceed the emissions or opacity estimate submitted in the notification or experience unauthorized emissions during an expected excess opacity event shall report such events as emissions events in accordance with the requirements in §101.201 of this title and §101.222 of this title (relating to Demonstrations).

(1) The notification for a scheduled maintenance, startup, or shutdown activity, except for boilers and combustion turbines referenced in the definition of RQ in §101.1 of this title, shall identify:

(A) the name of the owner or operator;

(B) the commission air account number of the facility, if an account number exists;

(C) the physical location of the point at which emissions from the scheduled maintenance, startup, or shutdown activity will occur;

(D) the type of scheduled maintenance, startup, or shutdown activity and the reason for the scheduled activity;

(E) the expected date and time of the scheduled maintenance, startup, or shutdown activity;

(F) the common name of the process unit or area, the common name and the agency-established facility identification number of the facility that experienced the emissions event, and the common name and the agency-established emission point number where the unauthorized emissions were released to the atmosphere. Owners or operators of those facilities and emission points for which the agency has not established facility identification numbers or emission point numbers are not required to provide the facility identification number and emission point number in the report, but are required to provide the common names in the report;

(G) the expected duration of the scheduled maintenance, startup, or shutdown activity;

(H) the compound descriptive type of the individually listed compounds or mixtures of air contaminants, in the definition of RQ in §101.1 of this title, which through common process knowledge or past engineering analysis or testing are expected to equal or exceed the RQ;

(I) the estimated total quantities for those compounds or mixtures described in subparagraph (H) of this paragraph, the preconstruction authorization number or rule citation of the standard permit, permit by rule, or rule governing the facility involved in the activity, authorized emissions limits for the facility involved in the emissions activity, and, if applicable, the estimated opacity and the authorized opacity limit;

(J) the basis used for determining the quantity of air contaminants to be emitted; and

(K) the actions taken to minimize the emissions from the scheduled maintenance, startup, or shutdown activity.

(2) The notification for a scheduled maintenance, startup, or shutdown activity involving a boiler or combustion turbine referenced in the definition of RQ in §101.1 of this title, or where the owner or operator expects only an excess opacity event and the owner or operator was not already required to provide a notification under paragraph (1) of this subsection, shall identify:

(A) the name of the owner or operator;

(B) the commission air account number of the facility, if an account number exists;

(C) the physical location of the scheduled maintenance, startup, or shutdown activity;

(D) the type of scheduled maintenance, startup, or shutdown activity and the reason for the scheduled activity;

(E) the common name of the process unit or area, the common name and the agency-established facility identification number of the facility that experienced the excess opacity event, and the common name and the agency-established emission point number where the excess opacity event occurred. Owners or operators of those facilities and emission points for which the agency has not established facility identification numbers or emission point numbers are not required to provide the facility identification number and emission point number in the report, but are required to provide the common names in the report;

(F) the expected date and time of the scheduled maintenance, startup, or shutdown activity;

(G) the estimated duration of the scheduled maintenance, startup, or shutdown activity;

(H) the estimated opacity and the authorized opacity limit; and

(I) the actions taken, or being taken, to minimize the emissions from the scheduled maintenance, startup, or shutdown activity.

(b) The owner or operator of a facility conducting a scheduled maintenance, startup, or shutdown activity shall create a final record of all scheduled maintenance, startup, and shutdown activities with unauthorized emissions, or with opacity exceedances from boilers and combustion turbines referenced in the definition of RQ in §101.1 of this title. The final record shall be created as soon as practicable, but no later than two weeks after the end of each scheduled activity. Final records shall be maintained on-site for a minimum of five years and be made readily available upon request to commission staff or personnel of any air pollution program with jurisdiction. If a site is not normally staffed, records of scheduled maintenance, startup, and shutdown activities may be maintained at the staffed location within Texas that is responsible for day-to-day operations of the site. Such scheduled activity records shall identify:

(1) the name of the owner or operator;

(2) the commission air account number of the facility, if an account number exists;

(3) the physical location of the scheduled point at which emissions from the maintenance, startup, or shutdown activity will occur;

(4) the type of scheduled maintenance, startup, or shutdown activity and the reason for the scheduled activity;

(5) the common name of the process unit or area, the common name and the agency-established facility identification number of the facility that experienced the emissions event, and the common name and the agency-established emission point number where the unauthorized emissions were released to the atmosphere. Owners or operators of those facilities and emission points for which the agency has not established facility identification numbers or emission point numbers are not required to provide the facility identification number and emission point number in the report, but are required to provide the common names in the report;

(6) the date and time of the scheduled maintenance, startup, or shutdown activity;

(7) the duration of the scheduled maintenance, startup, or shutdown activity;

(8) the compound descriptive type of all individually listed compounds or mixtures of air contaminants, in the definition of RQ in §101.1 of this title, which are known through common process knowledge or past engineering analysis or testing to have been released during the scheduled maintenance, startup, or shutdown activity, except for boilers or combustion turbines referenced in the definition of RQ in §101.1 of this title;

(9) the estimated total quantities and the authorized emissions limits for those compounds or mixtures described in paragraph (8) of this subsection, the preconstruction authorization number or rule citation of the standard permit, permit by rule, or rule governing the facility involved in the scheduled maintenance, startup, or shutdown activity, authorized emissions limits for the facility involved in the scheduled maintenance, startup, or shutdown activity, and, if applicable, the estimated opacity and authorized opacity limit, except for boilers or combustion turbines referenced in the definition of RQ in §101.1 of this title which record only the authorized opacity limit and the estimated opacity during the emissions event;

(10) the basis used for determining the quantity of air contaminants to be emitted, except for boilers or combustion turbines referenced in the definition of RQ in §101.1 of this title; and

(11) the actions taken to minimize the emissions from the scheduled maintenance, startup, or shutdown activity.

(c) For any scheduled maintenance, startup, or shutdown activity for which an initial notification was submitted under subsection (a) of this section, if the information required in subsection (b) of this section differs from the information provided under subsection (a) of this section, the owner or operator of the facility shall submit a copy of the final record to the commission office for the region in which the facility is located no later than two weeks after the end of the scheduled activity. If the owner or operator does not submit a record under this subsection, the information provided under subsection (a) of this section will be the final record of the scheduled activity.

(d) The owner or operator of a boiler or combustion turbine fueled by natural gas, coal, lignite, wood, or fuel oil containing hazardous air pollutants at a concentration of less than 0.02% by weight, that is equipped with a continuous emission monitoring system that completes a minimum of one operating cycle (sampling, analyzing, and data recording) for each successive 15-minute interval, and is required to submit excess emissions reports by other state or federal regulations, is exempt from creating, maintaining, and submitting final records of scheduled maintenance, startup, and shutdown activities with unauthorized emissions under subsections (b) and (c) of this section, as long as the notice submitted under subsection (a) of this section contains the information required under subsection (b) of this section.

(e) The executive director may specify the amount, time, and duration of emissions that will be allowed during the scheduled maintenance, startup, or shutdown activity. The owner or operator of any source subject to the provisions of this section shall submit a technical plan for any scheduled maintenance, startup, or shutdown activity when requested by the executive director. The plan shall contain a detailed explanation of the means by which emissions will be minimized during the scheduled maintenance, startup, or shutdown activity. For those emissions which must be released into the atmosphere, the plan shall include the reasons such emissions cannot be reduced further.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 3. OPERATIONAL REQUIREMENTS, DEMONSTRATIONS, AND ACTIONS TO REDUCE EXCESSIVE EMISSIONS

30 TAC §§101.221 - 101.224

STATUTORY AUTHORITY

The new sections are adopted under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under TCAA, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The new sections are also adopted under TCAA, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.014, concerning Emission Inventory, which authorizes the commission to require a person whose activities cause emissions of air contaminants to submit information to enable the commission to develop an emissions inventory; §382.016, concerning Monitoring Requirements: Examination of Records, which authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of emissions of air contaminants; §382.023, concerning Orders, which authorizes the commission to issue orders to carry out the purposes of the TCAA; §382.025, concerning Orders Relating to Controlling Air Pollution, which authorizes the commission to order actions indicated by the circumstances to control a condition of air pollution; §382.0518(g), concerning Preconstruction Permits, which authorizes the commission to authorize emissions under preconstruction permits; §382.085, concerning Unauthorized Emissions Prohibited, which prohibits emissions except as authorized by commission rule or order; §382.0215, concerning Assessment of Emissions Due to Emissions Events, which authorizes the commission to collect and assess unauthorized emissions data due to emissions events; and §382.0216, concerning Regulation of Emissions Events, which authorizes the commission to establish criteria for determining when emissions events are excessive and to require facilities to take action to reduce emissions from excessive emissions events. The new sections are also adopted under 42 USC, §7410(a)(F)(iii), which requires correlation of emissions reports and emission-related data by the state agency with any emission limitations or standards established under the FCAA, 42 USC, §§7401 *et seq*.

§101.221. Operational Requirements.

(a) All pollution emission capture equipment and abatement equipment shall be maintained in good working order and operated properly during facility operations. Emission capture and abatement equipment shall be considered to be in good working order and operated properly when operated in a manner such that each facility is operating within authorized emission limitations.

(b) Smoke generators and other devices used for training inspectors in the evaluation of visible emissions at a training school approved by the commission are not required to meet the allowable emission levels set by the rules and regulations, but must be located and operated such that a nuisance is not created at any time.

(c) Equipment, machines, devices, flues, and/or contrivances built or installed to be used at a domestic residence for domestic use are not required to meet the allowable emission levels set by the rules and regulations unless specifically required by a particular regulation.

(d) Sources emitting air contaminants which cannot be controlled or reduced due to a lack of technological knowledge may be exempt from the applicable rules and regulations when so determined and ordered by the commission. The commission may specify limitations and conditions as to the operation of such exempt sources. The

commission will not exempt sources from complying with any federal requirements.

(e) The owner or operator of a facility has the burden of proof to demonstrate that the criteria identified in §101.222(a) and (b) of this title (relating to Demonstrations) for emissions events, or in §101.222(c) of this title for scheduled maintenance, startup, or shutdown activities are satisfied for each occurrence of unauthorized emissions. The owner or operator of a facility has the burden of proof to demonstrate that the criteria identified in §101.222(d) of this title for excess opacity events, or in §101.222(e) for excess opacity events resulting from scheduled maintenance, startup, or shutdown activities are satisfied for each excess opacity event. The executive director or any air pollution program with jurisdiction may request documentation of the criteria in §101.222 of this title at their discretion. Satisfying the burden of proof is a condition to unauthorized emissions being considered not excessive and exempt from compliance with authorized emission limitations under §101.222 of this title.

(f) This section does not limit the commission's power to require corrective action as necessary to minimize emissions, or to order any action indicated by the circumstances to control a condition of air pollution.

§101.222. Demonstrations.

(a) Excessive emissions event determinations. The executive director shall determine when emissions events are excessive. Emissions events determined to be excessive are not exempt from compliance with emission limitations. To determine whether an emissions event or emissions events are excessive, the executive director will evaluate emissions events using the following criteria:

(1) the frequency of the facility's emissions events;

(2) the cause of the emissions event;

(3) the quantity and impact on human health or the environment of the emissions event;

(4) the duration of the emissions event;

(5) the percentage of a facility's total annual operating hours during which emissions events occur; and

(6) the need for startup, shutdown, and maintenance activities.

(b) Non-excessive emissions events. Emissions events determined not to be excessive by the executive director after applying the criteria in subsection (a) of this section are exempt from compliance with emission limitations if the owner or operator satisfies all of the following criteria:

(1) the owner or operator complies with the requirements of §101.201 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements);

(2) the unauthorized emissions were caused by a sudden breakdown of equipment or process, beyond the control of the owner or operator;

(3) the unauthorized emissions did not stem from any activity or event that could have been foreseen and avoided, and could not have been avoided by good design, operation, and maintenance practices;

(4) the air pollution control equipment or processes were maintained and operated in a manner consistent with good practice for minimizing emissions and reducing the number of emissions events;

(5) prompt action was taken to achieve compliance once the operator knew or should have known that applicable emission limitations were being exceeded;

(6) the amount and duration of the unauthorized emissions and any bypass of pollution control equipment were minimized;

(7) all emission monitoring systems were kept in operation if possible;

(8) the owner or operator actions in response to the unauthorized emissions were documented by contemporaneous operation logs or other relevant evidence;

(9) the unauthorized emissions were not part of a frequent or recurring pattern indicative of inadequate design, operation, or maintenance;

(10) the percentage of a facility's total annual operating hours during which unauthorized emissions occurred was not unreasonably high; and

(11) unauthorized emissions did not cause or contribute to an exceedance of the national ambient air quality standards (NAAQS), prevention of significant deterioration (PSD) increments, or to a condition of air pollution.

(c) Scheduled maintenance, startup, or shutdown activity. Emissions from any scheduled maintenance, startup, or shutdown activity are exempt from compliance with emission limitations, if the owner or operator satisfies all of the following criteria:

(1) the owner or operator complies with the requirements of §101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements);

(2) the periods of unauthorized emissions from any scheduled maintenance, startup, or shutdown activity could not have been prevented through planning and design;

(3) the unauthorized emissions from any scheduled maintenance, startup, or shutdown activity were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;

(4) if the unauthorized emissions from any scheduled maintenance, startup, or shutdown activity were caused by a bypass of control equipment, the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(5) the facility and air pollution control equipment were operated in a manner consistent with good practices for minimizing emissions;

(6) the frequency and duration of operation in a scheduled maintenance, startup, or shutdown mode resulting in unauthorized emissions were minimized;

(7) all emissions monitoring systems were kept in operation if possible;

(8) the owner or operator actions during the period of unauthorized emissions from any scheduled maintenance, startup, or shutdown activity were documented by contemporaneous operating logs or other relevant evidence; and

(9) unauthorized emissions did not cause or contribute to an exceedance of the NAAQS, PSD increments, or a condition of air pollution.

(d) Excess opacity events. Excess opacity events that are subject to §101.201(e) of this title, and other opacity events where the owner or operator did not experience an emissions event, are exempt

from compliance with applicable opacity limitations if the owner or operator satisfies all of the following criteria:

(1) the owner or operator complies with the requirements of §101.201 of this title;

(2) the opacity did not stem from any activity or event that could have been foreseen and avoided, and could not have been avoided by good design, operation, and maintenance practices;

(3) the air pollution control equipment or processes were maintained and operated in a manner consistent with good practice for minimizing opacity;

(4) prompt action was taken to achieve compliance once the operator knew or should have known that applicable opacity limitations were being exceeded;

(5) the amount and duration of the opacity event and any bypass of pollution control equipment were minimized;

(6) all emission monitoring systems were kept in operation if possible;

(7) the owner or operator actions in response to the opacity event were documented by contemporaneous operation logs or other relevant evidence; and

(8) the opacity event was not part of a frequent or recurring pattern indicative of inadequate design, operation, or maintenance; and

(9) the opacity event did not cause or contribute to a condition of air pollution.

(e) Opacity events resulting from scheduled maintenance, startup, or shutdown activity. Excess opacity events, or other opacity events where the owner or operator did not experience an emissions event, that result from any scheduled maintenance, startup, or shutdown activity are exempt from compliance with applicable opacity limitations if the owner or operator satisfies all of the following criteria:

(1) the owner or operator complies with the requirements of §101.211 of this title;

(2) the periods of opacity could not have been prevented through planning and design;

(3) the opacity was not part of a recurring pattern indicative of inadequate design, operation, or maintenance;

(4) if the opacity event was caused by a bypass of control equipment, the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(5) the facility and air pollution control equipment were operated in a manner consistent with good practices for minimizing opacity;

(6) the frequency and duration of operation in a scheduled maintenance, startup, or shutdown mode resulting in opacity were minimized;

(7) all emissions monitoring systems were kept in operation if possible;

(8) the owner or operator actions during the opacity event was documented by contemporaneous operating logs or other relevant evidence; and

(9) the opacity event did not cause or contribute to a condition of air pollution.

(f) Frequent or recurring pattern. When the commission finds a frequent or recurring pattern of events under this subchapter, the commission may pursue penalties and corrective actions from an owner or operator of a facility for unauthorized emissions notwithstanding the exemptions described in subsections (b) - (e) of this section.

§101.223. Actions to Reduce Excessive Emissions.

(a) The executive director will provide written notification to an owner or operator of a facility upon determination that a facility has had one or more excessive emissions events. The written notification shall contain, at a minimum, a description of the emissions events that were determined to be excessive and the time period when those excessive emissions events were evaluated. Upon receipt of this notice, the owner or operator of the facility must take action to reduce emissions and shall either file a corrective action plan (CAP) or, if the emissions are sufficiently frequent, quantifiable, and predictable, in which case the owner or operator may file a letter of intent to obtain authorization from the commission for emissions from such events, in lieu of a CAP.

(1) When a CAP is required, the owner or operator must submit a CAP to the commission office for the region in which the facility is located within 60 days after receiving notification from the executive director that a facility has had one or more excessive emissions events . The 60-day period may be extended once for up to 15 days by the executive director. The CAP shall, at a minimum:

(A) identify the cause or causes of each excessive emissions event including all contributing factors that led to each emissions event;

(B) specify the control devices or other measures that are reasonably designed to prevent or minimize similar emissions events in the future;

(C) identify operational changes the owner or operator will take to prevent or minimize similar emissions events in the future; and

(D) specify time frames within which the owner or operator will implement the components of the CAP.

(2) An owner or operator must obtain commission approval of a CAP no later than 120 days after the commission receives the first CAP submission from an owner or operator. If not disapproved within 45 days after initial filing, the CAP shall be deemed approved. The owner or operator of a facility must respond completely and adequately, as determined by the executive director, to all written requests for information concerning its CAP within 15 days after the date of such requests, or by any other deadline specified in writing. An owner or operator of a facility may request written approval of a CAP, in which case the commission shall take final written action to approve or disapprove the plan within 120 days from the receipt of such request. Once approved, the owner or operator must implement the CAP in accordance with the approved schedule. The implementation schedule is enforceable by the commission. The commission may require the owner or operator to revise a CAP if the commission finds the plan, after implementation begins, to be inadequate to prevent or minimize emissions or emissions events. If the CAP is disapproved, or determined to be inadequate to prevent or minimize excessive emissions events, the executive director shall identify deficiencies in the CAP and state the reasons for disapproval of the CAP in a letter to the owner or operator. If the commission finds a CAP inadequate to prevent or minimize excessive emissions events after implementation begins, an owner or operator must file an amended CAP within 60 days after written notification by the executive director.

(3) If the emissions from excessive emissions events are sufficiently frequent, quantifiable, and predictable, and an owner or

operator of a facility elects to file a letter of intent to obtain authorization from the commission for the emissions from excessive emissions events, the owner or operator must file such letter within 30 days of the notification that a facility has had one or more excessive emissions events. If the commission denies the requested authorization, the owner or operator of a facility shall file a CAP in accordance with paragraph (1) of this subsection within 45 days after receiving notice of the commission denial.

(A) If the intended authorization is a permit, the owner or operator must file a permit application with the executive director within 120 days after the filing of the letter of intent. The owner or operator of a facility must respond completely and adequately, as determined by the executive director, to all written requests for information concerning its permit application within 15 days after the date of such requests, or by any other deadline specified in writing.

(B) If the intended authorization is a permit by rule or standard permit, the owner or operator must obtain authorization within 120 days after filing of the letter of intent.

(b) The executive director, after a review of the excessive emissions events determinations made at a site as defined in §101.1 of this title (relating to Definitions), may forward these determinations to the commission requesting that it issue an order finding that the site has chronic excessive emissions events. Orders issued by the commission under this section shall be part of the entity's compliance history as provided in Chapter 60 of this title (relating to Compliance History). The commission may issue an order finding that a site has chronic excessive emissions events after considering the following factors:

(1) the size, nature, and complexity of the site operations;

(2) the frequency of emissions events at the site; and

(3) the reason or reasons for excessive emissions event determinations at that site.

(c) If an emissions event recurs because an owner or operator fails to take corrective action as required and in the time frames specified by a CAP approved by the commission, the emissions event is considered excessive and the unauthorized emissions from the event are not exempt from compliance with emission limitations.

(d) Nothing in this section shall limit the commission's ability to bring enforcement actions for violations of the TCAA or rules promulgated thereunder, including enforcement actions to require actions to reduce emissions from excessive emissions events.

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 23, 2002.

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Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-0348

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DIVISION 4. VARIANCES

30 TAC §§101.231 - 101.233

STATUTORY AUTHORITY

The new sections are adopted under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under TCAA, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The new sections are also adopted under TCAA, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.025, concerning Orders Relating to Controlling Air Pollution, which authorizes the commission to order actions indicated by the circumstances to control a condition of air pollution; §382.028, concerning Variances, which authorizes the commission to grant variances; and §382.085, concerning Unauthorized Emissions Prohibited, which prohibits emissions except as authorized by commission rule or order.

§101.233. Variance Transfers.

A variance or a permit is granted in person, and does not attach to the realty to which it relates. A variance cannot be transferred without prior notification to the commission. If a transfer of ownership of a source covered by a variance is contemplated by the holder of the variance, and the source and characteristics of the emissions will remain unchanged, upon notification, the executive director shall issue an endorsement to the variance reflecting the name of the new owner. Continuation of emissions by the new owner without prior notification to the commission makes the variance subject to forfeiture.

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 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION

The Texas Commission on Environmental Quality (commission) adopts amendments to §§116.10, 116.111, 116.311, 116.615, 116.711, and 116.715. The commission also adopts new §§116.315, 116.778, 116.803, and 116.919. Sections 116.10, 116.111, 116.311, 116.315, 116.615, 116.711, 116.715, 116.778, 116.803, and 116.919 are adopted *with changes* to the proposed text as published in the May 24, 2002 issue of the *Texas Register* (27 TexReg 4526).

The new and amended sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES In the May 24, 2002 issue of the *Texas Register* (27 TexReg 4526), the commission published a proposal which, in addition to containing the elements of this adoption, also proposed the optional incorporation of emissions resulting from routine maintenance, start-up, and shutdown (MSS) into new source review (NSR) permits. By making this proposal the commission sought to codify certain elements of a policy that has existed since February 2001 which allowed MSS incorporation.

Since the proposal, the commission has encountered, without clear resolution, certain issues concerning the incorporation of MSS and federal permitting requirements, including potential retroactive review for prevention of significant deterioration (PSD) or nonattainment (NA) determinations for those existing sources where the inclusion of MSS causes them to exceed the major source threshold of emissions. Additionally, EPA is preparing recommendations for changes to the federal NSR program regarding routine maintenance, repair, and replacement. Because federal developments relate directly to the content and form of a state NSR program, the commission believes it is appropriate to pursue resolution of these issues before proceeding with rulemaking in this area. Therefore, the commission decided not to adopt the elements of the May 24, 2002 proposal relating to MSS emissions permitting. The commission proceeded with the adoption of requirements to include dockside vessel emissions as part of the standard emissions reviewed for applications for new permits, permit amendments, and permit renewals. Dockside vessel emissions are those emissions from the vessel that occur because of functions performed with onshore equipment.

The commission also adopted the rule amendments to implement the requirements of House Bill (HB) 3040, 77th Legislature, 2001 which amended the Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.065 (Acts 2001, 77th Legislature, Chapter 1166, §1). This legislation limits the commission's authority to perform over water modeling and effects evaluation of non-criteria air pollutants from shipyards in coastal waters when issuing a permit. This adoption also includes changes to implement portions of HB 2912, 77th Legislature, 2001, regarding new compliance history evaluation requirements for permit renewals. Additionally, this adoption includes changes to clarify permit renewal application content requirements and moves renewal submittal deadlines to a new section adopted in this rulemaking.

In a separate rulemaking also published in this issue of the *Texas Register*, the commission adopted amendments to sections of 30 TAC Chapter 101, General Air Quality Rules, concerning upset events and maintenance activities which included changes in section numbering and designation. This adoption contains several references to sections within Chapter 101 which have been revised since proposal to correspond with the adopted Chapter 101 revisions.

Amendments to §116.115, General and Special Conditions, were originally proposed as part of this rulemaking. However, §116.115 needed to be opened as part of a separate rulemaking responding to EPA's notice of deficiency regarding the state's federal operating permits program (Rule Log Number 2002-043-122-AI). Therefore, §116.115 was withdrawn in the July 26, 2002 issue of the *Texas Register* (27 TexReg 6673), and is not discussed in this adoption preamble.

SECTION BY SECTION DISCUSSION

Subchapter A, Definitions

The adopted amendments to §116.10, General Definitions, add definitions for dockside vessel and dockside vessel emissions. A dockside vessel is defined as any water-based transportation that is moored to land. Dockside vessel emissions are those emissions from the vessel that occur because of functions performed with onshore equipment. Because the definition of grandfathered facility was open in a separate rulemaking, the definitions for dockside vessel and dockside vessel emissions could not be placed in alphabetical order at proposal because that would have required renumbering the definition that was already open. The rulemaking that included the definition of grandfathered facility was adopted on May 22, 2002, and became effective on June 12, 2002. For this reason, the adopted definitions in this rulemaking have now been moved into alphabetical order and subsequent definitions renumbered accordingly. Since the commission did not adopt the revisions related to MSS emissions permitting, the commission did not adopt the proposed definitions for routine maintenance, routine shutdown, or routine start-up in §116.10.

Subchapter B, New Source Review Permits

The adopted amendment to §116.111, General Application, requires that all dockside marine vessel emissions associated with onshore facilities or using onshore equipment be included in all permits. The commission determined that dockside vessels are facilities as defined in TCAA, §382.003(6), and thus subject to the requirements of Chapter 116. These emissions will require best available control technology (BACT) review, maximum allowable emission limitations, monitoring, testing, recordkeeping, and ambient air impacts review. The emissions originating from a dockside vessel that are the result of functions performed by onshore facilities or using onshore equipment include: loading and unloading of liquid bulk materials, liquified gaseous materials, and solid bulk materials; cleaning and degassing liquid vessel compartments; and abrasive blasting and painting.

The adopted amendments to §116.111 also implement the requirements of HB 3040. These amendments state that the commission, when conducting a permit review for a shipbuilding or ship repair operation, may not require or consider dispersion modeling results predicting ambient concentrations of non-criteria air contaminants over coastal waters of the state. The commission corrected the term "permit" to "permit application" in adopted subsection (a)(2)(J). The commission did not adopt the proposed revisions in §116.111 related to MSS emissions permitting.

Subchapter D, Permit Renewals

The adopted amendment to §116.311, Permit Renewal Application, requires that owners or operators submit information that demonstrates that dockside emissions comply with all commission rules and regulations and the intent of the TCAA, including protection of the health and property of the public and the minimization of emissions to the extent practicable, consistent with good air pollution control practices. Existing dockside emissions will be reviewed for off-property effects considering magnitude, frequency, and duration. The commission did not adopt proposed new subsection (b) related to MSS emissions permitting; therefore, the renumbering of subsequent subsections (b) and (c) was unnecessary.

Adopted §116.311(c) implements portions of HB 2912 regarding new compliance history evaluation requirements for permit renewals. Previous language in §116.311(c) reflected parts of

TCAA, §382.055(d)(1) and §382.056(o), which were amended by HB 2912. Although these sections, as they existed before amendment by HB 2912, will apply for purposes of consideration of compliance history for renewal applications which were submitted before September 1, 2002, HB 2912 provides that the amended sections apply to renewal applications submitted on or after September 1, 2002. Specifically, HB 2912 changes affect the language regarding substantial compliance with the provisions of the TCAA and the existing permit, as well as consequences when applicants are found to have a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including failure to make a timely and substantial attempt to correct any violations. The requirements of HB 2912 regarding compliance history evaluation and its consequences have been, and are continuing to be, administered by the commission through 30 TAC Chapter 60, Compliance History.

The adoption deletes existing §116.311(d) and (e) relating to permit renewal application submittal deadlines to clarify that §116.311 addresses only application content requirements. The renewal application submittal deadlines are moved to adopted new §116.315.

Adopted new §116.315, Permit Renewal Submittal, contains permit renewal dates which are transferred unchanged from existing §116.311(d) and (e). The renewal dates are being separated from permit content to conform with the format for pending rule proposals. The language has also been modified to indicate that permit renewal applications are due at least 90 days prior to permit expiration instead of within 90 days. This is to allow sufficient time for review and reflects current agency practice.

Subchapter F, Standard Permits

The adopted amendment to §116.615, General Conditions, requires that emissions from dockside vessel operations comply with the rules and regulations of the commission and comply with the intent of the TCAA, including protection of the health and property of the public. Any representation of emissions will become conditions under which the facility will be required to operate. The adopted amendment to §116.615(9) updates rule citations for consistency with a separate rulemaking published in this issue of the *Texas Register* which adopted revisions in Chapter 101. The commission did not adopt the proposed revisions in §116.615 related to MSS emissions permitting.

Subchapter G, Flexible Permits

The adopted amendment to §116.711, Flexible Permit Application, requires that emissions from dockside vessels be incorporated into new flexible permits. The adopted amendment to §116.711 also prohibits the commission from considering the effects of non-criteria air contaminants from shipyards over coastal waters consistent with the other amendments in this adoption that implement HB 3040. References to "undesignated heads" were also removed from the section as this term is obsolete. The commission corrected the term "permit" to "permit application" in adopted §116.711(10). The commission did not adopt proposed new subsection (b) related to MSS emissions permitting.

The adopted amendment to §116.715, General and Special Conditions, updates rule citations for consistency with a separate rulemaking published in this issue of the *Texas Register* which adopted revisions in Chapter 101. The commission did not adopt the proposed revisions in §116.715 related to MSS emissions permitting.

Subchapter H, Permits for Grandfathered Facilities

Division 2, Small Business Stationary Source Permits, Pipeline Facilities Permits, and Existing Facility Permits

Adopted new §116.778, Additional Requirements for Applications for Small Business Stationary Source Permits, Pipeline Facilities Permits, or Existing Facility Permits, requires that applicants for small business stationary source permits, pipeline facilities permits, or existing facility permits for grandfathered facilities represent, characterize, and quantify dockside vessel emissions. The phrase "consistent with good air pollution practices" was revised to "consistent with good air pollution control practices" to be accurate. The commission did not adopt the proposed revisions in §116.778 related to MSS emissions permitting.

Division 3, Existing Facility Flexible Permits

Adopted new §116.803, Additional Requirements for Existing Facility Flexible Permit Applications, requires that applicants for existing facility flexible permits for grandfathered facilities quantify dockside vessel emissions. The phrase "consistent with good air pollution practices" was revised to "consistent with good air pollution control practices" to be accurate. The commission did not adopt the proposed revisions in §116.803 related to MSS emissions permitting.

Subchapter I, Electric Generating Facility Permits

Adopted new §116.919, Additional Requirements for Grandfathered Electric Generating Facility Permit Applications, requires that permits for electric generating facilities quantify dockside vessel emissions. The phrase "consistent with good air pollution practices" was revised to "consistent with good air pollution control practices" to be accurate. The commission did not adopt the proposed revisions in §116.919 related to MSS emissions permitting.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that this 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 sector of the state.

The principal intent of this adoption is to require the permitting of all air contaminant emissions associated with dockside vessel operations. Because these emissions are currently controlled, the commission does not expect this action to result in significant new expenses. This adoption also implements the requirements of HB 3040 relating to limitations to the consideration of air dispersion modeling for shipyard facilities and certain portions of HB 2912 concerning compliance history determinations.

In addition, a regulatory impact analysis is not required because the rules do not meet any of the four applicability criteria for requiring a regulatory analysis of a "major environmental rule" as defined in the Texas Government Code. Section 2001.0225 applies only to a major environmental rule the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law;

3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. First, this rulemaking does not exceed a standard set by federal law, and the adopted technical requirements are consistent with federal applicability requirements for PSD or NA review. Second, this rulemaking does not exceed an express requirement of state law because it is authorized by the following state statutes: TCAA, §382.016, which authorizes the commission to require the measuring and monitoring of air contaminant emissions from a source or activity and to require that associated records of the emissions be made and maintained; and §382.051, which authorizes the commission's permitting activities; as well as the other sections cited in the STATUTORY AUTHORITY section of this preamble. Third, this rulemaking does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. Fourth, this rulemaking was not developed solely under the general powers of the agency, but was specifically developed under the state laws and authorizations noted in the STATUTORY AUTHORITY section of this preamble. The commission invited public comment on the draft regulatory impact analysis determination. No comments on the determination were received.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for these adopted rules in accordance with Texas Government Code, Chapter 2007. The principal intent of this rulemaking is to require the permitting of all air contaminant emissions associated with dockside vessel operations. This adoption also implements the requirements of HB 3040 relating to limitations to the consideration of air dispersion modeling for shipyard facilities and certain portions of HB 2912 related to compliance history. Promulgation and enforcement of these adopted rules will be neither a statutory nor a constitutional taking because they do not affect private real property. Specifically, the adopted 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 rules. Therefore, the adopted rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5) and these adopted rules will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that it is a rulemaking identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and, therefore, required that applicable goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission's consistency determination for the adopted rules in accordance with 31 TAC §505.22 found that the rulemaking is consistent with the applicable CMP goal to protect and preserve the quality and values of coastal natural resource areas (31 TAC §501.12(1)) and the policy which requires that the commission protect air quality in coastal areas (31 TAC §501.14(q)). The adopted rulemaking requires the incorporation of dockside emissions into NSR permits, implements HB 3040 and portions of HB 2912, and accomplishes certain administrative changes. No new emissions are authorized by this adoption; therefore, the rulemaking is consistent with the applicable CMP goal and policy. The commission invited public comment regarding the consistency determination. No comments on the determination were received.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Because Chapter 116 contains applicable requirements under 30 TAC Chapter 122 (Federal Operating Permits), owners or operators subject to the Federal Operating Permit Program must, consistent with the revision process in Chapter 122, revise their operating permits to include the revised Chapter 116 requirements for each emission unit affected by the revisions to Chapter 116 at their site.

PUBLIC COMMENTS

The commission held a public hearing on the proposal in Austin on June 10, 2002 at 2:00 p.m., Texas Natural Resource Conservation Commission complex, Building F, Room 2210, 12100 Park 35 Circle. During the public comment period, which closed on June 17, 2002, the commission received comments from Birch and Becker, L.L.P. on behalf of the City of Garland, Greenville Electric Utility System, and San Miguel Electric Cooperative, Inc. (Birch); the EPA; Houston Sierra Club (HSC); and Dow Chemical Company (Dow) suggesting changes to the proposed rules. Comments were received from Texas Chemical Council (TCC); Association of Texas Intrastate Natural Gas Pipelines (ATINGP); Brown McCarroll, L.L.P. (BMC); Baker Botts, L.L.P on behalf of the Texas Industrial Project (TIP); and Association of Electric Companies of Texas, Inc. (AECT) in opposition to the adoption of the portion of the proposal related to MSS emissions permitting and suggesting changes. Comments were received from BMC on behalf of First Wave Marine (FWM) in support of the portion of the rulemaking implementing HB 3040 and suggesting changes.

RESPONSE TO COMMENTS

TCC, ATINGP, BMC, TIP, and AECT opposed adoption of the amendments related to MSS emissions permitting. TCC, ATINGP, BMC, and AECT generally based their opposition to the proposal on four issues: 1) the MSS portions of the proposed rules were not required or implied by state or federal statute; 2) the EPA is considering revisions to the federal NSR program and any state action now might conflict; 3) the EPA final position on potential retroactive PSD or NA reviews had not been established; and 4) the rule was unnecessary as the current commission policy is to allow optional incorporation of MSS emissions into permits. ATINGP and AECT expressed concern that a program of optional MSS incorporation would evolve into a mandatory program. AECT also expressed concern regarding the definition of routine maintenance and the proposed §116.111(a)(2) and §116.311. BMC also stated that there is significant confusion and expense, and the rules are stricter than necessary. TCC and Birch also expressed concern regarding the proposed definitions of routine maintenance, routine shutdown, routine start-up, general and special conditions, and permit renewal applications. ATINGP also stated concerns with the sections regarding control technology and recordkeeping requirements. TIP stated that the rules are too prescriptive and that there are inconsistencies in the proposal.

Since making the proposal, the commission has encountered certain issues concerning the incorporation of MSS and federal

permitting requirements without clear resolution, including potential retroactive review for PSD or NA determinations for those existing sources where the inclusion of MSS causes then to exceed the major source threshold of emissions. Additionally, EPA is preparing recommendations for changes to the federal NSR program. Because federal developments relate directly to the content and form of a state NSR program, the commission believes it is appropriate to pursue resolution of these issues before considering rulemaking in this area. Therefore, the commission decided not to adopt the elements of the May 24, 2002 proposal relating to MSS emissions permitting.

EPA commented that it does not endorse a blanket inclusion of routine MSS emissions at permit renewal. EPA stated that some facilities may have avoided an appropriate PSD or NA review through exclusion of these emissions. Similarly, the facility may have avoided major source classification and the application of BACT and lowest achievable emission rate. EPA requested that the commission clarify issues regarding the inclusion of MSS emissions including public notice, the effect on attainment demonstrations, and whether or not the inclusion of new or additional emissions will constitute a relaxation of the permit potential to emit.

The comments made by EPA are illustrative of the issues that must be resolved before the commission will proceed with rulemaking concerning MSS incorporation. EPA is also examining modifications to its NSR program which would likely affect how any state program on MSS incorporation would be structured. As previously stated, the commission has not adopted those elements of the proposal concerning MSS incorporation.

EPA recommended that the list in §116.10 for dockside vessel emissions be stated as illustrative rather than inclusive.

The commission modified the rule language to indicate that dockside vessel emissions may include activities other than those specifically listed in the definition of dockside vessel emissions in §116.10.

TIP commented that the inclusion of emissions from abrasive blasting and painting in the definition of dockside vessel emissions should be limited to shipyard operations and should not include emissions from incidental maintenance performed at marine loading facilities. TIP based this comment on commission guidance concerning dockside vessel emissions.

The commission did not change the definition of dockside vessel emissions in §116.10 in response to this comment. While abrasive blasting and painting are common operations at shipyards, those activities may not necessarily be limited to shipyards. The guidance cited by the commenter does mention shipyards as the most common location of abrasive blasting and painting but this does not limit the commission's jurisdiction over this activity at other locations such as marine terminals. Incidental maintenance on the vessel in the form of small scale painting or surface preparation would not be included in dockside vessel emissions provided that the activity is restricted to the vessel and does not use on-shore equipment or material. Also, any incidental maintenance performed on dockside vessels while they are docked may qualify for classification as *de minimis* under §116.119, De Minimis Facilities or Sources.

HSC commented that the definitions of routine maintenance and routine shutdown are different from the language of 30 TAC §106.263 and requests that the definitions be made identical to reduce confusion. Also, the commission should promulgate standard definitions and requirements for certain types of MSS so all companies will have these emissions included in their permits.

The commission did not adopt these definitions and will wait until the completion of federal actions on the definition of routine maintenance before addressing the issue further.

HSC commented that the proposed rules should contain quality assurance requirements and procedures for estimating of MSS emissions to prevent under-reporting.

The commission did not adopt the rule amendments concerning MSS emissions permitting, but retained the policy that allows the optional incorporation of MSS emissions into permits. Before any permit application is approved, it is reviewed by the permit engineer to assure that the representations and calculations relating to emissions from the facility are correct.

HSC commented that it seeks assurance from the commission that human error is not an acceptable justification for excess emissions, and that emissions that should be considered upsets are not characterized as routine MSS. HSC also suggested individual records for each occurrence of MSS emissions.

Human error alone is not an acceptable reason for excess emissions and would not be a sufficient reason for finding that excessive emissions are exempt from compliance with emissions limitations as provided for in §101.222, Demonstrations. Chapter 101 remains the principal method of excusing MSS emissions from enforcement and does require individual records for MSS events.

HSC stated that because the commission does not know the magnitude of existing MSS, these emissions should not be exempted from PSD or NA review. The commission needs to ensure that all existing MSS is declared.

The commission does not intend to exempt subject facilities from federal review in deciding not to adopt elements of the proposal related to MSS emissions. The commission recognizes that improvements in the accurate quantification of MSS emissions are probably necessary, and expects that the adopted changes to excessive emissions events and scheduled maintenance reporting rules, as well as changes to the reportable quantity of some highly reactive volatile organic compounds, which are part of a separate rulemaking also published in this issue of the *Texas Register*, and the ongoing evaluation of episodic emissions in the ozone NA areas of Houston/Galveston and Beaumont/Port Arthur will result in improvements to the inventory. To the extent that MSS emissions are properly reported in this inventory, they are already considered in SIP and PSD rule development. The improvements that remain to be made to the quantification of these emissions do not constitute a basis for determination of federal applicability review. It is the quantification itself that must serve as a basis for the determination.

HSC commented that the cost estimate of $6,000 to $10,000 per ton of pollutant removed is too pessimistic because the costs of pollution control will drop considerably as industry is required to reduce this form of emissions.

The commission based this estimate on retrofits of BACT and believes it represents a reasonable range of costs.

HSC requested a clarification of the term "coastal waters" as it appears in §116.111 and 116.711. HSC does not want the term to be interpreted so broadly as to include freshwater areas.

The commission will interpret "coastal waters" consistent with the definition of that term in Natural Resource Code, §33.203(6),

which states that coastal waters means waters under tidal influence and waters of the open Gulf of Mexico.

FWM requested that the commission modify the rules implementing HB 3040 to include all permitting actions of the commission under THSC, Chapter 382. FWM stated that the proposed rules appear to apply to permits issued under Chapter 116 only.

FWM is correct about the application of HB 3040 to all permitting actions under THSC, Chapter 382. Any changes to the permitting requirements of Chapter 116 will be incorporated into federal operating permits under Chapter 122. No modification to Chapter 122 is needed because permit conditions are not addressed in that chapter. There are currently no permits by rule in 30 TAC Chapter 106 that concern shipyard emissions and any authorization that is adopted under Chapter 106 will be evaluated for off-site effects according to TCAA, 382.05196. Therefore, the commission did not revise the rules in response to this comment.

SUBCHAPTER A. DEFINITIONS

30 TAC §116.10

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC, and under THSC, TCAA, §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also adopted under TCAA, §382.002, which establishes the commission's purpose to safeguard the state's air resources consistent with the protection of public health, general welfare, and physical property; §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a comprehensive plan for proper control of the state's air; §382.016, which authorizes the commission to require the measuring and monitoring of emissions of air contaminants from a source or activity and to require that associated records of the emissions be made and maintained; §382.051, which authorizes the commission's permitting activities; and §382.065, which prescribes duties of the commission regarding permitting of emissions from a shipyard.

§116.10. General Definitions.

Unless specifically defined in the TCAA or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA, and in §101.1 of this title (relating to Definitions), the following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Actual emissions--The highest rate of emissions of an air contaminant actually achieved from a qualified facility within the 120-month period prior to the change. This rate cannot exceed any applicable federal or state emissions limitation. This definition applies only when determining whether there has been a net increase in allowable emissions under §116.116(e) of this title (relating to Changes to Facilities).

(2) Allowable emissions--The authorized rate of emissions of an air contaminant from a facility as determined in accordance with this section. This rate cannot exceed any applicable state or federal emissions limitation. This definition applies only when determining whether there has been a net increase in allowable emissions under §116.116(e) of this title.

(A) Permitted facility--For a facility with a permit under this chapter, the allowable emissions shall be any emission limit established in the permit on a maximum allowable emissions rate table and any emission limit contained in representations in the permit application which was relied upon in issuing the permit, plus any allowable emissions authorized under Chapter 106 of this title (relating to Permits by Rule).

(B) Facility permitted by rule--For a facility operating under Chapter 106 of this title, the allowable emissions shall be the least of the emissions rate allowed in Chapter 106, Subchapter A of this title (relating to General Requirements), the emissions rate specified in the applicable permit by rule, or the federally enforceable emission rate established on a PI-8 form.

(C) Qualified grandfathered facility--For a qualified grandfathered facility, the allowable emissions shall be the maximum annual emissions rate after the implementation of any air pollution control methods to become a qualified facility, plus 10% of the maximum annual emissions rate prior to the implementation of such control methods, but in no case shall the allowable emissions be greater than the maximum annual emissions rate prior to the implementation of such control methods. The maximum annual emissions rate is the emissions rate at the maximum annual capacity according to the physical or operational design of the facility, data from actual operations over a period of no more than 12 months that demonstrates the maximum annual capacity, or other information that demonstrates the maximum annual capacity. Except where a grandfathered facility has been modified, the allowable emissions for the modification shall be determined as a permitted facility.

(D) Standard permit facility--For a facility authorized by standard permit, other than §116.617(2) of this title (relating to Standard Permits for Pollution Control Projects), the allowable emissions shall be the maximum emissions rate represented in the registration to use the standard permit.

(E) Special exemption facility--For a facility operating under a special exemption, the allowable emissions shall be the emissions rate represented in the original special exemption request.

(F) The allowable emissions for a qualified facility shall not be adjusted by the voluntary installation of controls.

(3) Best available control technology (BACT)--BACT with consideration given to the technical practicability and the economic reasonableness of reducing or eliminating emissions from the facility.

(4) Dockside vessel--Any water-based transportation, platforms, or similar structures which are connected or moored to the land.

(5) Dockside vessel emissions--Those emissions originating from a dockside vessel that are the result of functions performed by onshore facilities or using onshore equipment. These emissions include, but are not limited to:

(A) loading and unloading of liquid bulk materials;

(B) loading and unloading of liquified gaseous materials;

(C) loading and unloading of solid bulk materials;

(D) cleaning and degassing of liquid vessel compartments; and

(E) abrasive blasting and painting.

(6) Facility--A discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary

source, including appurtenances other than emission control equipment. A mine, quarry, well test, or road is not a facility.

(7) Federally enforceable--All limitations and conditions which are enforceable by the EPA, including:

(A) those requirements developed under Title 40 of the Code of Federal Regulations (CFR) Parts 60 and 61 (40 CFR 60 and 61);

(B) Chapter 113, Subchapter C of this title (relating to National Emission Standards for Hazardous Air Pollutants for Source Categories (FCAA, §112, 40 CFR 63));

(C) requirements within any applicable state implementation plan (SIP);

(D) any permit requirements established under 40 CFR §52.21;

(E) any permit requirements established under regulations approved under 40 CFR Part 51, Subpart I, including permits issued under the EPA-approved program that is incorporated into the SIP and that expressly requires adherence to any permit issued under such program; or

(F) any permit requirements established under Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)).

(8) Grandfathered facility--Any facility that is not a new facility and has not been modified since August 30, 1971.

(9) Lead smelting plant--Any facility which produces purified lead by melting and separating lead from metal and nonmetallic contaminants and/or by reducing oxides into elemental lead. Raw materials consist of lead concentrates, lead-bearing ores or lead scrap, drosses, or other lead-bearing residues. Additional processing may include refining and alloying. A facility which only remelts lead bars or ingots for casting into lead products is not a lead smelting plant.

(10) Maximum allowable emissions rate table (MAERT)--A table included with a preconstruction permit issued under this chapter that contains the allowable emission rates established by the permit for a facility.

(11) Modification of existing facility--Any physical change in, or change in the method of operation of, a facility in a manner that increases the amount of any air contaminant emitted by the facility into the atmosphere or that results in the emission of any air contaminant not previously emitted. The term does not include:

(A) insignificant increases in the amount of any air contaminant emitted that is authorized by one or more commission exemptions;

(B) insignificant increases at a permitted facility;

(C) maintenance or replacement of equipment components that do not increase or tend to increase the amount or change the characteristics of the air contaminants emitted into the atmosphere;

(D) an increase in the annual hours of operation unless the existing facility has received a preconstruction permit or has been exempted, under the TCAA, §382.057, from preconstruction permit requirements;

(E) a physical change in, or change in the method of operation of, a facility that does not result in a net increase in allowable emission of any air contaminant and that does not result in the emission of any air contaminant not previously emitted, provided that the facility:

(i) has received a preconstruction permit or permit amendment or has been exempted under the TCAA, §382.057, from preconstruction permit requirements no earlier than 120 months before the change will occur; or

(ii) uses, regardless of whether the facility has received a preconstruction permit or permit amendment or has been exempted under the TCAA, §382.057, an air pollution control method that is at least as effective as the BACT that the commission required or would have required for a facility of the same class or type as a condition of issuing a permit or permit amendment 120 months before the change will occur;

(F) a physical change in, or change in the method of operation of, a facility where the change is within the scope of a flexible permit or a multiple plant permit; or

(G) a change in the method of operation of a natural gas processing, treating, or compression facility connected to or part of a natural gas gathering or transmission pipeline which does not result in an annual emission rate of any air contaminant in excess of the volume emitted at the maximum designed capacity, provided that the facility is one for which:

(i) construction or operation started on or before September 1, 1971, and at which either no modification has occurred after September 1, 1971, or at which modifications have occurred only under Chapter 106 of this title; or

(ii) construction started after September 1, 1971, and before March 1, 1972, and which registered in accordance with TCAA, §382.060, as that section existed prior to September 1, 1991.

(12) New facility--A facility for which construction is commenced after August 30, 1971, and no contract for construction was executed on or before August 30, 1971, and that contract specified a beginning construction date on or before February 29, 1972.

(13) New source--Any stationary source, the construction or modification of which is commenced after March 5, 1972.

(14) Nonattainment area--A defined region within the state which is designated by the EPA as failing to meet the national ambient air quality standard for a pollutant for which a standard exists. The EPA will designate the area as nonattainment under the provisions of FCAA, §107(d).

(15) Public notice--The public notice of application for a permit as required in this chapter.

(16) Qualified facility--An existing facility that satisfies the criteria of either paragraph (9)(E)(i) or (ii) of this section.

(17) Source--A point of origin of air contaminants, whether privately or publicly owned or operated.

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 23, 2002.

TRD-200205573

Stephanie Bergeron
Division Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-5017

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SUBCHAPTER B. NEW SOURCE REVIEW PERMITS

DIVISION 1. PERMIT APPLICATION

30 TAC §116.111

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC, and under the THSC, TCAA, §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA. The amendments are also adopted under TCAA, §382.002, which establishes the commission's purpose to safeguard the state's air resources consistent with the protection of public health, general welfare, and physical property; §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a comprehensive plan for proper control of the state's air; §382.016, which authorizes the commission to require the measuring and monitoring of emissions of air contaminants from a source or activity and to require that associated records of the emissions be made and maintained; and §382.051, which authorizes the commission's permitting activities; §382.0511, which allows the commission to consolidate various authorizations into a single permit and to process amendments to a consolidated permit; §382.0513, which authorizes the commission to establish and enforce permit conditions consistent with the TCAA and adopt by rule permit conditions of general applicability; §382.0515, which requires that a person applying for an air permit must submit a permit application, demonstrations (plans and specifications) necessary to determine if the facility or source will comply with applicable federal and state air control statutes, rules, and regulations and the intent of the TCAA, and any other necessary information; §382.0518, which requires that a permit be obtained from the commission prior to new construction or modification of an existing facility; and §382.065, which prescribes duties of the commission regarding permitting of emissions from a shipyard.

§116.111. General Application.

(a) In order to be granted a permit, amendment, or special permit amendment, the application must include:

(1) a completed Form PI-1 General Application signed by an authorized representative of the applicant. All additional support information specified on the form must be provided before the application is complete;

(2) information which demonstrates that emissions from the facility, including any associated dockside vessel emissions, meet all of the following.

(A) Protection of public health and welfare.

(i) The emissions from the proposed facility will comply with all rules and regulations of the commission and with the intent of the TCAA, including protection of the health and property of the public.

(ii) For issuance of a permit for construction or modification of any facility within 3,000 feet of an elementary, junior high/middle, or senior high school, the commission shall consider any possible adverse short-term or long-term side effects that an air contaminant or nuisance odor from the facility may have on the individuals attending the school(s).

(B) Measurement of emissions. The proposed facility will have provisions for measuring the emission of significant air contaminants as determined by the executive director. This may include the installation of sampling ports on exhaust stacks and construction of sampling platforms in accordance with guidelines in the "Texas Natural Resource Conservation Commission (TNRCC) Sampling Procedures Manual."

(C) Best available control technology (BACT). The proposed facility will utilize BACT, with consideration given to the technical practicability and economic reasonableness of reducing or eliminating the emissions from the facility.

(D) New Source Performance Standards (NSPS). The emissions from the proposed facility will meet the requirements of any applicable NSPS as listed under Title 40 Code of Federal Regulations (CFR) Part 60, promulgated by the EPA under FCAA, §111, as amended.

(E) National Emission Standards for Hazardous Air Pollutants (NESHAP). The emissions from the proposed facility will meet the requirements of any applicable NESHAP, as listed under 40 CFR Part 61, promulgated by EPA under FCAA, §112, as amended.

(F) NESHAP for source categories. The emissions from the proposed facility will meet the requirements of any applicable maximum achievable control technology standard as listed under 40 CFR Part 63, promulgated by the EPA under FCAA, §112 or as listed under Chapter 113, Subchapter C of this title (relating to National Emissions Standards for Hazardous Air Pollutants for Source Categories (FCAA §112, 40 CFR 63)).

(G) Performance demonstration. The proposed facility will achieve the performance specified in the permit application. The applicant may be required to submit additional engineering data after a permit has been issued in order to demonstrate further that the proposed facility will achieve the performance specified in the permit application. In addition, dispersion modeling, monitoring, or stack testing may be required.

(H) Nonattainment review. If the proposed facility is located in a nonattainment area, it shall comply with all applicable requirements in this chapter concerning nonattainment review.

(I) Prevention of Significant Deterioration (PSD) review. If the proposed facility is located in an attainment area, it shall comply with all applicable requirements in this chapter concerning PSD review.

(J) Air dispersion modeling. Computerized air dispersion modeling may be required by the executive director to determine air quality impacts from a proposed new facility or source modification. In determining whether to issue, or in conducting a review of, a permit application for a shipbuilding or ship repair operation, the commission will not require and may not consider air dispersion modeling results predicting ambient concentrations of non-criteria air contaminants over coastal waters of the state. The commission shall determine

compliance with non-criteria ambient air contaminant standards and guidelines at land-based off-property locations.

(K) Hazardous air pollutants. Affected sources (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) for hazardous air pollutants shall comply with all applicable requirements under Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)).

(L) Mass cap and trade allowances. If subject to Chapter 101, Subchapter H, Division 3, of this title (relating to Mass Emissions Cap and Trade Program), the proposed facility, group of facilities, or account must obtain allowances to operate.

(b) In order to be granted a permit, amendment, or special permit amendment, the owner or operator must comply with the following notice requirements.

(1) Applications declared administratively complete before September 1, 1999, are subject to the requirements of Chapter 116, Subchapter B, Division 3 (relating to Public Notification and Comment Procedures).

(2) Applications declared administratively complete on or after September 1, 1999, are subject to the requirements of Chapter 39 of this title (relating to Public Notice) and Chapter 55 of this title (relating to Request for Reconsideration and Contested Case Hearings; Public Comment). Upon request by the owner or operator of a facility which previously has received a permit or special permit from the commission, the executive director or designated representative may exempt the relocation of such facility from the provisions in Chapter 39 of this title if there is no indication that the operation of the facility at the proposed new location will significantly affect ambient air quality and no indication that operation of the facility at the proposed new location will cause a condition of air pollution.

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 D. PERMIT RENEWALS

30 TAC §116.311, §116.315

STATUTORY AUTHORITY

The amendment and new section are adopted under TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC, and under the THSC, TCAA, §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA. The amendment and new section are also adopted under TCAA, §382.002, which establishes the commission's purpose to safeguard the state's air resources consistent with the protection of public health, general welfare, and physical property; §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a comprehensive plan for proper control of the state's air; §382.016, which authorizes the commission to require the measuring and monitoring of emissions of air contaminants from a source or activity and to require that associated records of the emissions be made and maintained; §382.051, which authorizes the commission's permitting activities; §382.0513, which authorizes the commission to establish and enforce permit conditions consistent with the TCAA and adopt by rule permit conditions of general applicability; §382.055, which authorizes the commission to review and renew preconstruction permits and, under certain conditions, to impose appropriate air quality control requirements; and §382.065, which prescribes duties of the commission regarding permitting of emissions from a shipyard. The amendment and new section are also adopted under TWC, §5.753, which requires the commission, by rule, to develop a uniform standard for evaluating compliance history; and TWC, §5.754, relating to the classification and use of compliance history.

§116.311. Permit Renewal Application.

(a) In order to be granted a permit renewal, the permit holder shall submit information in support of the application which demonstrates that:

(1) dockside vessel emissions associated with the facility will comply with all rules and regulations of the commission and with the intent of the TCAA, including protection of the health and property of the public and minimization of emissions to the extent possible, consistent with good air pollution practices.

(2) the facility is being operated in accordance with all requirements and conditions of the existing permit, including representations in the application for permit to construct and subsequent amendments, and any previously granted renewal, unless otherwise authorized for a qualified facility;

(3) the facility meets the requirements of any applicable New Source Performance Standards as listed under Title 40 Code of Federal Regulations (CFR) Part 60, promulgated by the EPA under the authority of the FCAA, §111, as amended;

(4) the facility meets the requirements of any applicable emission standard for hazardous air pollutants as listed under Title 40 CFR Part 61, promulgated by EPA under the authority of the FCAA, §112, as amended; and

(5) the facility meets the requirements of any applicable maximum achievable control technology standard as listed under 40 CFR Part 63, promulgated by the EPA under FCAA, §112 or as listed under Chapter 113, Subchapter C of this title (relating to National Emissions Standards for Hazardous Air Pollutants for Source Categories (FCAA §112, 40 CFR 63)).

(6) the facility meets the requirements of Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)).

(b) In addition to the requirements in subsection (a) of this section, if the commission determines it necessary to avoid a condition of air pollution or to ensure compliance with otherwise applicable federal or state air quality control requirements, then:

(1) the applicant may be required to submit additional information regarding the emissions from the facility and their impacts on the surrounding area; and

(2) the commission shall impose as a condition for renewal only those requirements the executive director determines to be economically reasonable and technically practicable considering the age of the facility and the impact of its emissions on the surrounding area.

(c) A compliance history review must be conducted in accordance with Chapter 60 of this title (relating to Compliance History).

§116.315. Permit Renewal Submittal.

(a) An application for renewal must be submitted at least 90 days prior to expiration of the permit or the permit will expire. The executive director may extend the time period for submitting an application.

(b) Any permit issued:

(1) before December 1, 1991, is subject for review 15 years after the date of issuance;

(2) on or after December 1, 1991, is subject for review every ten years after the date of issuance.

(3) at non-federal sources on or after December 1, 1991, may, for cause, contain a provision requiring renewal between five and ten years.

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 F. STANDARD PERMITS

30 TAC §116.615

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC, and under the THSC, TCAA, §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also adopted under TCAA, §382.002, which establishes the commission's purpose to safeguard the state's air resources consistent with the protection of public health, general welfare, and physical property; §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a comprehensive plan for proper control of the state's air; §382.016, which authorizes the commission to require the measuring and monitoring of emissions of air contaminants from a source or activity and to require that associated records of the emissions be made and maintained; §382.051, which authorizes the commission's permitting activities; §382.0513, which authorizes the commission to establish and enforce permit conditions consistent with the TCAA and adopt by rule permit conditions of general applicability; §382.0515, which requires that a person applying for an air permit must submit a permit application, demonstrations (plans and specifications) necessary to determine if the facility or source will comply with applicable federal and state air control statutes, rules, and regulations and the intent of the TCAA, and any other necessary information; §382.05195, which authorizes the commission to issue standard permits for new or existing similar facilities; and §382.065, which prescribes duties of the commission regarding permitting of emissions from a shipyard.

§116.615. General Conditions.

The following general conditions are applicable to holders of standard permits, but will not necessarily be specifically stated within the standard permit document.

(1) Protection of public health and welfare. The emissions from the facility, including dockside vessel emissions, must comply with all applicable rules and regulations of the commission adopted under Texas Health and Safety Code, Chapter 382, and with intent of the TCAA, including protection of health and property of the public.

(2) Standard permit representations. All representations with regard to construction plans, operating procedures, and maximum emission rates in any registration for a standard permit become conditions upon which the facility or changes thereto, must be constructed and operated. It is unlawful for any person to vary from such representations if the change will affect that person's right to claim a standard permit under this section. Any change in condition such that a person is no longer eligible to claim a standard permit under this section requires proper authorization under §116.110 of this title (relating to Applicability). If the facility remains eligible for a standard permit, the owner or operator of the facility shall notify the executive director of any change in conditions which will result in a change in the method of control of emissions, a change in the character of the emissions, or an increase in the discharge of the various emissions as compared to the representations in the original registration or any previous notification of a change in representations. Notice of changes in representations must be received by the executive director no later than 30 days after the change.

(3) Standard permit in lieu of permit amendment. All changes authorized by standard permit to a facility previously permitted under §116.110 of this title (relating to Applicability) shall be administratively incorporated into that facility's permit at such time as the permit is amended or renewed.

(4) Construction progress. Start of construction, construction interruptions exceeding 45 days, and completion of construction shall be reported to the appropriate regional office not later than 15 working days after occurrence of the event, except where a different time period is specified for a particular standard permit.

(5) Start-up notification.

(A) The appropriate air program regional office of the commission and any other air pollution control program having jurisdiction shall be notified prior to the commencement of operations of the facilities authorized by a standard permit in such a manner that a representative of the executive director may be present.

(B) For phased construction, which may involve a series of units commencing operations at different times, the owner or operator of the facility shall provide separate notification for the commencement of operations for each unit.

(C) Prior to beginning operations of the facilities authorized by the permit, the permit holder shall identify to the Office of Permitting, Remediation, and Registration the source or sources of allowances to be utilized for compliance with Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program).

(D) A particular standard permit may modify start-up notification requirements.

(6) Sampling requirements. If sampling of stacks or process vents is required, the standard permit holder shall contact the Office of Air Quality and any other air pollution control program having jurisdiction prior to sampling to obtain the proper data forms and procedures. All sampling and testing procedures must be approved by the executive director and coordinated with the regional representatives of the commission. The standard permit holder is also responsible for providing sampling facilities and conducting the sampling operations or contracting with an independent sampling consultant.

(7) Equivalency of methods. The standard permit holder shall demonstrate or otherwise justify the equivalency of emission control methods, sampling or other emission testing methods, and monitoring methods proposed as alternatives to methods indicated in the conditions of the standard permit. Alternative methods must be applied for in writing and must be reviewed and approved by the executive director prior to their use in fulfilling any requirements of the standard permit.

(8) Recordkeeping. A copy of the standard permit along with information and data sufficient to demonstrate applicability of and compliance with the standard permit shall be maintained in a file at the plant site and made available at the request of representatives of the executive director, the EPA, or any air pollution control program having jurisdiction. For facilities that normally operate unattended, this information shall be maintained at the nearest staffed location within Texas specified by the standard permit holder in the standard permit registration. This information must include, but is not limited to, production records and operating hours. Additional recordkeeping requirements may be specified in the conditions of the standard permit. Information and data sufficient to demonstrate applicability of and compliance with the standard permit must be retained for at least two years following the date that the information or data is obtained. The copy of the standard permit must be maintained as a permanent record.

(9) Maintenance of emission control. The facilities covered by the standard permit may not be operated unless all air pollution emission capture and abatement equipment is maintained in good working order and operating properly during normal facility operations. Notification for emissions events and scheduled maintenance shall be made in accordance with §101.201 and §101.211 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements; and Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping).

(10) Compliance with rules. Registration of a standard permit by a standard permit applicant constitutes an acknowledgment and agreement that the holder will comply with all rules, regulations, and orders of the commission issued in conformity with the TCAA and the conditions precedent to the claiming of the standard permit. If more than one state or federal rule or regulation or permit condition are applicable, the most stringent limit or condition shall govern. Acceptance includes consent to the entrance of commission employees and designated representatives of any air pollution control program having jurisdiction into the permitted premises at reasonable times to investigate conditions relating to the emission or concentration of air contaminants, including compliance with the standard permit.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 23, 2002.

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Texas Commission on Environmental Quality
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SUBCHAPTER G. FLEXIBLE PERMITS

30 TAC §116.711, §116.715

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC, and under the THSC, TCAA, §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA. The amendments are also adopted under TCAA, §382.002, which establishes the commission's purpose to safeguard the state's air resources consistent with the protection of public health, general welfare, and physical property; §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a comprehensive plan for proper control of the state's air; §382.016, which authorizes the commission to require the measuring and monitoring of emissions of air contaminants from a source or activity and to require that associated records of the emissions be made and maintained; and §382.051, which authorizes the commission's permitting activities; §382.0513, which authorizes the commission to establish and enforce permit conditions consistent with the TCAA and adopt by rule permit conditions of general applicability; §382.0515, which requires that a person applying for an air permit must submit a permit application, demonstrations (plans and specifications) necessary to determine if the facility or source will comply with applicable federal and state air control statutes, rules, and regulations and the intent of the TCAA, and any other necessary information; §382.0518, which requires that a permit be obtained from the commission prior to new construction or modification of an existing facility; and §382.065, which prescribes duties of the commission regarding permitting of emissions from a shipyard.

§116.711. Flexible Permit Application.

Any application for a new flexible permit or flexible permit amendment must include a completed Form PI-1 General Application. The Form PI-1 must be signed by an authorized representative of the applicant. The Form PI-1 specifies additional support information which must be provided before the application is deemed complete. In order to be granted a flexible permit or flexible permit amendment, the owner or operator of the proposed facility shall submit information to the commission which demonstrates that all of the following are met.

(1) Protection of public health and welfare. The emissions from the proposed facility, group of facilities, or account as determined under §116.716 of this title (relating to Emission Caps and Individual Emission Limitations), will comply with all rules and regulations of the commission and with the intent of the TCAA, including protection of the health and physical property of the people. In considering the issuance of a flexible permit for construction or modification of any facility, group of facilities, or account within 3,000 feet or less of an elementary, junior high/middle, or senior high school, the commission shall consider any possible adverse short-term or long-term side effects that an air contaminant or nuisance odor from the facility, group of

facilities, or account may have on the individuals attending these school facilities.

(2) Measurement of emissions. The proposed facility, group of facilities, or account will have provisions for measuring the emission of air contaminants as determined by the executive director. This may include the installation of sampling ports on exhaust stacks and construction of sampling platforms in accordance with guidelines in the "Texas Natural Resource Conservation Commission Sampling Procedures Manual."

(3) Best available control technology (BACT). The proposed facility, group of facilities, or account will utilize BACT, with consideration given to the technical practicability and economic reasonableness of reducing or eliminating the emissions from the facility on a proposed facility, group of facilities, or account basis. Control technology beyond BACT may be used on certain facilities to provide the emission reductions necessary to comply with this requirement on a group of facilities or account basis, provided however, that the existing level of control may not be lessened for any facility. For new facilities and proposed affected sources (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) subject to Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)), the use of BACT shall be demonstrated for the individual facility or affected source.

(4) New Source Performance Standards (NSPS). The emissions from each affected facility as defined in 40 Code of Federal Regulations (CFR), Part 60 will meet at least the requirements of any applicable NSPS as listed under Title 40 CFR Part 60, promulgated by the EPA under authority granted under the FCAA, §111, as amended.

(5) National Emission Standards for Hazardous Air Pollutants (NESHAPS). The emissions from each facility as defined in 40 CFR Part 61 will meet at least the requirements of any applicable NESHAPS, as listed under 40 CFR Part 61, promulgated by EPA under authority granted under the FCAA, §112, as amended.

(6) NESHAPS for source categories. The emissions from each affected facility shall meet at least the requirements of any applicable MACT standard as listed under 40 CFR Part 63, promulgated by the EPA under FCAA, §112 or as listed under Chapter 113, Subchapter C of this title (relating to National Emissions Standards for Hazardous Air Pollutants for Source Categories (FCAA, §112, 40 CFR 63)).

(7) Performance demonstration. The proposed facility, group of facilities, or account will achieve the performance specified in the flexible permit application. The applicant may be required to submit additional engineering data after a flexible permit has been issued in order to demonstrate further that the proposed facility, group of facilities, or account will achieve the performance specified in the flexible permit. In addition, initial compliance testing with ongoing compliance determined through engineering calculations based on measured process variables, parametric or predictive monitoring, stack monitoring, or stack testing may be required.

(8) Nonattainment review. If the proposed facility, group of facilities, or account is located in a nonattainment area, each facility shall comply with all applicable requirements concerning nonattainment review in this chapter.

(9) Prevention of Significant Deterioration (PSD) review. If the proposed facility, group of facilities, or account is located in an attainment area, each facility shall comply with all applicable requirements in this chapter concerning PSD review.

(10) Air dispersion modeling or ambient monitoring. Computerized air dispersion modeling and/or ambient monitoring may be required by the commission's New Source Review Permits Division to determine the air quality impacts from the facility, group of facilities, or account. In conducting a review of a permit application for a shipbuilding or ship repair operation, the commission will not require and may not consider air dispersion modeling results predicting ambient concentrations of non- criteria air contaminants over coastal waters of the state. The commission shall determine compliance with non-criteria ambient air contaminant standards and guidelines at land-based off-property locations.

(11) Federal standards of review for constructed or reconstructed major sources of hazardous air pollutants. If the proposed source is an affected source (as defined in §116.15(1) of this title), it shall comply with all applicable requirements under Subchapter C of this chapter.

(12) Mass cap and trade allocations. If subject to Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program) the proposed facility, group of facilities, or account must obtain allocations to operate.

(13) Application content. In addition to any other requirements of this chapter, the applicant shall:

(A) identify each air contaminant for which an emission cap is desired;

(B) identify each facility to be included in the flexible permit;

(C) identify each source of emissions to be included in the flexible permit and for each source of emissions identify the Emission Point Number (EPN) and the air contaminants emitted;

(D) for each emission cap, identify all associated EPNs and provide emission rate calculations based on the expected maximum capacity and the proposed control technology;

(E) for each individual emission limitation, identify the EPN and provide emission rate calculations based on the expected maximum capacity and the proposed control technology.

(14) Proposed control technology and compliance demonstration. The applicant shall specify the control technology proposed for each unit to meet the emission cap and demonstrate compliance with all emission caps at expected maximum production capacity.

§116.715. General and Special Conditions.

(a) Flexible permits may contain general and special conditions. The holders of flexible permits shall comply with any and all such conditions. Upon a specific finding by the executive director that an increase of a particular air contaminant could result in a significant impact on the air environment, or could cause the facility, group of facilities, or account to become subject to review under §116.150 and §116.151 and §§116.160 - 116.163 of this title (relating to Nonattainment Review or Prevention of Significant Deterioration Review) or Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)), the permit may include a special condition which requires the permittee to obtain written approval from the executive director before constructing a facility under a standard permit or a permit by rule under Chapter 106 of this title (relating to Permits by Rule).

(b) A pollutant specific emission cap or multiple emission caps and/or individual emission limitations shall be established for each air contaminant for all facilities authorized by the flexible permit.

(c) The following general conditions shall be applicable to every flexible permit.

(1) Voiding of permit. A flexible permit or flexible permit amendment under this subchapter is automatically void if the holder fails to complete construction as specified in the flexible permit. Upon request, the executive director may grant a one time 12-month extension of the date to complete construction. This section does not apply to physical or operational changes allowed without an amendment under §116.721 of this title (relating to Amendments and Alterations).

(2) Construction progress. The start of construction, construction interruptions exceeding 45 days, and completion of construction shall be reported to the appropriate regional office of the commission not later than 15 working days after occurrence of the event.

(3) Start-up notification.

(A) The appropriate regional office of the commission and any local program having jurisdiction shall be notified prior to the commencement of operations of the facilities authorized by the permit in such a manner that a representative of the commission may be present.

(B) Phased construction, which may involve a series of facilities commencing operations at different times, shall provide separate notification for the commencement of operations for each facility.

(C) Prior to beginning operations of the facilities authorized by the permit, the permit holder shall identify to the Office of Permitting, Remediation, and Registration the source or sources of allowances to be utilized for compliance with Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program).

(4) Sampling requirements. If sampling of stacks or process vents is required, the flexible permit holder shall contact the commission's Engineering Services Section, Office of Compliance and Enforcement prior to sampling to obtain the proper data forms and procedures. All sampling and testing procedures must be approved by the executive director and coordinated with the appropriate regional office of the commission. The flexible permit holder is also responsible for providing sampling facilities and conducting the sampling operations or contracting with an independent sampling consultant.

(5) Equivalency of methods. It shall be the responsibility of the flexible permit holder to demonstrate or otherwise justify the equivalency of emission control methods, sampling or other emission testing methods, and monitoring methods proposed as alternatives to methods indicated in the conditions of the flexible permit. Alternative methods shall be applied for in writing and must be reviewed and approved by the executive director prior to their use in fulfilling any requirements of the permit.

(6) Recordkeeping. A copy of the flexible permit along with information and data sufficient to demonstrate continuous compliance with the emission caps and individual emission limitations contained in the flexible permit shall be maintained in a file at the plant site and made available at the request of personnel from the commission or any air pollution control program having jurisdiction. For facilities that normally operate unattended, this information shall be maintained at the nearest staffed location within Texas specified by the permit holder in the permit application. This information may include, but is not limited to, emission cap and individual emission limitation calculations based on a 12-month rolling basis and production records and operating hours. Additional recordkeeping requirements may be specified in special conditions attached to the flexible permit. Information in the file shall be retained for at least two years following the date that the information or data is obtained.

(7) Maximum allowable emission rates. A flexible permit covers only those sources of emissions and those air contaminants listed in the table entitled "Emission Sources, Emissions Caps and Individual Emission Limitations" attached to the flexible permit. Flexible permitted sources are limited to the emission limits and other conditions specified in the table attached to the flexible permit.

(8) Emission cap readjustment. If a schedule to install additional controls is included in the flexible permit and a facility subject to such a schedule is taken out of service, the emission cap contained in the flexible permit will be readjusted for the period the unit is out of service to a level as if no schedule had been established. Unless a special provision specifies the method of readjustment of the emission cap, a permit alteration shall be obtained.

(9) Maintenance of emission control. The facilities covered by the flexible permit shall not be operated unless all air pollution emission capture and abatement equipment is maintained in good working order and operating properly during normal facility operations. Notification for emissions events and scheduled maintenance shall be made in accordance with §101.201 and §101.211 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements; and Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping).

(10) Compliance with rules. Acceptance of a flexible permit by a permit applicant constitutes an acknowledgment and agreement that the holder will comply with all Rules, Regulations, and Orders of the commission issued in conformity with the TCAA and the conditions precedent to the granting of the permit. If more than one state or federal rule or regulation or flexible permit condition are applicable, then the most stringent limit or condition shall govern and be the standard by which compliance shall be demonstrated. Acceptance includes consent to the entrance of commission employees and agents into the permitted premises at reasonable times to investigate conditions relating to the emission or concentration of air contaminants, including compliance with the flexible permit.

(d) There may be additional special conditions attached to a flexible permit upon issuance or amendment of the permit. Such conditions in a flexible permit may be more restrictive than the requirements of this title.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 239-5017

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SUBCHAPTER H. PERMITS FOR GRANDFATHERED FACILITIES

30 TAC §116.778, §116.803

STATUTORY AUTHORITY

The new sections are adopted under TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC, and under the THSC, TCAA, §382.017, which provides the

commission the authority to adopt rules consistent with the policy and purposes of the TCAA. The sections are also adopted under TCAA, §382.002, which establishes the commission's purpose to safeguard the state's air resources consistent with the protection of public health, general welfare, and physical property; §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a comprehensive plan for proper control of the state's air; §382.016, which authorizes the commission to require the measuring and monitoring of emissions of air contaminants from a source or activity and to require that associated records of the emissions be made and maintained; and §382.051, which authorizes the commission's permitting activities; §382.0513, which authorizes the commission to establish and enforce permit conditions consistent with the TCAA and adopt by rule permit conditions of general applicability; §382.0515, which requires that a person applying for an air permit must submit a permit application, demonstrations (plans and specifications) necessary to determine if the facility or source will comply with applicable federal and state air control statutes, rules, and regulations and the intent of the TCAA, and any other necessary information; §382.0518, which requires that a permit be obtained from the commission prior to new construction or modification of an existing facility; §382 05181 which require grandfathered facilities to apply for a permit and comply with its conditions by certain dates, and requires ceratin actions of the commission; §382.0519, which authorizes the commission to grant an air permit to the owner or operator of an existing, unpermitted facility not subject to the requirement to obtain a permit; and §382.065, which prescribes duties of the commission regarding permitting of emissions from a shipyard.

§116.778. Additional Requirements for Applications for Small Business Stationary Source Permits, Pipeline Facilities Permits, or Existing Facility Permits.

In addition to complying with all applicable requirements of this subchapter, any application for a small business stationary source permit, a pipeline facilities permit, or an existing facility permit must include emissions from the facility resulting from any associated dockside vessel operations. These emissions must comply with all rules and regulations of the commission and with the intent of the TCAA, including protection of the health and property of the public and minimization of emissions to the extent possible, consistent with good air pollution control practices.

§116.803. Additional Requirements for Existing Facility Flexible Permit Applications.

Any application for an existing facility flexible permit must include emissions from the facility resulting from any associated dockside vessel operations. These emissions must comply with all rules and regulations of the commission and with the intent of the TCAA, including protection of the health and property of the public and minimization of emissions to the extent possible, consistent with good air pollution control practices.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER I. ELECTRIC GENERATING FACILITY PERMITS

30 TAC §116.919

STATUTORY AUTHORITY

The new section is adopted under TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC, and under the THSC, TCAA, §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA. The section is also adopted under TCAA, §382.002, which establishes the commission's purpose to safeguard the state's air resources consistent with the protection of public health, general welfare, and physical property; §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a comprehensive plan for proper control of the state's air; §382.016, which authorizes the commission to require the measuring and monitoring of emissions of air contaminants from a source or activity and to require that associated records of the emissions be made and maintained; and §382.051, which authorizes the commission's permitting activities; §382.0513, which authorizes the commission to establish and enforce permit conditions consistent with the TCAA and adopt by rule permit conditions of general applicability; §382.0515, which requires that a person applying for an air permit must submit a permit application, demonstrations (plans and specifications) necessary to determine if the facility or source will comply with applicable federal and state air control statutes, rules, and regulations and the intent of the TCAA, and any other necessary information; §382.0518, which requires that a permit be obtained from the commission prior to new construction or modification of an existing facility; §382 05181 which require grandfathered facilities to apply for a permit and comply with its conditions by certain dates, and requires certain actions of the commission; and §382.065, which prescribes duties of the commission regarding permitting of emissions from a shipyard.

§116.919. Additional Requirements for Grandfathered Electric Generating Facility Permit Applications.

In addition to complying with all applicable requirements of this subchapter, any application for a new grandfathered electric generating facility permit under Texas Health and Safety Code, TCAA, §382.05185(c) and (d) (relating to Electric Generating Facility Permits) for auxiliary combustors and coal-fired units only must include emissions from the facility resulting from any associated dockside vessel operations. These emissions must comply with all rules and regulations of the commission and with the intent of the TCAA, including protection of the health and property of the public and minimization of emissions to the extent possible, consistent with good air pollution control practices.

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 305. CONSOLIDATED PERMITS
SUBCHAPTER D. AMENDMENTS, RENEWALS, TRANSFERS, CORRECTIONS, REVOCATION, AND SUSPENSION OF PERMITS

30 TAC §305.64

The Commission on Environmental Quality (commission) adopts an amendment to §305.64. Section 305.64 is adopted *without change* to the proposed text as published in the June 7, 2002 issue of the *Texas Register* (27 TexReg 4913) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

House Bill (HB) 2912, 77th Legislature, 2001, amended Texas Water Code (TWC), §26.003, by adding the phrase "taking into consideration" before the words "economic development of the state." This rulemaking amends §305.64 to reflect the change made by HB 2912 to TWC.

SECTION DISCUSSION

Section 305.64, Transfer of Permits, adopts an amendment to subsection (i)(8), which adds the phrase "taking into consideration" before the words "economic development of the state" and modifies sentence structure to reflect the concept in TWC, §26.003, which is that economic development of the state should be taken into consideration when actions are taken to maintain the quality of water in the state, rather than the actions should be consistent with economic development.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the adopted rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the adopted rule is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. Major environmental rule means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rule does not meet the definition of a major environmental rule because the specific intent of the rule is to clarify commission policy to state that the commission must take into consideration the economic development of the state. The rule substantially advances this purpose by specifically stating that the commission will take into consideration the economic development of the state when maintaining the quality of water in the state. Since the adopted rule states a policy which requires the consideration of the economic development of the state, the adopted rule is not likely to adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs. The adopted rule is not anticipated to adversely affect in a material way the environment or the public health and safety of the state or a sector of the state because the requirement for consideration of the economic development of the state is inserted into policy statements which provide for the protection of the environment and the public health and safety.

In addition, the adopted rule does not exceed the four applicability requirements of Texas Government Code, §2001.0025(a)(1) - (4) in that the adopted rule does not: 1) exceed a standard set by federal law; 2) exceed an express requirement of state law; 3) exceed a requirement of a delegation agreement; or 4) propose to adopt a rule solely under the general powers of the agency.

The adopted rule does not exceed a standard set by federal law because there are no such corresponding federal standards relating to the commission taking into consideration the economic development of the state in maintaining the quality of water in the state. Further, the adopted rule does not exceed an express requirement of state law because it is mandated by state law. The adopted rule does not exceed the requirements of delegation agreements concerning water quality because the delegation agreements do not establish express requirements for taking into consideration the economic development of the state. Finally, this adopted rule is not adopted solely under the general powers of the agency, but is adopted under the specific provisions of TWC, §26.003 and §26.011. No public comment was received on the regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this adopted rule in accordance with Texas Government Code, §2007.043. The commission's assessment indicates that Texas Government Code, Chapter 2007 applies to the adopted rule and that the rule does not constitute a statutory or constitutional taking.

The specific purpose of the adopted rule is to conform commission policy to HB 2912, §1.26, which changed state policy to provide that the commission take into consideration the economic development of the state in maintaining water quality in the state. Before enactment of HB 2912, §1.26, the state policy on maintaining the quality of water in the state provided that the commission should maintain water quality consistent with the economic development of the state, in TWC, §26.003.

The adopted rule substantially advances the purpose stated previously by changing the policy of the commission to conform to HB 2912, §1.26.

The adopted rule does not place any burden on real property and it does not obtain any benefit to society from the use of private real property because it does not directly apply to the ownership or use of a particular parcel of private real property.

Promulgation of the adopted rule setting a policy to take into consideration the economic development of the state will not constitute a taking because the adopted rule does not directly apply to the ownership or use of a particular parcel of private real property.

There are no reasonable alternative actions that the commission may take regarding this adopted rule because the policy of the state on this issue has been determined by law through the enactment of HB 2912, §1.26.

Since the adopted rule does not directly apply to the ownership or use of a particular parcel of real property, it does not burden real property in a manner which would be a statutory or constitutional taking. Specifically, the adopted rule does 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 adopted rule.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adopted rule is not subject to the Texas Coastal Management Program.

PUBLIC COMMENTS

No public hearing was held on this rulemaking and no comments were received during the comment period that closed on July 8, 2002.

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which provides the commission with 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 §26.011, which provides the commission with the power necessary and convenient to carry out its responsibilities under TWC, Chapter 26.

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 328. WASTE MINIMIZATION AND RECYCLING

The Texas Natural Resource Conservation Commission (commission) adopts new §§328.2 - 328.5. The commission also adopts an amendment to §328.8. Sections 328.2 - 328.5 are adopted *with changes* to the proposed text as published in the April 26, 2002 issue of the *Texas Register* (27 TexReg 3525). Section 328.8 is adopted *without change* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of the amendments and new sections is to implement the requirements of House Bill (HB) 2912, Article 9, §9.03, 77th Legislature, 2001. HB 2912 became effective on September 1, 2001. HB 2912 amended Texas Health and Safety Code (THSC) by adding §361.119, which directed the commission to adopt rules, including recordkeeping and reporting requirements and limitations on the storage of recyclable material, to ensure that recyclable material is reused and not abandoned or disposed of, and that recyclable material does not create a nuisance or threaten or impair the environment or public health and safety. Corresponding amendments to 30 TAC Chapter 330, Municipal Solid Waste, and 30 TAC Chapter 332, Composting, are adopted in a concurrent rulemaking (Rule Log Number 2001-081-328-WS).

SECTION BY SECTION DISCUSSION

The changes to Chapter 328 add sections and language critical to justifying a recycling facility's exemption from registration and permit requirements under Chapter 330. The amendments add four new sections to Subchapter A and require a change in the title of Subchapter A to reflect that the subchapter contains general information in addition to the subchapter's purpose. Also, the title to Subchapter B has been changed to indicate that the subchapter addresses recycling goals and rates.

Section 328.2, Definitions, was revised to add two new definitions and revise two others with changes critical to the rules on limitations on storage and reporting and recordkeeping requirements. Paragraph (1) defines the term "Affiliated with" that is used, but not defined, in the legislation that created THSC, §361.119, leading to this rule. The commission borrowed from and adapted definitions for "substantial interest" from Texas Government Code, §572.005; "affiliate" from the Texas Business and Commerce Code, §24.002(1); and "affiliated shareholder" from the Texas Business Corporation Act, Article 13.02, while using the criterion of 20% interest for affiliation found in the Texas Business and Commerce Code, §24.002(1); Texas Business Corporation Act, Article 13.02; THSC, §361.089(g); and Texas Water Code (TWC), §7.301(2). The term "Affiliated with" is used in three contexts in the rules: in setting a standard for an exemption to the recordkeeping and reporting requirements for facilities affiliated with a person or facility holding a permit to dispose of municipal solid waste; in setting a standard for an exemption to the storage and to the recordkeeping and reporting requirements for secondary metals recycling facilities affiliated with smelters; and in preventing a facility from using its affiliation with a hauler to circumvent the recordkeeping and reporting requirements and the limitations on material storage and accumulation. Paragraph (1)(A) and (B) would clarify that affiliation by ownership or control can be established in either of two ways. Paragraph 2 was added since proposal to define "Incidental amount(s) of non-recyclable waste or incidental non-recyclable waste" as this term is used throughout the chapter. The definition of "Incidental amount(s) of non-recylcable waste" in proposed §330.2 has been moved here and changed to establish upper limits of 10% on the total amount of non-recylcable waste in any incoming load, and 5% on the average amount of non-recyclable waste in all loads received by a facility in the last six-month period. A reference to §328.4(e) was also added since proposal that outlines the procedures the executive director will use in evaluating and granting applications for alternative compliance with the requirements for obtaining a permit or registration. The agency intends to create a

guidance document for the regulated community and for agency field enforcement personnel detailing the kinds of recordkeeping documents that will be sufficient to demonstrate compliance with the 10% incoming and 5% outgoing limits in the rule. Facilities that process recyclable material that contains more than incidental amounts of putrescible or non-recyclable waste must obtain a permit or registration. Paragraph (3) was expanded from proposal to include "Processed for recycling or processing for beneficial use" to distinguish material that has been processed at a facility to make it amenable for recycling from unprocessed material when applying the rule's limitation on material storage and accumulation. Paragraph (4) was added from proposal to define the term "Secondary metals recycling facility" to distinguish a facility that is predominately engaged in the business of obtaining ferrous or nonferrous metals that have served their original economic purpose in order to convert those metals, or sell those metals for conversion, into raw material products. The language for this definition came from Texas Revised Civil Statutes, Article 6687-2a(g). Paragraph (5) defines the term "Source-separated recyclable material" consistent with the definition of "source-separated organic material" in Chapter 332, to distinguish such material from municipal solid waste, which must be taken to a registered or permitted municipal solid waste facility rather than to an exempt recycling facility.

Section 328.3, General Requirements, has been amended from proposal to call attention to the potential applicability of federal laws and regulations and regulations of the commission; and to list all applicable state laws for recycling facilities.

Section 328.4, Limitations on Storage of Recyclable Materials, is adopted with changes to the proposed text. Section 328.4(a) establishes to whom the section is applicable. Composting facilities that require notification under Chapter 332 have been included to ensure that the overall requirements for exempt-tier composting facilities under Chapter 332 not be more stringent than those for notification-tier composting facilities under Chapter 332.

Adopted §328.4(a)(1) - (3) establishes which facilities are exempt from limitations on the storage and accumulation of recyclable material, as specified in the legislation. Section 328.4(a)(1) will exempt a facility owned or operated by a local government or the federal government from the requirements of the section. The federal government and agency of the state has been added to the list of exemptions in §328.4 based on comments received during the comment period. THSC, §361.119(e), reads "A solid waste processing facility that is owned or operated by a local government is not subject to rules adopted under this section." The commission has interpreted the legislative intent to be that recycling facilities, not solid waste processing facilities, owned and operated by a local government or the federal government be exempt from the requirements of the new rules, inasmuch as all solid waste processing facilities are required to be permitted or registered under Chapter 330.

The language in §328.4(a)(2) reflects the statutory exemption of recycling facilities whose "primary function . . . is to process materials that have a resale value greater than the cost of processing the materials for subsequent beneficial use." The rule language would create a practical standard for this exemption by limiting it to facilities that receive more than 50% of their recyclable materials directly from any combination of generators not affiliated with the facility, the public, or from haulers not affiliated with the facility, receive no financial compensation to accept any of the recyclable material they receive, and show that material is potentially recyclable and has an economically feasible means of being recycled. The owner or operator of the facility must demonstrate that the primary function of the facility is to process materials that have a resale value greater than the cost of processing the material for subsequent beneficial use and all the solid waste generated from processing the materials is disposed of in a solid waste facility. Illegitimate recyclers typically charge tipping fees to accept materials, retaining most of these as profits with no further effort. (It should be noted that many legitimate recyclers and composters charge tipping fees to accept recyclable materials. It is not the intent of the legislation nor the rules to restrict these operations; only to require that they further demonstrate their qualification for exemption from municipal solid waste registration and permitting requirements.) Stakeholders pointed out that an unscrupulous facility could circumvent the rule by imposing hauling charges in lieu of tipping fees. The language requiring a facility to show that the material is potentially recyclable and has an economically feasible means of being recycled is meant to provide assurance that a facility actually demonstrates, as the statute requires, that the primary function of the facility is to process materials that have a resale value greater than the costs of processing the materials for subsequent beneficial use. To provide this assurance, a recycler must be able to reasonably demonstrate that there is or will be a market for a recycled/recyclable material.

Section 328.4(a)(3) has been added from proposal in response to oral comments. Originally, the exemption in §328.4(a)(2) was intended to cover to all facilities exempted by THSC, §361.119(c). However, smelters and affiliated secondary metals recycling facilities felt that it was necessary that the specific exemption for their industry in the statute should be reflected in the adopted rule. The language of adopted §328.4(a)(3) mirrors the language in the statute.

Section 328.4(b) specifies the conditions under which recyclable material may be accumulated or stored at a facility. Based on the comments received during the comment period, the conditions for which recyclable material may be accumulated or stored have been amended. Section 328.4(b) language was derived from 30 TAC §335.17, relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials, which includes a prohibition against speculative accumulation of materials. In addition to the language borrowed from §335.17, §328.4(b)(2)(B) will establish that if a material has been processed for recycling or undergoes processing for beneficial use (see definition in §328.2) and is managed as a commodity to be sold for recycling, it is not considered to be accumulated material for the purposes of the section. Within 270 days after the effective date of this rule, or 270 days from the commencement of a new facility's operations, the amount of material recycled, or transferred to a different site for recycling, must equal at least 25% by weight or volume of the material accumulated 90 days from the effective date of this rule or 90 days from the commencement of a new facility's operation. During each subsequent six- month period, the amount of material that is recycled, or transferred to a different site for recycling, must equal at least 50% by weight or volume of the material accumulated at the beginning of the period. Materials for mulching and composting facilities that have been ground for use as mulch, or prepared and placed in a windrow, static pile, or vessel for composting or materials for other recycling facilities, that have been processed for recycling, shall not be considered to be accumulated, but shall be considered to be recycled, as long as they have been contained, covered, or otherwise managed to protect them from degradation, contamination, or loss of value as recyclable material.

Section 328.4(c) has been clarified since proposal to allow the agency to require a non-complier to obtain a municipal solid waste registration or a permit. This is left to the discretion of the executive director to allow flexibility for legitimate recycling facilities that receive massive amounts of materials resulting from natural disasters, or that may not have failed to recycle or process for recycling due to other unavoidable circumstances. The intent of the legislation was to prevent illegitimate recycling operations, not to force legitimate recyclers to comply with registration or permit requirements from which they should be exempt. The reference to subsection (e) was added and the reference to §328.5(g) concerning reporting and recordkeeping requirements was deleted. Section 328.4(d) - (f) has been added since proposal to outline the procedures the executive director will use in evaluating and granting applications for alternative compliance with the requirements under the definition of "Incidental amount(s) of non-recyclable waste" in §328.2. The agency intends to create a guidance document for the regulated community and for agency field enforcement personnel detailing the kinds of recordkeeping documents that will be sufficient to demonstrate compliance with the 10% incoming and 5% outgoing limits in the rule.

Section 328.5, Reporting and Recordkeeping Requirements, fulfills the statutory requirement in THSC, §361.119, that the commission "adopt rules, including recordkeeping and reporting requirements." Section 328.5(a) applies to facilities and operations claiming to be exempt from registration and permitting under §330.4(f)(1)(B) or registration and permitting under Chapter 332. Paragraphs (1) - (4) specify the exemptions provided by the legislation. The federal government has been added to the list of exemptions. Paragraphs (1) - (3) provide exemptions identical to those in §328.4. Subsection (a)(4) exempts "A facility that is owned, operated, or affiliated with a person that has a permit to dispose of municipal solid waste," as directed by THSC, §361.119.

Section 328.5(b) covers information to be included in the facility's report to the commission. Additional reports are required only if information submitted on a previous report has changed. The commission anticipates that the report will consist of two parts: the Core Data Form and an explanation of how and what materials will be stored and processed. Section 328.5(c) requires recordkeeping necessary to demonstrate compliance with the limitations on storage of materials in §328.4, and to demonstrate reasonable efforts to maintain source-separation and limit non-recyclable waste to incidental amounts. At the request of stakeholders, language has been included that requires facilities to make these records available to local governments. The statutory authority for this provision is in THSC, §361.032(b), relating to Inspections: Right of Entry. Section 328.5(c)(2)(D) has been changed since proposal to clarify that an owner or operator of a facility shall maintain all records necessary to show documentation that incidental non-recyclable waste constitutes no more than 5% of the average total scale weight or volume of all materials received in the last six- month period. Due to the nature of the operations at recycling facilities, the recordkeeping requirements are not intended to include inspections of every incoming load. It is not expected that one load that is an aberration regarding percentages of incidental waste constitutes a violation. An audit procedure addressing these issues, based on current, similar agency audit procedures, will be developed in guidance. Section 328.5(e) has been added since proposal that will require composting facilities exempt from authorization or requiring notification and recycling facilities that manage combustible materials not exempt from this section to have a fire prevention and suppression plan that shall be made available to the local fire prevention authority having jurisdiction over the facility for review and coordination. The agency will, in its guidance document, clarify the types of combustible materials covered by this requirement, including, but not limited to, wood, brush, wood chips, and paper.

Section 328.8, Measurement of Recycling Rates, changed only in title, since the title that has been deleted is now the title of §328.5. The new title more accurately describes the contents of §328.8.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rules are not subject to §2001.0225 because they do not meet the definition of a "major environmental rule" as defined in that statute. Although the intent of the rules is to protect the environment or reduce risks to human health from environmental exposure, the rules will not have an adverse material impact on 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 new sections and amendment to Chapter 328 are intended to identify and affect only those facilities improperly disposing of municipal solid waste without an authorization and, therefore, do not meet the definition of a major environmental rule. These rules do not meet any of the four applicability requirements listed in §2001.0225(a). These rules do not exceed any standard set by federal law for distinguishing facilities improperly disposing of municipal solid waste from legitimate recycling facilities, and these rules are specifically required by state law under THSC, §361.119. These rules do not exceed the requirements of state law under THSC, §361.119, and the rules are not required by federal law. There is no delegation agreement or contract between the state and an agency or representative of the federal government to implement any state and federal program to distinguish facilities improperly disposing of municipal solid waste without authorization from legitimate recycling facilities. These rules are not adopted solely under the general powers of the agency, but rather specifically under THSC, §361.119, as well as the other general powers of the agency.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these rules and performed an analysis of whether Texas Government Code, Chapter 2007 is applicable. The commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply to these rules because this is an action taken to prohibit or restrict a condition or use of private real property that constitutes a public or private nuisance, which is exempt under Texas Government Code, §2007.003(b)(6). Specifically, the statutory basis for these rules, THSC, §361.119, directs the commission to develop these rules to ensure that a solid waste processing facility is regulated as a solid waste facility under the Texas Solid Waste Disposal Act and is not allowed to operate unregulated as a recycling facility, and to ensure that recyclable material is reused and not abandoned or disposed of and that recyclable material does not create a nuisance or threaten or impair the environment or public health and safety. Garbage or other organic wastes deposited, stored, discharged, or exposed in such a way as to be a potential

instrument or medium in disease transmission to a person or between persons is a public health nuisance by law under THSC, §341.011(5). A facility that operates without appropriate controls can become a private nuisance. The recordkeeping and reporting requirements in these rules attempt to identify municipal solid waste facilities operating unregulated as recycling facilities and require that they obtain the proper authorization with regulatory controls.

Nevertheless, the commission further evaluated these rules and performed an analysis of whether these rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of these rules is to ensure that recyclable material is reused and not abandoned or improperly disposed of, and that recyclable material does not create a nuisance or threaten or impair the environment or public health and safety. The rules would substantially advance the stated purpose by requiring recordkeeping and reporting and imposing limitations on the storage of recyclable material. The records required to be kept and reports required to be filed will assist agency enforcement staff to easily distinguish legitimate recycling facilities from municipal solid waste facilities operating without proper authorization.

Promulgation and enforcement of these rules will be neither a statutory nor a constitutional taking of private real property. Specifically, the 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, or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, these rules do not prevent property owners from operating legitimate recycling facilities, which reuse or recycle materials and thus legitimately protect the environment and public health and safety by reducing the volume of the municipal solid waste stream.

There are no burdens imposed on private real property, and the benefits to society are facilities properly and legitimately recycling materials and reducing the volume of the municipal solid waste stream and facilities properly and legitimately processing municipal solid waste with appropriate environmental and health and safety controls. Therefore, the adopted rules will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rules and found that the rules are identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and will affect an action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11 and, therefore, the applicable goals and policies of the Texas Coastal Management Program (CMP) have been considered during the rulemaking process. The CMP goal applicable to these rules is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs) in accordance with 31 TAC §501.12(l). The CMP policy applicable to these rules is 31 TAC §501.14(d)(1) - (2). In accordance with §501.14(d)(1), the construction and operation of solid waste facilities in the coastal zone shall comply with all policies for CNRAs relating to the construction and operation of solid waste treatment, storage, and disposal facilities for both new facilities and areal expansion of existing facilities. In accordance with §501.14(d)(2), the commission shall comply with all policies for CNRAs when issuing permits and adopting rules under THSC, Chapter 361.

The specific purpose of these rules is to make existing commission rules consistent with the new legislative changes made to THSC by HB 2912. The rules require the commission to ensure solid waste processing facilities are regulated as solid waste facilities and are not allowed to operate unregulated as recycling facilities. The commission anticipates that promulgation and enforcement of these rules will not have a direct or significant adverse effect on any CNRAs, nor will these rules have a substantial effect on commission actions subject to CMP. Therefore, the commission has made a finding of consistency with the applicable goals and policy. The commission solicited public comment, but no comments were received.

PUBLIC COMMENT

The public comment period closed on June 7, 2002. A total of 18 commenters provided both general and specific written comments on the proposed rules. The commenters were: Abitibi- Consolidated, Inc. (ACI); Balcones Recycling (BR); City of Fort Worth; City of Houston; Community Waste Disposal, Inc.; Department of the Air Force; El Paso Disposal, LP (EPD); Goodwill Industries; Harris County Commissioners Court (HCCC); Harris County Public Health & Environmental Services (HCPH&ES); Representative Charlie F. Howard; I-27 Recycling & Public Scales (I-27); Novus Wood Group (NWG); Silver Creek Materials Recycling & Compost (SCMR&C); Texas Chapter National Solid Wastes Management Association (NSWMA); Trinity Waste Services (TWS); Waste Management; and one individual.

RESPONSE TO COMMENTS

Department of the Air Force commented that the rule cannot be applied to federal facilities because the rule does not apply equally to all "persons." The waiver of sovereign immunity in the Resource Conservation and Recovery Act (RCRA) mandates that federal facilities comply with requirements "in the same manner, and to the same extent, as any person is subject to such requirements." 42 United States Code (USC), §6961(a). The definition of "person" includes political subdivisions of a state (42 USC, §6903(15)). Sections 328.4(a)(1) and 328.5(a)(1) of the rule exclude facilities owned or operated by local governments from the requirements of the rule. Because the rule discriminates against federal facilities by exempting certain "persons" from its requirements, the rule exceeds the limited waiver of sovereign immunity promulgated by Congress. Waivers of the federal government's sovereign immunity must be unequivocally expressed in statutory text; they may not be implied or inferred. Federal facilities should be included in the exemptions contained in §328.4(a)(1) and §328.5(a)(1) of the rule.

The commission agrees with this comment. The waiver of immunity from suit in RCRA clearly and unambiguously requires that federal facilities be subject to state requirements in the same manner, and to the same extent, as any person. RCRA defines "person" to include not only a state or political subdivision of a state, but also a municipality. THSC, §361.119, exempts facilities owned or operated by a local government from the storage and recordkeeping requirements of the rules, as well as smelters and affiliated secondary metals recycling facilities, and exempts facilities owned, operated, or affiliated with a person holding a permit to dispose of municipal solid waste from the recordkeeping requirements of the rules. Therefore, the state law treats federal facilities differently, and to a different extent, from some other persons. Sections 328.4(a)(1) and 328.5(a)(1) have been changed to exempt federal facilities from the storage and recordkeeping requirements of these rules. Federal facilities remain

subject to Chapter 330 and may be required to obtain a permit or registration. Also, if a federal facility contracts out its recycling activities, the contractor will be required to comply with these recycling rules.

NSWMA commented that under the proposed definition of "Affiliated with" under §328.2(1), only parent/subsidiary companies can be affiliated. Discussions with legislators before and after the legislative session about THSC, §361.119(d), indicate it was their intent to include sister companies as well. Proposed §328.2(1) should add a subparagraph (C) as follows: "(C) 'A' and 'B' are owned or controlled by the same entities with either 'A' or 'B' possessing a municipal solid waste facility permit within 50 miles of the affiliated recycling facility." EPD commented that the definition of "Affiliated with" should be clarified to include sister business entities that share a common parent. EPD suggested the following rule language for §328.2(1)(C): "(C) 'A' and 'B' are subsidiaries of the same parent entity." Representative Charlie Howard commented that currently the rule does not allow two businesses that are owned by the same entity to claim affiliated status. This is especially troubling for municipal solid waste companies because many of these companies split their landfill and hauling operations for business reasons. Because of specifics of how the municipal solid waste and recycling business operates, this rule needs to be tailored to their specific needs and, in this case, to fail to do so is unfair. Representative Howard suggested that the definition of "Affiliated with" be expanded to include businesses owned by the same individual or entity. Anything less would be unjustly detrimental and discriminatory to many good operators that are exemplary in their compliance efforts.

The commission agrees with the assertion that the principle of fairness is of primary importance in the establishment of effective regulations. However, in this instance, the commission considers consistency with established law and regulation to be a critical aspect of fairness, and sees no compelling reason to create a different standard under this rule for affiliates of a person holding a permit to dispose of municipal solid waste than is applied to other business entities in legal and regulatory precedents that do not consider sister companies to be affiliated. The commission borrowed from and adapted definitions for "substantial interest" from Texas Government Code, §572.005; "affiliate" from the Texas Business and Commerce Code, §24.002(1); and "affiliated shareholder" from the Texas Business Corporation Act, Article 13.02, while using the criterion of 20% interest for affiliation found in the Texas Business and Commerce Code, §24.002(1); Texas Business Corporation Act, Article 13.02; THSC, §361.089(g); and TWC, §7.301(2). The commission has made no changes in response to this comment.

NWG commented that regarding "Affiliated with" the definition can be abused by unscrupulous operators that wish to be exempt from the proposed rules. It is a simple task to assign 20% of the voting stock of a company, which owns a permitted disposal facility, to a related entity for purposes of becoming exempt from the rules. This is a loophole that will be exploited and needs to be closed. The affiliated person must own or operate a permitted disposal facility within 100 miles of the recycling facility seeking the exemption. The cost associated with transporting the recyclable material can be economical within 100 miles, thereby providing the party owning or operating the permitted disposal facility with the ability to dispose of the material if it is not recycled or properly processed.

The commission acknowledges the possibility that a company may seek to avoid regulation through the structuring of its business operations. However, the commission finds that the concept of distance, especially in a state as large and diverse as Texas, cannot be appropriately incorporated in a definition of affiliation. Rather, the commission understands the intent of the legislative exemption to be an acknowledgment of a permitted entity's vested interest in the responsible management of solid waste, in accordance with the requirements of its permit. The commission has made no changes in response to this comment.

BR commented that excluding municipally-owned facilities (that operate in direct competition with private industry), non-profit entities, and business entities that own and operate both recycling and landfill operations from the recycling rules amounts to uneven and unfair oversight of recycling facilities. Any rules that are adopted for and directed at the private sector should apply equally to public sector recycling operations and all business entities that operate stand-alone recycling operations. An individual commented that §328.4(a)(1) should be deleted from the proposed rules. Exempting facilities owned or operated by local governments from storage and accumulation limitations creates a dual standard and places non-governmental organizations at a competitive disadvantage. An individual commented that §328.5(a)(1) should be deleted from the proposed rules. The exemption of facilities owned or operated by local governments from reporting and recordkeeping requirements creates a dual standard that places a non-governmental organization at a competitive disadvantage. This individual also commented that §328.5(a)(3) should be deleted from the proposed rules. All recycling facilities located outside of the boundaries of permitted landfills should be required to comply with same reporting and recordkeeping requirements. This paragraph creates a dual standard based on facility ownership. NSWMA commented that the legislature enacted an exception to THSC, §361.119(c), for facilities that reuse or smelt metals. This exemption should be listed as passed by the legislature in proposed §328.4(a).

The commission is charged with implementing the legislation, which contains exclusions for various types of recycling facilities, and cannot respond to comments that address the equity of the statutory law. The exemptions specified in the legislation (THSC, §361.119), including facilities that reuse or smelt metals, have been provided for in proposed §328.4 and §328.5. However, the commission has added no exclusions or exceptions in drafting the Chapter 330 rules that create basic standards for the registration and permitting requirements of municipal solid waste facilities, taking its statutory authority for those rules from other legislation, including THSC, §361.011, which provides the commission all powers necessary and convenient to carry out its responsibilities concerning the regulation and management of municipal solid waste. The commission has made no changes in response to these comments.

EPD commented that there is no provision for financial assurance to cover clean-up costs for a sham recycler who simply goes out of business leaving solid waste in place. Consideration should be given to developing such a mechanism. NWG commented that a financial assurance requirement is necessary to provide monies to address large quantities of stockpiled recyclable material that are not processed properly in a timely manner. Combining the reporting and processing requirements with some form of financial assurance will not be unreasonable for compliant operators and will present barriers to entry for unscrupulous operators. A financial assurance requirement was consistent with the solid waste rules and should be required of

those existing and future recycling facility operators. SCMR&C commented that §328.4(c) should be rewritten as follows: "(c) A recycling facility that fails to comply with the requirements of this section shall be required, if the executive director so requests in writing, to post financial assurance equal in amount to what is deemed to be necessary for clean-up and closure of site operations should the entity fail or be ordered to cease operations by the Commission." HCCC commented that prior to the operation of mulching and composting facilities, financial assurance as per 30 TAC Chapter 37, Subchapter J, should be required for site closure and corrective actions (including fire suppression). HCCC recommended that each site provide $1 million value of financial assurance, which would require expansion of the applicability of Chapter 37 to include exempted composting facilities.

The commission disagrees with the suggestion that financial assurance be required of recycling facilities that meet the standards and operational requirements of the new rules, which are intended to prevent the mismanagement of recyclable materials and, therefore, the need for cleanup and remediation of mismanaged facilities. Further, financial assurance is currently required only for registered and permitted solid waste facilities and permitted composting facilities and would, therefore, not be appropriate for recycling facilities exempt from registration and permitting under §330.4(f). While a facility that does not comply with these rules may be subject to regulation as a solid waste facility under Chapter 330, it is not the intent of the legislation to regulate a compliant recycler as a solid waste facility.

However, the requirements of the Chapter 328 do not constitute the only restrictions and penalties to which a recycler, legitimate or otherwise, is subject. Once the commission makes a determination that an illegitimate recycler is a solid waste facility requiring a municipal solid waste registration or permit, other statutory remedies can be applied. For example, a person that disposes or allows or permits the disposal of more than five pounds of solid waste, for a commercial purpose, at a place that is not an approved solid waste site, is subject to both civil suit and criminal prosecution under the Texas Litter Abatement Act, which may result in an injunction against the illegal activity, fines, recovery of damages and costs, and imprisonment of the guilty person. The commission has made no changes in response to these comments.

Representative Charlie Howard commented that he has concerns with the inspection time period and compliance requirements. Representative Howard stated that a new rogue operator would have two years before any enforcement action can be taken. This is not effective and would not address any of the issues faced in Fort Bend County. Many rogue operators are not even in business for a year before they have made a mess and disappeared. Representative Howard suggested that it is essential that the time period be shortened to three months if possible, but absolutely no more than six months, from the first opening of the business or at the start of the rule for previously existing operators. The percentage of material required to be recycled during each period could also be adjusted to reflect shorter periods, but only if necessary in order to make the rule fair. For new operators, in order to assure that a new operator was truly a recycler and was recycling in a timely fashion, immediate progress towards recycling should be demonstrated at shorter periods during the first time frame. This is so that a rogue operator cannot start a business with the knowledge that no one can require any recycling for the first two periods, which could be as long as a year. There needs to be immediate demonstrated progress so that a new problem facility can be dealt with within weeks or months, not a year. NWG commented that the proposed reporting requirement and time frames required to comply are too long and can be abused by unscrupulous recycling operators. Essentially, a new operator can open January 2 of any year and have two years in which to begin to comply with the processing requirements described in the proposed rules. NWG suggested that the reporting period be increased to quarterly from annually to be consistent with the solid waste rules and that the percentage of material that is "recycled or transferred to a different site for recycling, equals 50% by weight or volume of the material accumulated during the period plus any unprocessed material balances carried over from a prior period." This will identify the bad actors more quickly, which will reduce the potential impact and risk associated with all future illegal dumping sites. SCMR&C commented that §328.4(b)(2), and (3) should be rewritten as follows: "(b)(2) For existing facilities that have been conducting recycling for at least six-months, by the end of each six-month period (the first commencing on January 1 and ending on June 30; and the second commencing on July 1 and ending on December 31) the amount of material that is recycled, or transferred to a different site for recycling, equals at least 75% by weight or volume of the material accumulated at the beginning of that six-month period. (3) for an existing facility that is beginning a new form of recycling or a new facility that is beginning to recycle, by the end of the first six-month period (commencing on the first day of recycling operations) the amount of material that is recycled, or transferred to a different site for recycling, equals at least 25% by weight or volume of the material accumulated during that six-month period and the amount of material that is recycled, or transferred to a different site for recycling, equals at least 75% by weight or volume of the material accumulated at the beginning of each subsequent 6-month period." I-27 commented that accumulation of recyclable materials is not necessarily based on day-to-day activities. Most are generated after an act of God. Hail, wind, and tornadoes cause a drastic increase in the amount of material. Individual situations, including previous years' weather calamities, should be taken into account for the new storage limitation provision. HCPH&ES commented that §328.4(c) should be amended to read as follows: "A recycling facility that fails to comply with the requirements of this section shall be required to obtain a permit or registration as a municipal solid waste facility under the provisions of §330.4 of this title, except when additional storage time is necessary, due to natural disaster, as determined by the executive director based on local conditions." Such language will clarify the situation where exemption from the time limits can be allowed instead of leaving enforcement of this provision to lack of action, as in the current proposed language. This would allow a facility operator to specifically and proactively apply for an exemption in a case of natural disaster instead of waiting for the inactivity of the executive director. NSWMA commented that in proposed §328.4, limitations are placed on the amount of time recyclable material may be stored at a facility. A provision should be included to allow a facility to apply to the commission for a waiver of the storage limitations for one year if an unforeseen event beyond its control prevents the facility from meeting the storage requirements. EPD commented that proposed §328.4(c) should be revised to read as follows: "A recycling facility that fails to comply with the requirements of this section shall be required to obtain a permit or registration as a municipal solid waste facility under the provisions of §330.4 of this title unless overruled by the executive director and/or a majority vote of the commissioners as a discretionary act." NSWMA commented that proposed §328.4(c) says a recycling facility that fails to comply with the storage limitations

shall be required, if the executive director so requests in writing, to obtain a permit or registration as a municipal solid waste facility. The burden of compliance with the storage limitations and applying for a permit or registration should be on the facility operator. The burden should not be on the executive director to request in writing that operators comply with the rules. This will allow a facility to operate illegally without a penalty until caught.

The commission agrees with the need to prevent the accumulation of recyclable materials for extended periods of time, and has amended proposed §328.4 and §328.5 to require monitoring and processing of accumulated materials every six months. Language has also been added to proposed §328.4(c) referring to circumstances beyond a facility's control, including those noted by commenters, that may be considered exceptions to the storage requirements of the section. A vote of the commission is not necessary to authorize such exceptions. Enforcement of this section is expected to follow the commission's standard enforcement process, whereby a non- compliant facility is issued a notice of violation and a timetable to come into compliance prior to a determination that a facility is required to obtain a solid waste permit or registration.

TWS commented that §328.4 should require quarterly turn-over of a small percentage of the stored materials and annual turnover of a larger percentage of the stored recyclable material. Recycling facilities should be required to either recycle a portion of their on-site material every quarter or post a security bond that would cover the cost of the processing of all on-site materials. TWS encouraged the commission to also retain the requirement that a facility annually recycle 75% of the material accumulated. TWS believed it was appropriate to require a facility to show that it regularly recycles at least a small portion (25%) of its intake and that it annually recycles a majority (75%) of the material stored on-site. If a facility were unable to make this determination, the facility should be excused from the requirement if it posts a bond in the amount required to process the material. Posting such a bond would show that the operation has the actual intention to recycle when the conditions or the market is right.

As noted in response to the previous comment, the commission agrees with the need to prevent the accumulation of recyclable materials for extended periods of time, and has amended proposed §328.4 and §328.5 to require monitoring and processing of accumulated materials every six months. However, the commission disagrees with the suggestion that a bond be required of recycling facilities, as such a requirement is beyond the scope of the enabling legislation and is currently required only for registered and permitted solid waste facilities and permitted composting facilities.

EPD commented that a real concern was the sham recycler who begins operating a facility; abandons it and moves to a new location, leaving behind an accumulation of solid waste; and then reopens in a new location. The proposed storage rules seemed to leave a loophole. For this reason, §328.4(b)(2) should be revised to read as follows: "(2) during each calendar year (commencing on January 1), the amount of material that is recycled, or transferred to a different site for recycling, equals at least 75% by weight or volume of the material accumulated at the beginning of the period and at least 75% by weight or volume of the additional material brought to the site during the calendar year."

The commission disagrees with the proposed change, as it could seriously jeopardize the viability of legitimate recyclers that face seasonal and annual fluctuations both in the incoming stream of feedstock materials and in the markets for their processed materials or products. Supply and market variability are historical characteristics of the recycling industry, and are largely beyond the control of a facility owner or operator. The suggested requirement would also be significantly more stringent than the regulation currently applied to generators of industrial solid waste and municipal hazardous waste in §335.17(a)(8). In addition, the shortening of monitoring and storage intervals to six months in length reduces the likelihood of an illegitimate operator relocating his business to avoid compliance requirements and enforcement, particularly when other regulatory performance measures are in effect and enforceable from the first day of a facility's operation. The commission has made no changes in response to this comment.

An individual commenter commented that the definitions of "Processed for recycling" in §328.2(2) and "Source-separated recyclable material" in §328.2(3) are good definitions and should be retained in the proposed rules. This individual also commented that §328.4(b)(2)(B) should be retained in the proposed rules. NWG commented that the definition of "Processed for recycling" should be amended to prevent unscrupulous operators from avoiding its intent. In the wood processing business, for example, an operator may receive large quantities of land clearing debris (trees, stumps, and brush) and claim that it has processed the material by simply shaking the dirt from it and then stacking it up in large piles. The last portion of the proposed definition was unclear and subject to interpretation or misinterpretation and may provide unscrupulous operators with the ability to claim that they have processed the material thereby complying with the volume reduction requirements in §328.4(2). NWG suggested the following rule language for §328.4(2) "cleaning, grinding, size reduction, or other mechanical preparation at a recycling facility to make it amenable for subsequent use." Including the words "size reduction," "mechanical preparation," and "use" in the definition may preclude abuse of the rules by unscrupulous operators.

The commission agrees that unscrupulous operators should not be able to circumvent the storage requirements of §328.4(b) through token processing of accumulated materials. Rather than amending the definition of "Processed for recycling," the commission has amended proposed §328.4(b)(2)(B), specifying certain mulching and composting practices to qualify materials as "processed" as a more appropriate means of preventing this practice.

ACI commented that §328.4(a)(2) and §328.5(a)(2) should be clarified regarding the receipt of recyclables directly from the public. Exempting these facilities will allow the commission to focus on the sham recyclers the legislation intends to eliminate. ACI recognized that these approaches go beyond this rulemaking but should be considered as an alternative to the current proposal. ACI recommended clarification of proposed §328.4(a)(2) and §328.5(b), and recommended that the phrase "the facility receives no financial compensation to accept any of the recyclable materials it receives" be deleted from §328.4(a)(2). ACI questioned the reasonableness of the limitation of these exemptions to exclude recycling facilities that may receive financial compensation to accept any of the recyclable materials. Whether the material was bought by the recycling facility subject to a recycling processing fee is not determinative of the legitimacy or quality of the recycling operation. ACI recommended that the phrase, "the facility receives no financial compensation to accept any of the recyclable material it receives" be deleted. I-27 commented that instead of penalizing businesses by withholding exemptions

for accepting tipping fees, encourage the use of the fee so businesses have more funds for individual research and experimentation of uses for recyclable resources. Evaluate each individual business by its acquisition of equipment to be used in recycling and its labor force. NSWMA commented that proposed §328.4(a)(2) creates an exemption from the storage limitations for facilities that accept more than 50% of its material from the public at no charge. That exemption is not authorized by the statute and should have been deleted.

The commission disagrees with the suggested changes. The draft rule language exempting facilities that charge no fees to accept any of the recyclable materials they receive applies a practical standard to implement the terms of the statute: "(c) A facility that reuses or smelts recyclable materials or metals and the operations conducted and materials handled at the facility are not subject to regulation under rules adopted under this section if the owner or operator of the facility demonstrates that: (1) the primary function of the facility is to process materials that have a resale value greater than the cost of processing the materials for subsequent beneficial use."

The fee standard also avoids requiring reports from backyard composters and community gardens, as well as drop-off centers operated by schools, churches, and non-profit or volunteer community groups. It also exempts the vast majority of legitimate recycling businesses that pay for their feedstocks from furnishing detailed records of their processing costs and resale value of processed materials, which they would be reluctant to provide and difficult for an inspector to verify. The commission has made no changes in response to these comments.

EPD commented that in proposed §328.4(a)(2) and (b)(1) and §328.5(a)(2), anything could be characterized as being "potentially recyclable." EPD suggested the following changes: the words "the material is potentially recyclable and has an economically feasible means of being recycled" should be deleted and the following words substituted therefor: "the material meets the criteria of §328.4(c)." EPD commented that a new §328.4(c) should be added, and the current §328.4(c) should be relettered to §328.4(d). The new §328.4(c) should read as follows.

"(c) A recycling facility in possession of recyclable material must demonstrate that: (1) there are commercially-feasible manufacturing means for processing or preparing the recyclable material for use in the production of new saleable products; (2) there are commercially-feasible means for recyclable material when processed or prepared; (3) the recyclable material meets, or when processed or prepared will meet, a commercial specification grade; (4) a market has existed, exists, or is likely to exist for the recyclable material when processed or prepared; (5) substantial quantities of the recyclable material when processed or prepared or material of a like-kind have been made available for use as feedstock for the production of new saleable products; and (6) the recyclable material when processed or prepared can be a replacement or substitute for a virgin raw material in the production of new saleable products."

The commission disagrees with the proposed amendments, as they are essentially no more specific than the current proposed rule language. Simply stated, a recycler must be able to demonstrate that the materials stored at his facility are recyclable in practice rather than in theory; that is, identify someone that will buy the materials or take possession of them for beneficial reuse, or show that they can be beneficially used by the facility owner or operator. Examples of specific types of acceptable evidence to substantiate the recyclability of a particular material would include published market indexes for a particular material and region, sales receipts or price quotations from buyers, and evidence of the recycler's ability to process the material to market specifications. The commission has been successful in enforcing this same language in its industrial and hazardous waste rules (§335.17(8)). The commission has made no changes in response to these comments.

EPD commented that it was not clear in the proposed rules that both existing facilities and new facilities were required to file reports. The reporting requirements should be structured as a demonstration that the facility is, in fact, exempt from registration and permitting requirements. The current reporting requirements do not appear to be adequate. Section 328.5(b) should be revised to read as follows.

"(b) Prior to the commencement of operations of new facilities, and within 60 days after the effective date of these rules for existing facilities, the owner or operator of a facility that serves as a collection and processing point for only non-putrescible source-separated recyclable materials, or for mulching or composting of only source-separated yard trimmings, clean wood material, vegetative material, paper, and manure shall demonstrate that the facility is exempt from the registration and permit requirements under §330.4(f)(B) or (C) of this title by filing a report on a form or forms to be provided by the executive director, which includes a description of : (1) the type(s) of material(s) accepted for recycling; (2) any storage of materials prior to recycling; and (3) how the material(s) will be recycled. Subsequent reports shall be submitted annually thereafter and within 90 days of the effective date of any change to update or change any information contained in the facility report."

The commission disagrees with the proposed change. The addition of the words "shall demonstrate that the facility is exempt from the registration and permit requirements under §330.4(f)(B) or (C) of this title by filing a report" to this section of the rules would not enhance the value of the information contained in the report, which is unchanged from the current proposal. The commission considers the reporting requirement for recycling facilities to be primarily a notification process. Actual demonstration of a facility's exemption from solid waste authorization requirements is to be based on the facility's performance, and the records maintained on-site to substantiate that performance. On-site inspection of a facility's operations and access to its records by state and local officials constitute the fairest, most effective means of evaluating a facility's compliance and regulatory status. The commission has made no changes in response to this comment.

EPD commented that as an assurance of compliance there should be some record or justification subject to examination for facilities that are exempted from the storage and recordkeeping requirements of the new section because they meet the requirements for exemption. EPD suggested adding the following language to proposed §328.4(a)(2) and §328.5(a)(2): "Prior to the commencement of operations of new facilities, and within 60 days after the effective date of these rules for existing facilities, the owner or operator of a facility described in this subsection shall certify on a form or forms to be provided by the executive director that the facility meets the criteria of this subsection, and will give notice when the facility ceases to operate."

The commission disagrees with the proposed change, as it cannot enforce a regulatory requirement (in this case, reporting) on

an entity that is exempted by law from that requirement. The commission has made no changes in response to this comment.

NWG commented that all operators should be required to comply with the terms and conditions imposed by the Texas Pollutant Discharge Elimination System storm water multi-sector general permit. This requirement should be referenced in the rules where it is appropriate to do so.

The commission agrees with the comment, and has included a general reference to compliance with TWC, Chapter 26 (relating to Water Quality Control) in adopted §328.3.

HCPH&ES commented that in addition to requiring a site-specific fire prevention and suppression plan to be approved by the local fire marshal for recycling facilities, a technical guide should be drafted to assist these facilities in preparing a fire protection and suppression plan. HCPH&ES provided a draft document of Fire Protection and Suppression Plan Guidelines for Mulch and Tire Recycling Facilities as prepared by Harris County Fire and Pollution Hazard Review Committee to assist the commission in drafting such a technical guide. HCCC commented that for each recycling facility storing combustible materials, a site-specific fire prevention and suppression plan should be approved by the local fire marshal prior to operation. HCCC provided technical standards for said fire prevention and suppression plan. HCCC stated that this plan could be added to §328.4 with reference from Chapter 332 and, alternatively, it could be applied to only composting/mulching facilities by placement in Chapter 332.

The commission agrees that fire protection is an important aspect of recycling operations that handle combustible materials. Therefore, §328.5(e) has been added to require composting facilities exempt from authorization or requiring notification and recycling facilities that manage combustible materials to have a fire prevention and suppression plan and be made available to the local fire prevention authority having jurisdiction over the facility for review and coordination.

ACI commented regarding §328.5(b) that the reporting requirements should be clarified to assure that business confidential or other competitive information not be included in the reports. ACI was concerned about the reporting and subsequent release to competitors of information regarding the volume of specific materials recycled as well as specific business contractual relations (e.g., end users). ACI recommended that the report only require the identification of the materials and end use markets on a generic basis.

HCCC commented that per §328.5(b), the draft language proposed that certain facilities "report on a form to be provided by the executive director." HCCC suggested that this form include identification of key personnel by full name and driver's license number in addition to the information required in the current commission forms 10400 (Core Data Form) and 0651 (Compost Form No. 1). Such information would assist in enforcement actions, if needed. Additionally, HCCC commented that the commission should create a process for local governments to have a timely access to the information provided in these forms. I-27 commented that records were already available for United States Internal Revenue Service officials and state sales tax representatives. I-27 stated, "Why should records showing total incoming and outgoing material be available for local government officials? What business is it of any local government what I do? If these records keeping rules are passed, the only agency the rules apply to should have access to the information and then, only if there is sufficient evidence to show non-compliance. What is this information going to be used for? What is considered "local official" government officials? Does this include any city or county official from the mayor to the dogcatcher and every councilman from city hall? My taxing district is New Deal. Does this give the sheriff of New Deal the right to walk in and go through my personal business records?"

The commission will require the reporting of only that information necessary to identify a regulated entity as required by commission Form 10400 (Core Data Form) and establish the nature of its activities, similar to commission Form 0651 (Compost Form No. 1, Notice of Intent to Operate A Compost Facility). These forms are public records, and contain no information that could be considered proprietary to a business interest. Recordkeeping requirements in the rules include only that information necessary to verify a facility's regulatory status and compliance, consistent with the state's authority to regulate in the interests of environmental protection and public health and safety. These records, as proposed, may be accessed by agents or employees of the executive director or of local governments with territorial or extra-territorial jurisdiction over the property on which the facility is located (including local health, safety, environmental, and law enforcement officials with the authority to enforce THSC). The commission has made no change in regard to these comments.

I-27 commented that "excluded facilities are those owned or operated by local governments and those whose primary function is to process materials that have a resale value greater than the cost of processing the materials." Primary function should be changed to "those whose intent is to process." By the use of "intent," the processor of the material would have to show ability by acquiring equipment and a firm lease of the property or a purchase agreement.

The commission disagrees with the suggested change, as the intent of a facility owner or operator is not subject to objective evaluation, nor does it guarantee the protection of environmental quality and public health and safety, which are the state's primary interests in this regulatory area. The commission maintains that the performance standards contained in the rules provide fair criteria by which to evaluate the day-to-day and overall operations of recycling and solid waste facilities in the protection of these interests. The commission has made no changes in response to this comment.

I-27 commented that the best product produced is out of ground asphalt shingles which need to age in order to become brittle before being ground. This produces a more uniform material and results in less machine maintenance. The more extreme the temperature changes are, the better the final product is. Also, the rule should exclude inert recycled materials and concrete.

The commission recognizes that recycling processes imitate natural systems and can be aided by them. However, a recycling facility is expected to recycle materials, both organic and inert, more rapidly than they are recycled in nature, and this expectation may be legitimately expressed and enforced through the rules. The commission has made no changes in response to this comment.

SUBCHAPTER A. PURPOSE AND GENERAL INFORMATION

30 TAC §§328.2 - 328.5

STATUTORY AUTHORITY

The new sections are adopted under THSC, Texas Solid Waste Disposal Act, §361.119, which provides the commission with the authority to adopt rules to ensure that a solid waste processing facility is regulated as a solid waste facility under Texas Solid Waste Disposal Act and is not allowed to operate unregulated as a recycling facility; §§361.011, 361.017 and 361.024, which provide the commission with the authority to adopt rules necessary to carry out its powers and duties under Texas Solid Waste Disposal Act; §361.022, which establishes state public policy concerning municipal solid waste to include recycling of waste as a preferred method and requires the commission to consider that policy when adopting rules; and §361.428, which provides the commission with the authority to adopt rules establishing standards and guidelines for composting facilities. The new sections are also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under TWC.

§328.2. Definitions.

The following terms, when used in this subchapter, shall have the following meanings. Other definitions may be found in Chapters 3, 330, and 332 of this title (relating to Definitions; Municipal Solid Waste; and Composting).

(1) Affiliated with - A person, "A," is affiliated with another person, "B," if either of the following two conditions applies:

(A) "A" owns or controls more than 20% of the voting interest, fair market value, profits, proceeds, or capital gains of "B"; or

(B) "B" owns or controls more than 20% of the voting interest, fair market value, profits, proceeds, or capital gains of "A."

(2) Incidental amount(s) of non-recyclable waste or incidental non-recyclable waste - Non-recyclable waste that accompanies recyclable material despite reasonable efforts to maintain source-separation and that is no more than 10% by volume or scale weight of each incoming load, and averages no more than 5% of the total scale weight or volume of all materials received in the last six- month period, as substantiated by the facility's records. The practices and standards of recycling facilities of a particular type will be considered by the executive director to allow alternative compliance with these standards on a case-by-case basis, as provided for in §328.4(e) of this title (relating to Limitations on Storage of Recyclable Materials). Reasonable efforts to maintain source-separation must include: having dual collection and transportation systems in place for recyclable material and non-recyclable waste at the point of generation; having informed generators and haulers of the source-separation requirements; and the recycling facility having instituted quality control measures including, at a minimum, inspection of incoming loads and rejection by the recycling facility of those loads that would cause the facility to exceed these percentages as described in this paragraph. After incoming loads are processed for recycling, all resulting non-recyclable waste must be managed according to the requirements of this chapter or taken to an authorized solid waste facility within one week. Incidental amount(s) of non-recyclable waste does not include non-recyclable components that are integral to recyclable material, including:

(A) the non-recyclable components of white goods, whole computers, whole automobiles, or other manufactured items for which dismantling and separation of recyclable from non-recyclable components by the generator are impractical, such as insulation or electronic components in white goods;

(B) source-separated recyclable material rendered unmarketable by damage during collection, unloading, and sorting, such as broken recyclable glass; and

(C) tramp materials, such as:

(i) glass from recyclable metal windows;

(ii) nails and roofing felt attached to recyclable shingles;

(iii) nails and sheetrock attached to recyclable lumber generated through the demolition of buildings; and

(iv) pallets and packaging materials.

(3) Processed for recycling or processing for beneficial use - Material has been or is processed for recycling, or undergoes processing for beneficial reuse, if it has been subjected to activities including extraction or separation of component materials (such as the separation of commingled recyclable materials), cleaning, grinding, or other preparation at a recycling facility to make it amenable for subsequent recycling or beneficial reuse.

(4) Secondary metals recycling facility - A facility that:

(A) is predominately engaged in the business of obtaining ferrous or nonferrous metals that have served their original economic purpose in order to convert those metals, or to sell those metals for conversion, into raw material products consisting of prepared grades and having an existing or potential economic value;

(B) has the capability for performing the process by which ferrous or nonferrous metals are converted into raw material products consisting of prepared grades and having an existing or potential economic value, other than by the exclusive use of hand tools, by methods including, without limitation, the processing, sorting, cutting, classifying, cleaning, baling, wrapping, shredding, shearing, or changing the physical form or chemical content thereof; and

(C) sells or purchases those ferrous or nonferrous metals solely for purposes of use in the form of raw materials in the production of new products.

(5) Source-separated recyclable material - Recyclable material from residential, commercial, municipal, institutional, recreational, industrial, and other community activities, that at the point of generation has been separated, collected, and transported separately from municipal solid waste, or transported in the same vehicle as municipal solid waste, but in separate containers or compartments. Source-separation does not require the recovery or separation of non-recyclable components that are integral to a recyclable product, including:

(A) the non-recyclable components of white goods, whole computers, whole automobiles, or other manufactured items for which dismantling and separation of recyclable from non-recyclable components by the generator are impractical, such as insulation or electronic components in white goods;

(B) source-separated recyclable material rendered unmarketable by damage during collection, unloading, and sorting, such as broken recyclable glass; and

(C) tramp materials, such as:

(i) glass from recyclable metal windows;

(ii) nails and roofing felt attached to recyclable shingles;

(iii) nails and sheetrock attached to recyclable lumber generated through the demolition of buildings; and

(iv) pallets and packaging materials.

§328.3. General Requirements.

(a) All recycling facilities shall comply with all applicable regulations of the commission, all applicable federal laws and regulations, as well as, without limitation, the following state laws, as applicable:

(1) Texas Solid Waste Disposal Act, Texas Health and Safety Code (THSC), Chapter 361;

(2) Texas Litter Abatement Act, THSC, Chapter 365;

(3) Texas Toxic Chemical Release Reporting Act, THSC, Chapter 370;

(4) Texas Clean Air Act, THSC, Chapter 382;

(5) Texas Radiation Control Act, THSC, Chapter 401; and

(6) Texas Water Code (TWC), Chapter 26 (relating to Water Quality Control).

(b) Violations of state laws or regulations are subject to enforcement by the commission and may result in the assessment of civil or administrative penalties under TWC, Chapter 7 (relating to Enforcement).

§328.4. Limitations on Storage of Recyclable Materials.

(a) The provisions of subsections (e) and (f) of this section are available to all recycling facilities. In order to be exempt from the registration and permit requirements under §330.4(f)(1)(B) of this title (relating to Permit Required) or under Chapter 332 of this title (relating to Composting), a facility must comply with the requirements of this section unless:

(1) the owner or operator of the facility is a local government or an agency of the state or the federal government;

(2) the facility receives more than 50% of its recyclable material directly from any combination of generators not affiliated with the facility, from the public, or from haulers not affiliated with the facility; the facility receives no financial compensation to accept any of the recyclable material it receives; and the facility accumulating the recyclable material can show that the material is potentially recyclable and has an economically feasible means of being recycled; or

(3) the facility smelts recyclable metals or the facility is a secondary metals recycling facility affiliated with a smelter of recyclable metals, including the operations conducted and materials handled at the facility, provided that the owner or operator of the facility demonstrates that:

(A) the primary function of the facility is to process materials that have a resale value greater than the cost of processing the materials for subsequent beneficial use; and

(B) all the solid waste generated from processing the materials is disposed of in a solid waste facility authorized under Texas Health and Safety Code, Chapter 361 (relating to the Solid Waste Disposal Act), with the exception of small amounts of solid waste that may be inadvertently and unintentionally disposed of in another manner.

(b) Recyclable material may be accumulated or stored at a recycling facility only under the following conditions:

(1) the facility accumulating it can show that the material is potentially recyclable and has an economically feasible means of being recycled;

(2) within 270 days after the effective date of this rule, or 270 days from the commencement of a new facility's operations, the amount of material recycled, or transferred to a different site for recycling, equals at least 25% by weight or volume of the material accumulated 90 days from the effective date of this rule or 90 days from the commencement of a new facility's operation; and

(3) during each subsequent six-month period, the amount of material that is recycled, or transferred to a different site for recycling, equals at least 50% by weight or volume of the material accumulated at the beginning of the period.

(A) In calculating the percentage of turnover, the percentage requirements are to be applied to each material of the same type.

(B) For the purposes of this section, the following materials shall not be considered to be accumulated, but shall be considered to be recycled, as long as they have been contained, covered, or otherwise managed to protect them from degradation, contamination, or loss of value as recyclable material:

(i) materials for mulching and composting facilities that have been ground for use as mulch, or compost, or prepared and placed in a windrow, static pile, or vessel for composting; or

(ii) materials for other recycling facilities that have been processed for recycling.

(c) A recycling facility that fails to comply with the requirements of this section shall be required, if the executive director so requests in writing, to obtain a permit or registration as a municipal solid waste facility under the provisions of §330.4 of this title. A facility that receives large quantities of materials as a result of a disaster or other circumstance beyond its control, and a mulching or composting facility that must accumulate a certain volume of materials in order to obtain grinding services from a contractor may not be subject to one or more of the requirements of subsection (b) of this section as determined by the executive director on a case-specific basis for a specified period of time as provided for in subsection (e) of this section.

(d) A facility that processes recyclable material that contains more than incidental amounts of non- recyclable waste must obtain a permit or registration as applicable under §330.4 of this title unless the executive director approves its request for alternative compliance.

(e) The executive director will use the following procedures in evaluating applications for alternative compliance with the standards in the definition of "Incidental amount(s) of non-recyclable waste" in §328.2 of this title (relating to Definitions) or with the requirements of subsection (b) of this section.

(1) The applicant must apply in writing to the executive director for the alternative compliance. The application must address the relevant criteria contained in subsection (f) of this section.

(2) The executive director will evaluate the application and issue a letter granting or denying the application. Any person affected by the decision of the executive director may file with the chief clerk a motion to overturn according to the procedures set out in §50.139(b) - (g) of this title (relating to Motion to Overturn Executive Director's Decision). The executive director may revoke an alternative compliance for good cause.

(f) The executive director may grant requests for alternative compliance if the applicant submits sufficient documentation demonstrating that the applicant cannot meet the requirements in the definition of "Incidental amount(s) of non-recyclable waste" in §328.2 of this title without affecting the ability to support related recycling activities. Failure to qualify for alternative compliance will subject the applicant to the permitting or registration requirements of §330.4 of this title. The executive director's decision will be based on the following factors:

(1) whether the application is for a single facility or for facilities of a similar type recycling the same kind of material;

(2) the locations of all facilities to be covered by the alternative compliance;

(3) the type(s) of material(s) accepted for recycling;

(4) any storage of materials prior to recycling;

(5) how the material(s) are recycled;

(6) the amount of and reasons for unavoidable damage to incoming material during collection, unloading, and sorting that renders the material unmarketable;

(7) reasons that data on tramp or damaged materials cannot be separated from data on other non- recyclable waste;

(8) reasonable efforts used at the facility or facilities to maintain and enforce source-separation, or reasons why source-separation cannot be practicably maintained and enforced at the facility or facilities;

(9) the amount and type of non-recyclable waste disposed of by the facility or facilities, the method of disposal, and the amount of time between receiving the waste and disposal;

(10) the prevalence of the practice on an industry-wide basis, or on the basis of other similar facilities recycling the same kind of material;

(11) reasons why alternative compliance would be protective of the environment and human health and safety; and

(12) other relevant factors.

§328.5. Reporting and Recordkeeping Requirements.

(a) In order to be exempt from the registration and permit requirements under §330.4(f)(1)(B) of this title (relating to Permit Required) or under Chapter 332 of this title (relating to Composting), a facility must comply with the requirements of this section unless:

(1) the owner or operator of the facility is a local government or an agency of the state or the federal government;

(2) the facility receives more than 50% of its recyclable material directly from any combination of generators not affiliated with the facility, the public, or haulers not affiliated with the facility; the facility receives no financial compensation to accept any of the recyclable material it receives; and the facility accumulating the recyclable material can show that the material is potentially recyclable and has an economically feasible means of being recycled;

(3) the facility smelts recyclable metals or the facility is a secondary metals recycling facility affiliated with a smelter of recyclable metals, including the operations conducted and materials handled at the facility, provided that the owner or operator of the facility demonstrates that:

(A) the primary function of the facility is to process materials that have a resale value greater than the cost of processing the materials for subsequent beneficial use; and

(B) all the solid waste generated from processing the materials is disposed of in a solid waste facility authorized under Texas Health and Safety Code, Chapter 361 (relating to the Solid Waste Disposal Act), with the exception of small amounts of solid waste that may be inadvertently and unintentionally disposed of in another manner; or

(4) the owner or operator of the facility owns or operates a facility permitted to dispose of municipal solid waste, or is affiliated with a person holding a permit to dispose of municipal solid waste.

(b) Within 90 days of the effective date of this section or prior to the commencement of new operations, the owner or operator of a facility that serves as a collection and processing point for only non-putrescible source-separated recyclable materials, or for mulching or composting of only source-separated recyclable material shall report on a form or forms to be provided by the executive director, describing:

(1) the type(s) of material(s) accepted for recycling;

(2) any storage of materials prior to recycling;

(3) how the material(s) will be recycled; and

(4) Subsequent reports shall be submitted to update or change any information contained in the facility report within 90 days of the effective date of the change.

(c) The owner or operator of a facility subject to the requirements of this subchapter shall maintain all records necessary to show:

(1) compliance with the requirements of §328.4 of this title (relating to Limitations on Storage of Recyclable Materials); and

(2) reasonable efforts to maintain source-separation of materials received by the facility, including:

(A) notice to customers of source-separation requirements,

(B) training of staff in the inspection of incoming loads to ensure that they contain no more than 10% incidental non-recyclable waste,

(C) documentation of loads that have been rejected for exceeding 10% incidental non-recyclable waste, and

(D) documentation that incidental non-recyclable waste constitutes no more than 5% of the average total scale weight or volume of all materials received in the last six-month period.

(d) The owner or operator of a facility subject to the requirements of this section shall make these records available upon request to agents or employees of the executive director or of local governments with territorial or extra-territorial jurisdiction over the property on which the facility is located.

(e) The owner or operator of a facility subject to the requirements of this section that manages combustible materials shall have a fire prevention and suppression plan that shall be made available to the local fire prevention authority having jurisdiction over the facility for review and coordination.

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 23, 2002.

TRD-200205598
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: September 12, 2002
Proposal publication date: April 26, 2002
For further information, please call: (512) 239-4712

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SUBCHAPTER B. RECYCLING, REUSE, AND MATERIALS RECOVERY GOALS AND RATES

30 TAC §328.8

STATUTORY AUTHORITY

The amendment is adopted under THSC, Texas Solid Waste Disposal Act, §361.119, which provides the commission with the authority to adopt rules to ensure that a solid waste processing facility is regulated as a solid waste facility under Texas Solid Waste Disposal Act and is not allowed to operate unregulated as a recycling facility; §§361.011, 361.017, and 361.024, which provide the commission with the authority to adopt the rules necessary to carry out its powers and duties under Texas Solid Waste Disposal Act; §361.022, which establishes state public policy concerning municipal solid waste to include recycling of waste as a preferred method and requires the commission to consider that policy when adopting rules; and §361.428, which provides the commission with the authority to adopt rules establishing standards and guidelines for composting facilities. The adopted amendment is also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under TWC.

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 330. MUNICIPAL SOLID WASTE
SUBCHAPTER A. GENERAL INFORMATION

30 TAC §330.2

The Texas Commission on Environmental Quality (commission) adopts an amendment to §330.2. Section 330.2 is adopted *with change* to the proposed text as published in the April 26, 2002, issue of the *Texas Register* (27 TexReg 3532).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The purpose of the amendment is to implement certain requirements of House Bill (HB) 2912, Article 9, §9.03, 77th Legislature, 2001. HB 2912 became effective on September 1, 2001. HB 2912 amends Texas Health and Safety Code (THSC) by adding §361.119, which requires the commission to ensure solid waste processing facilities are regulated as solid waste facilities and are not allowed to operate unregulated as recycling facilities. Corresponding changes to 30 TAC Chapter 328, Waste Minimization and Recycling; and 30 TAC Chapter 332, Composting, are published in the Adopted Rules section of this issue of the *Texas Register*. The adopted amendment to §330.4, Permit Required (Rule Log Number 2001-082-328-WS) that was proposed in a separate rulemaking at the March 13, 2002 commission agenda is also published in the Adopted Rules section of this issue of the *Texas Register*.

SECTION DISCUSSION

Section 330.2. Definitions, adds the definition for "Source-separated recyclable material." The definition of "Source-separated recyclable material" has been changed since proposal by adding pallets and packaging material to the list of tramp materials. The definition of "Incidental amount(s) of non-recyclable waste" has been deleted from this section and added to §328.2, because the term is no longer used in Chapter 330. The remaining definitions have been renumbered. Language has been added to the definition of "Storage" to be consistent with the language in §330.4.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rule is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. Although the intent of the rule is to protect the environment or reduce risks to human health from environmental exposure, the rule will not have an adverse material impact on 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 amendment to Chapter 330 is intended to identify and affect only those facilities improperly processing municipal solid waste without an authorization and, therefore, does not meet the definition of a major environmental rule. Furthermore, the adopted rule does not meet any of the four applicability requirements listed in §2001.0225(a). This rule does not exceed any standard set by federal law for distinguishing facilities improperly processing municipal solid waste from legitimate recycling facilities, and this rule is specifically required by state law under THSC, §361.119. This rule does not exceed the requirements of state law under THSC, §361.119, and is not required by federal law. There is no delegation agreement or contract between the state and an agency or representative of the federal government to implement any state and federal program to distinguish facilities improperly processing municipal solid waste without authorization from legitimate recycling facilities. This rule is not adopted solely under the general powers of the agency, but rather specifically under THSC, §361.119, as well as the other general powers of the agency.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rule and performed an analysis of whether Texas Government Code, Chapter 2007 is applicable. The commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this rule because this is an action taken to prohibit or restrict a condition or use of private real property that constitutes a public or private nuisance, which is exempt under Texas Government Code, §2007.003(b)(6). Specifically, the statutory basis for this rule, THSC, §361.119, directs the commission to develop this rule to ensure that a solid waste processing facility is regulated as a solid waste facility under the Texas Solid Waste Disposal Act and is not allowed to operate unregulated as a recycling facility, and to ensure that recyclable material is reused and not abandoned or disposed of and that recyclable material does not create a nuisance or threaten or impair the environment or public health and safety. Garbage or other organic wastes deposited, stored, discharged, or exposed in such a way as to be a potential instrument or medium in disease transmission to a person or between persons is a public health nuisance by law under THSC, §341.011(5). A facility that operates without appropriate controls can become a private nuisance.

Nevertheless, the commission further evaluated this rule and performed an analysis of whether this rule constitutes a takings

under Texas Government Code, Chapter 2007. The specific purpose of this rule is to ensure that recyclable material is reused and not abandoned or improperly disposed of, and that recyclable material does not create a nuisance or threaten or impair the environment or public health and safety. The rule would substantially advance the stated purpose by requiring recordkeeping and reporting and imposing limitations on the storage of recyclable material. The records are required to be kept and will assist agency enforcement staff to easily distinguish legitimate recycling facilities from municipal solid waste facilities operating without proper authorization.

Promulgation and enforcement of this rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the rule does not affect a landowner's rights in private real property because this rule does not burden (constitutionally), nor restrict or limit the owner's right to property, or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, this rule does not prevent property owners from operating legitimate recycling facilities, which reuse or recycle materials and thus legitimately protect the environment and public health and safety by reducing the volume of the municipal solid waste stream.

There are no burdens imposed on private real property, and the benefits to society are facilities properly and legitimately recycling materials and reducing the volume of the municipal solid waste stream and facilities properly and legitimately processing municipal solid waste with appropriate environmental and health and safety controls. Therefore, the rule will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rule and found that the rule is identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and will affect an action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11 and, therefore, the applicable goals and policies of the Texas Coastal Management Program (CMP) have been considered during the rulemaking process. The CMP goal applicable to this rule is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs) in accordance with 31 TAC §501.12(l). The CMP policy applicable to this rule is 31 TAC §501.14(d)(1) and (2). In accordance with §501.14(d)(1), the construction and operation of solid waste facilities in the coastal zone shall comply with all policies for CNRAs relating to the construction and operation of solid waste treatment, storage, and disposal facilities for both new facilities and areal expansion of existing facilities. In accordance with §501.14(d)(2), the commission shall comply with all policies for CNRAs when issuing permits and adopting rules under THSC, Chapter 361.

The specific purpose of the rule is to make existing commission rules consistent with the new legislative changes made to THSC by HB 2912. The rule requires the commission to ensure solid waste processing facilities are regulated as solid waste facilities and are not allowed to operate unregulated as recycling facilities. The commission anticipates that promulgation and enforcement of the rule will not have a direct or significant adverse effect on any CNRAs, nor will the rule have a substantial effect on commission actions subject to CMP. Therefore, the commission has made a finding of consistency with the applicable goals and policy. The commission solicited public comment, but no comments were received.

PUBLIC COMMENT

The public comment period closed on June 7, 2002. A total of 18 commenters provided both general and specific written comments on the proposed rules. The commenters are: Abitibi-Consolidated Inc. (ACI); Balcones Recycling (BR); City of Fort Worth; City of Houston (COH); Community Waste Disposal, Inc. (CWD); Department of the Air Force; El Paso Disposal, LP (EPD); Goodwill Industries; Harris County Commissioners Court (HCCC); Harris County Public Health & Environmental Services (HCPH&ES); Representative Charlie F. Howard; I-27 Recycling & Public Scales (I-27); Novus Wood Group (NWG); Silver Creek Materials Recycling & Compost (SCMR&C); Texas Chapter National Solid Wastes Management Association (NSWMA); Trinity Waste Services (TWS); Waste Management (WM); and one individual.

RESPONSE TO COMMENTS

ACI commented that it supports the intent of the proposed rule, but is concerned the rule will discourage legitimate recycling. ACI commented that the proposed definition of "Incidental amount(s) of non-recyclable waste" in §330.2(59) is too restrictive. The determination of the percentage by volume of non-recyclable material is problematic. The proposal does not suggest how inspections are to be performed. Unless the shipment was grossly over the percentage and, through visual inspection, was unquestionably above the percentage, an accurate determination cannot be made without unloading and processing the material. The percentage was to be determined for each incoming load. This requirement would be difficult to implement without a definitive compliance method, and would be subject to the potential for arbitrary compliance determinations. ACI also commented that the 5% limitation for each load had no reasonable basis. If the intent of the proposal was to address sham recycling operations, ACI recommended that this limitation be evaluated on an aggregate basis. In addition, the agency should consider the impact of the proposed requirement that all resulting non-recyclable waste be taken to an authorized solid waste facility within one week. ACI recommends that instead of focusing on a percentage limitation on a per load basis, the agency should evaluate the feasibility of regulations that address the legitimacy of the processing facilities. This could be accomplished through tracking the end use of the materials accepted for processing. "Do the recovered materials have a market? Are the materials being shipped off-site for recovery and re-use? Are the residuals for processing being properly managed for off-site disposition?" Another alternative is for the rules to exempt processing facilities that receive more than two-thirds of incoming material from residential curbside and/or drop-off programs.

The commission agrees with ACI's contention that the proposed definition of "Incidental amount(s) of non-recyclable waste" in proposed §330.2(59) was too restrictive, in light of similar comments from several other legitimate public and private sector recyclers that contribute significantly to recycling in Texas. The commission also recognizes the inability of a processing facility to exercise total control over the amount of non-recyclable waste in each incoming load, despite reasonable efforts to maintain source-separation, and the likelihood of non-recyclable waste in excess of 5% being present in any given load. The commission is also committed to the state's legislated recycling goals and its policy preference for recycling over landfilling as a waste management strategy. In addition, in response to other comments in

writing and at the August 7, 2002 commission agenda, the proposed definition has been moved to §328.2 and the reference to "incidental amounts of non-recyclable waste" made in §328.4 and §328.5 in order to clarify to which facilities the definition applies.

Therefore, the proposed definition in §328.2 has been amended to establish an upper limit of 10% on the scale or weight or volume of non-recyclable waste that may constitute "incidental non-recyclable waste" in any single load of recyclable material received by a facility, and a limit of 5% on the average scale weight or volume of non-recyclable waste in all materials received by a facility in the last six-month period. Additional language has been included in the definition to allow for flexibility in the application of this standard on a case-by-case basis, in consideration of the practices and standards of recycling facilities of a particular type, and pallets and packaging have been added to the list of examples of "tramp materials" excluded from the definition. However, this less restrictive definition is not intended to weaken or obstruct the intent of the enabling statute, which is to draw a clearer distinction between legitimate recycling facilities and solid waste facilities that currently operate unregulated under the guise of recycling facilities. To make this distinction, and to hold recyclers accountable for the responsible disposition of the materials they handle, the commission has adopted significant restrictions on the storage of unprocessed recyclable materials under §328.4, and reporting and recordkeeping requirements to substantiate them in §328.5. A procedure for demonstrating alternative compliance with the definition of "Incidental amount(s) of non-recyclable waste" has been added to the definition since proposal. To ensure that alternative compliance be available to the appropriate sectors of the regulated community, the definition has been moved to §328.2. The commission agrees that materials accepted for recycling should be both recyclable and recycled, and has adopted rules to establish these requirements in proposed §328.4.

The commission has considered the impact of the requirement that, following processing by a recycling facility, all resulting non-recyclable waste be taken to an authorized solid waste facility within one week. Because this may impose disposal requirements on a recycling facility that do not apply to other generators of solid waste, the proposed rule has been amended to require recycling facilities to dispose of resulting non-recyclable waste according to the provisions of Chapter 330, or taken to an authorized solid waste facility within one week.

The commission disagrees with the suggestion that facilities that receive two-thirds of their materials from public collection programs should be exempted from the rule, as this would eliminate practical distinctions between legitimate recyclers and unscrupulous solid waste facilities. The commission has made no changes in response to this comment.

BR commented that the proposed definition of "Incidental amount(s) of non-recyclable waste" would place an unreasonable demand and hardship on paper recycling operations. Recyclable paper can be delivered to a paper recycling facility in a variety of ways, including enclosed containers (i.e., compactor receiver boxes and front-end-load trucks). The contents of these containers cannot be inspected until after they are dumped onto the processing floor, at which time it would be too late to reject the load. To subject each individual load to a threshold of (5% or any other percent) does not necessarily reflect the overall volume of trash that could pass through a facility. All containers entering a facility are weighed upon entry (full) and exit (empty). The contents are then separated as trash and marketable commodities and shipped out to either a landfill or mill, respectively. Therefore, the only accurate measure of trash (as a percentage of total material brought in for processing) at a recycling facility would be to divide the weight (not volume) of the trash sent to a landfill, by the total weight of material that entered the facility. BR provided the following suggested language: "(59) Incidental amount(s) of non-recyclable waste--Non-recyclable material that accompanies recyclable material despite reasonable efforts to maintain source-separation and that is no more than 5% by weight of the total incoming material during the reporting period. Reasonable efforts to maintain source-separation must include: having dual collection and transportation systems in place for recyclable and non-recyclable materials at the point of generation; having informed generators and haulers of the source-separation requirements; and the recycling facility having instituted quality control measures."

The commission agrees with the assertion that the proposed definition of "Incidental amount(s) of non-recyclable waste" would place an unreasonable demand and hardship on paper recycling operations. Therefore, the proposed definition has been amended to establish an upper limit of 10% on the scale weight or volume of non-recyclable waste that may constitute "incidental non-recyclable waste" in any single load of recyclable material received by a facility, and a limit of 5% on the average scale weight or volume of non-recyclable waste in all materials received by a facility in the last six-month period. Additional language has been included in the definition to allow for alternative compliance with the standards in the definition on a case-by-case basis, in consideration of the practices and standards of recycling facilities of a particular type. A procedure for demonstrating alternative compliance with the definition of "incidental amount(s) of non-recyclable waste" has been added to the definition since proposal. To ensure that alternative compliance be available to the appropriate sectors of the regulated community, the definition has been moved to §328.2. Pallets and packaging have been added to the list of examples of "tramp materials" excluded from the definition.

The commission recognizes that many recyclable materials, including glass, metal, paper, and plastic, are commonly sold by the pound or by the ton. However, many smaller facilities do not have scales on-site, but rely on scale weights provided by the buyers of their materials. In addition, many landfills do not have scales; and mulch, compost, and materials reused or recycled as aggregate substitutes are commonly traded by their volume in cubic yards. Requiring the purchase, certification, and maintenance of scales simply for the purpose of proving their regulatory compliance is not an obligation that is appropriate for all legitimate recyclers. Therefore, calculations of incidental non-recyclable waste may be made by either weight or volume measurements.

CWD commented that the proposed rule was clearly anti-recycling and will do nothing but put a lot of small, honest entrepreneurial recycling companies out of business. CWD urged the commission to not implement the proposed rule in its current form.

The commission has made amendments to the proposed rule to ensure that it will not have a detrimental impact on legitimate recyclers. While the adopted contains restrictions on facilities to draw a clearer line between legitimate recyclers and unscrupulous solid waste processors, this increased accountability is intended to ensure that neither legitimate recyclers nor legitimate

disposal facilities suffer from unfair competition from unregulated solid waste facilities. The proposed rule is further intended to safeguard the public from the health and safety threats posed by the mismanagement of solid waste.

City of Fort Worth commented that it fully supports the intent of the proposed rule changes to control improper or sham recycling operations. However, the City of Fort Worth was concerned about the rule change in §330.2(59), "Incidental amount(s) of non-recyclable waste," and stated that curbside recycling programs operating "single stream" collections (commingled source-separated recyclables) could exceed the 5% limit. City of Fort Worth proposed that a bi-regulatory system be established. This system would keep the 5% rule intact for companies that accept recyclable material exclusively from commercial entities. The 5% rule would not apply to the recyclable waste stream generated by companies that receive material from both public and private sources. COH commented that it fully supports the intent of the proposed changes to control improper or sham recycling operations. COH was concerned with the definition of "Source-separated recyclable material" because a large percentage of material collected by COH is delivered in a commingled form. If these materials included in the commingled recycled collection process were classified as non-recyclable waste, this incidental amount could exceed the 5% limit as currently written in the proposed rule. COH suggested that the requirement for inspection and rejection of incoming loads from public recycling be allowed to exceed the 5% non-recyclable waste requirement. WM commented that the definition of "Incidental amount(s) of non-recyclable waste" focusing on each load appeared arbitrary. The basis for the percentage was unclear. WM contended that a capricious standard will deal a devastating blow to recycling in the state and result in the unintended consequence of landfilling tons of residential and commercially generated recyclables in an abundance of caution to avoid a citation by the commission inspector. Furthermore, in a single stream recycling system where recyclables are collected in a cart using an automated collection system, the recycling collector and processor will be required to control what is put in that cart and ultimately tipped at the recycling facility. It would be extremely difficult and resource consumptive to comply with these standards. In many cases, the recycling processor is not responsible for any of the public education of the citizenry and is merely operating as an extension of the municipality. In these cases, the processor should not be subject to rules adopted under this section as set forth in HB 2912, Article 9, §361.119(e).

The commission appreciates the difficulties of complying with a 5% limit on non-recyclable waste, particularly in a single-stream curbside collection program. However, the commission disagrees with the suggestion of establishing separate standards for facilities that receive materials from public sources and those that receive materials exclusively from commercial entities. Such a distinction would weaken the basic performance-based standards established by the definition of "Incidental amount(s) of non-recyclable waste." Instead, the commission has raised the limit on non-recyclable waste present in each incoming load received by the facility to 10%, and added a limit of 5% on the average amount of non-recyclable waste present in all loads processed by a facility in the last six-month period. A procedure for demonstrating alternative compliance with the definition of "Incidental amount(s) of non-recyclable waste" has been added to the definition since proposal. To ensure that alternative compliance be available to the appropriate sectors of the regulated community, the definition has been moved to §328.2.

NSWMA commented that the proposed new definition of "Incidental amounts of non-recyclable waste" should also include a definition of "incidental amounts of putrescible waste" as that was also a criterion proposed in §330.4. An inspector needs to be on notice of how much is more than incidental amounts of putrescible waste. A recycling facility should be allowed to accept up to 5% non-recyclable waste; however, only a de minimus amount of putrescible waste may be included in that non-recyclable percentage. Exceeding these limits should trigger a requirement to obtain a permit or registration as a Type V municipal solid waste facility. An individual commented that the definition of "Incidental amount(s) of non-recyclable waste" should be retained in the proposed rule. The 5% limit on waste intermixed with recyclable material is good. This establishes a clear distinction between material that is regulated as a recyclable material and material that is regulated as a waste material. The same individual commented that the definition of "Source-separated recyclable material" was a good definition and should be retained in the proposed rule. TWS commented that there should be a definition of "incidental amounts of putrescible waste" in §330.2. TWS proposed that the definition state that "incidental amount(s) of non-putrescible waste" are those amounts that are truly de minimus and total less than five pounds per load. TWS believed that the "de minimus" level was necessary because facilities that process putrescible waste must be subject to stricter rules and oversight than facilities processing non-putrescible waste, regardless of whether the material was recyclable or not. Only those facilities that process truly minimal amounts of non-recyclable materials, and screen out and reject putrescible waste, should be exempt from the commission oversight, public input, and the continuing environmental obligations that registration and permitting require. NSWMA commented that it supports the 5% limitation on non-recyclable material volume of each incoming load as a reasonable threshold for non-recyclable waste and the definition of "Incidental amounts of non-recyclable waste" should include a requirement that the recycling facility maintain written records to prove the recycling facility is complying with reasonable efforts requirements. NSWMA also commented that the definition of "Incidental amounts of non-recyclable waste" should require the recycling facility to maintain written proof of how much material was received and how much was disposed of off-site or on-site so the commission inspector can readily determine if a facility is in compliance with the 5% limitation. NSWMA commented that this requirement was more appropriate for inclusion in §330.4. NSWMA commented that the definition of "Incidental amounts of non-recyclable waste" contained a requirement that non-recyclable material must be taken to an authorized solid waste disposal facility within one week. NSWMA supports this requirement and suggests requiring the recycling facility operator to maintain written proof this is being accomplished. NSWMA commented that this restriction was probably more appropriate for inclusion in §330.4. NSWMA commented that the definition of "incidental amounts of non-recyclable waste" includes several exceptions that should be eliminated or narrowed because it is so broad that everything could qualify as an exemption. The first exemption that should be deleted is in proposed §330.2(59)(A) that exempts "other manufactured items for which dismantling and separation of recyclable from non-recyclable components by the generator are impractical." A process could be intentionally designed for any man-made object to make it impractical for the generator to separate out the non-recyclable materials. The second exemption should be narrowed in proposed §330.2(59)(B)

for "damage to source-separated recyclable material during collection, unloading, and sorting." This standard would be too simple to satisfy. A process could be set up to purposely destroy material that could be recycled, but it is more economical to dispose of the material. This exemption is important to keep, but needed to be narrowed to exempt only broken glass from the definition of incidental amounts of non-recyclable material. NSWMA also commented that the third exception which should be eliminated is in proposed §330.2(59)(C) for tramp materials. There is no explicit definition of tramp materials, but by the examples cited, it appears that any non-recyclable material that accompanies recycled material was excluded from the definition of "incidental amounts of non-recyclable waste." NSWMA believed this was the type of material that should be considered for the 5% limitation when evaluating whether a facility should be a Type V municipal solid waste facility. TWS commented that the addition of tramp materials within the definition of "Incidental amounts of non-recyclable waste" in §330.2(59)(C) should be deleted. The definition of "Tramp materials" was overly broad and seriously weakens the 5% non-recyclable waste requirement for incidental amounts of non-recyclable waste. While a strong argument can be made for retaining the exception for the non-recyclable components of white goods, whole computers, whole automobiles, and similar items which are typically shredded to facilitate the separation of materials and the exception for source-separated recyclable material which has been damaged during collection, sorting, or processing (i.e., breakage to recyclable glass), no similar argument can be applied to tramp materials. Therefore, tramp materials as listed in subparagraph (C) should be counted as "non-recyclable material" in calculating the amount of non-recyclable material that accompanies recyclable material despite reasonable efforts to maintain source-separation. The amount of tramp materials should be counted against the 5% maximum allowable amount of non-recyclable materials. For example, nails in recyclable lumber would be in the 5% non-recyclable portion and could be separated magnetically when the wood is chipped or processed. Sheet rock, gypsum, and wallboard would have to be separated prior to the recyclable lumber being processed to avoid contamination. Failure to separate the materials into the recyclable components should preclude the recycler from claiming that trash is recyclable material.

The commission disagrees with suggestions to place more restrictive limitations on the definition of "Incidental amount(s) of non-recyclable waste" in proposed §330.2(59). In light of the comments received from several legitimate municipal and private sector recyclers that contribute significantly to recycling in Texas, the commission finds that, in many cases, such restrictions could deter the practice of recycling and work in opposition to the state's policy preference for recycling over landfilling, established in THSC, §361.022, relating to Public Policy Concerning Municipal Solid Waste and Sludge. Further, the commission finds that such restrictions are not necessary to implement the prescriptions nor the intention of the enabling legislation. The commission recognizes the inability of a recycling facility to exercise total control over the amount of non-recyclable waste in each incoming load, despite reasonable efforts to maintain source-separation, and the likelihood of non-recyclable waste in excess of 5% being present in any given load. The commission also recognizes that the potential public health and safety risks arising from non-hazardous, non-putrescible recyclable materials, when handled in accordance with proposed §328.3, General Requirements, for recycling facilities, can be minimized.

For these reasons, the proposed definition has been amended to establish an upper limit of 10% on the total amount of non-recyclable waste that may constitute "incidental non-recyclable waste" in any single incoming load, and added a limit of 5% on the average amount of non-recyclable waste present in all materials received by a facility in the last six-month period. However, this less restrictive definition is not intended to weaken or obstruct the intent of the enabling statute and the second purpose of the rule, which is to draw a clearer distinction between legitimate recycling facilities and solid waste facilities that currently operate unregulated under the guise of recycling facilities. The commission recognizes that the primary distinction between legitimate and non-legitimate recycling operations is the unrestricted accumulation of unprocessed materials on the part of the latter. To address this distinction, to hold recyclers accountable for the responsible disposition of the materials they handle, and to minimize the public health and safety hazards associated with the accumulation of materials, the commission adopts significant restrictions on the storage of unprocessed recyclable materials under §328.4, and reporting and recordkeeping requirements to substantiate them in §328.5. In addition, §328.3 establishes general requirements for recycling facilities that apply the performance-based standards of several existing statutes to their operations. A procedure for demonstrating alternative compliance with the definition of "Incidental amount(s) of non-recyclable waste" has been added to the definition since proposal. To ensure that alternative compliance be available to the appropriate sectors of the regulated community, the definition has been moved to §328.2.

STATUTORY AUTHORITY

The amendment is adopted under THSC, Texas Solid Waste Disposal Act, §361.119, which provides the commission with the authority to adopt rules to ensure that a solid waste processing facility is regulated as a solid waste facility under the Texas Solid Waste Disposal Act and is not allowed to operate unregulated as a recycling facility; §§361.011, 361.017 and 361.024, which provide the commission with the authority to adopt rules necessary to carry out its powers and duties under Texas Solid Waste Disposal Act; §361.022, which establishes state public policy concerning municipal solid waste to include recycling of waste as a preferred method and requires the commission to consider that policy when adopting rules; and §361.428, which provides the commission with the authority to adopt rules establishing standards and guidelines for composting facilities. The adopted amendment is also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under TWC.

§330.2. Definitions.

Unless otherwise noted, all terms contained in this section are defined by their plain meaning. This section contains definitions for terms that appear throughout this chapter. Additional definitions may appear in the specific section to which they apply. As used in this chapter, words in the masculine gender also include the feminine and neuter genders, words in the feminine gender also include the masculine and neuter genders; words in the singular include the plural and words in the plural include the singular. The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) 100-year flood--A flood that has a 1.0% or greater chance of recurring in any given year or a flood of a magnitude equalled or exceeded once in 100 years on the average over a significantly long period.

(2) Acid--A substance containing hydrogen that will release hydrogen (hydronium) ions when dissolved in water. Acids will have a pH of less than 7.0 and usually have a sour taste and will cause blue litmus dye to turn red.

(3) Active life--The period of operation beginning with the initial receipt of solid waste and ending at certification/completion of closure activities in accordance with §§330.250 - 330.253 of this title (relating to Closure and Post-Closure).

(4) Active portion--That part of a facility or unit that has received or is receiving wastes and that has not been closed in accordance with §§330.250 - 330.253 of this title.

(5) Airport--A public-use airport open to the public without prior permission and without restrictions within the physical capacities of available facilities.

(6) Aquifer--A geological formation, group of formations, or portion of a formation capable of yielding significant quantities of groundwater to wells or springs.

(7) Areas susceptible to mass movements--Areas of influence (i.e., areas characterized as having an active or substantial possibility of mass movement) where the movement of earth material at, beneath, or adjacent to the MSWLF unit, because of natural or man-induced events, results in the downslope transport of soil and rock material by means of gravitational influence. Areas of mass movement include, but are not limited to, landslides, avalanches, debris slides and flows, soil fluction, block sliding, and rock fall.

(8) Asbestos-containing materials--Include the following.

(A) Category I nonfriable asbestos-containing material (ACM) means asbestos-containing packings, gaskets, resilient floor covering, and asphalt roofing products containing more than 1.0% asbestos as determined using the method specified in Appendix A, Subpart F, 40 CFR, Part 763, §1, Polarized Light Microscopy.

(B) Category II nonfriable ACM means any material, excluding Category I nonfriable ACM, containing more than 1.0% asbestos as determined using the methods specified in Appendix A, Subpart F, 40 CFR, Part 763, §1, Polarized Light Microscopy, that, when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure.

(C) Friable ACM means any material containing more than 1.0% asbestos that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure.

(D) Nonfriable ACM means any material containing more than 1.0% asbestos that, when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure.

(9) ASTM--The American Society of Testing and Materials.

(10) Battery--An electrochemical device that generates electric current by converting chemical energy. Its essential components are positive and negative electrodes made of more or less electrically conductive materials, a separate medium, and an electrolyte. There are four major types:

(A) primary batteries (dry cells);

(B) storage or secondary batteries;

(C) nuclear and solar cells or energy converters; and

(D) fuel cells.

(11) Battery acid (also known as electrolyte acid)--A solution of not more than 47% sulfuric acid in water suitable for use in storage batteries, which is water white, odorless, and practically free from iron.

(12) Battery retailer--A person or business location that sells lead-acid batteries to the general public, without restrictions to limit purchases to institutional or industrial clients only.

(13) Battery wholesaler--A person or business location that sells lead-acid batteries directly to battery retailers, to government entities by contract sale, or to large-volume users, either directly or by contract sale.

(14) Bird hazard--An increase in the likelihood of bird/aircraft collisions that may cause damage to an aircraft or injury to its occupants.

(15) Brush--Cuttings or trimmings from trees, shrubs, or lawns and similar materials.

(16) Buffer zone--A zone free of municipal solid waste processing and disposal activities adjacent to the site boundary.

(17) CFR--Code of Federal Regulations.

(18) Citizens' collection station--A facility established for the convenience and exclusive use of residents (not commercial or industrial users or collection vehicles). The facility may consist of one or more storage containers, bins, or trailers.

(19) Class I industrial solid waste--See industrial solid waste.

(20) Collection--The act of removing solid waste (or materials that have been separated for the purpose of recycling) for transport elsewhere.

(21) Collection system--The total process of collecting and transporting solid waste. It includes storage containers; collection crews, vehicles, equipment and management; and operating procedures. Systems are classified as municipal, contractor, or private.

(22) Commercial solid waste--All types of solid waste generated by stores, offices, restaurants, warehouses, and other nonmanufacturing activities, excluding residential and industrial wastes.

(23) Commission--The Texas Water Commission and its successors.

(24) Compacted waste--Waste that has been reduced in volume by a collection vehicle or other means including, but not limited to, dewatering, composting, incineration, and similar processes, with the exception of waste that has been reduced in volume by a small, in-house compactor device owned and/or operated by the generator of the waste.

(25) Composite liner--A liner system consisting of two components: the upper component must consist of a minimum 30-mil flexible membrane liner (FML) or minimum 60-mil high-density polyethylene (HDPE), and the lower component must consist of at least a two-foot layer of compacted soil with a hydraulic conductivity of no more than 1×10^{-7} cm/sec. The FML component must be installed in direct and uniform contact with the compacted soil component.

(26) Compost--The stabilized product of the decomposition process that is used or sold for use as a soil amendment, artificial top soil, growing medium amendment, or other similar uses.

(27) Composting--The controlled biological decomposition of organic materials through microbial activity.

(28) Conditionally exempt small-quantity generator--A person who generates no more than 220 pounds of hazardous waste in a calendar month.

(29) Construction-demolition waste--Waste resulting from construction or demolition projects; includes all materials that are directly or indirectly the by-products of construction work or that result from demolition of buildings and other structures, including, but not limited to, paper, cartons, gypsum board, wood, excelsior, rubber, and plastics.

(30) Contaminate--The man-made or man-induced alteration of the chemical, physical, biological, or radiological integrity of ground or surface water.

(31) Controlled burning--The combustion of solid waste with control of combustion air to maintain adequate temperature for efficient combustion; containment of the combustion reaction in an enclosed device to provide sufficient residence time and mixing for complete combustion; and control of the emission of the combustion products, i.e., incineration in an incinerator.

(32) Discard--To abandon a material and not use, re-use, reclaim, or recycle it. A material is abandoned by being disposed of; burned or incinerated (except where the material is being burned as a fuel for the purpose of recovering usable energy); or physically, chemically, or biologically treated (other than burned or incinerated) in lieu of or prior to being disposed.

(33) Discharge--Includes deposit, conduct, drain, emit, throw, run, allow to seep, or otherwise release, or to allow, permit, or suffer any of these acts or omissions.

(34) Discharge of dredged material--Any addition of dredged material into the waters of the United States. The term includes, without limitation, the addition of dredged material to a specified disposal site located in waters of the United States and the runoff or overflow from a contained land or water disposal area.

(35) Discharge of fill material--The addition of fill material into waters of the United States. The term generally includes placement of fill necessary to the construction of any structure in waters of the United States: the building of any structure or improvement requiring rock, sand, dirt, or other inert material for its construction; the building of dams, dikes, levees, and riprap.

(36) Discharge of pollutant--Any addition of any pollutant to navigable waters from any point source or any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source.

(37) Displacement--The measured or estimated distance between two formerly adjacent points situated on opposite walls of a fault (synonymous with net slip).

(38) Disposal--The discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste (whether containerized or uncontainerized) into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwater.

(39) Dredged material--Material that is excavated or dredged from waters of the United States.

(40) Drinking-water intake--The point at which water is withdrawn from any water well, spring, or surface water body for use as drinking water for humans, including standby public water supplies.

(41) Elements of nature--Rainfall, snow, sleet, hail, wind, sunlight, or other natural phenomenon.

(42) Endangered or threatened species--Any species listed as such pursuant to the Federal Endangered Species Act, §4, 16 United States Code (USC), §1536, as amended or pursuant to the Texas Endangered Species Act.

(43) EPA--United States Environmental Protection Agency.

(44) Essentially insoluble--Any material that, if representatively sampled and placed in static or dynamic contact with deionized water at ambient temperature for seven days, will not leach any quantity of any constituent of the material into the water in excess of the maximum contaminant levels in 40 CFR 141, Subparts B and G, and 40 CFR 143 for total dissolved solids.

(45) Executive director--The executive director of the Texas Water Commission and successors, or a person authorized to act on her behalf.

(46) Existing MSWLF unit--Any municipal solid waste landfill unit that received solid waste as of October 9, 1993. Waste placement in existing units must be consistent with past operating practices or modified practices to ensure good management.

(47) Experimental project--Any new proposed method of managing municipal solid waste, including resource and energy recovery projects, that appears to have sufficient merit to warrant commission approval.

(48) Facility--All contiguous land and structures, other appurtenances, and improvements on the land used for the storage, processing, or disposal of solid waste.

(49) Fault--A fracture or a zone of fractures in any material along which strata, rocks, or soils on one side have been displaced with respect to those on the other side.

(50) Fill material--Any material used for the primary purpose of filling an excavation.

(51) Floodplain--The lowland and relatively flat areas adjoining inland and coastal waters, including flood-prone areas of offshore islands, that are inundated by the 100-year flood.

(52) Garbage--Solid waste consisting of putrescible animal and vegetable waste materials resulting from the handling, preparation, cooking, and consumption of food, including waste materials from markets, storage facilities, handling, and sale of produce and other food products.

(53) Gas condensate--The liquid generated as a result of any gas recovery process at a municipal solid waste facility.

(54) Generator--Any person, by site or location, whose act or process produces a solid waste or first causes it to become regulated.

(55) Groundwater--Water below the land surface in a zone of saturation.

(56) Hazardous waste--Any solid waste identified or listed as a hazardous waste by the administrator of United States Environmental Protection Agency (EPA) pursuant to the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, 42 USC, §6901 *et seq*., as amended.

(57) Holocene--The most recent epoch of the Quaternary Period, extending from the end of the Pleistocene Epoch to the present.

(58) Household waste--Any solid waste (including garbage, trash, and sanitary waste in septic tanks) derived from households (including single and multiple residences, hotels, and motels, bunkhouses, ranger stations, crew quarters, campgrounds, picnic grounds, and day-use recreation areas); does not include yard waste or brush that is completely free of any household wastes.

(59) Industrial hazardous waste--Hazardous waste determined to be of industrial origin.

(60) Industrial solid waste--Solid waste resulting from or incidental to any process of industry or manufacturing, or mining or agricultural operations, classified as follows.

(A) Class I industrial solid waste or Class I waste is any industrial solid waste designated as Class I by the executive director as any industrial solid waste or mixture of industrial solid wastes that because of its concentration or physical or chemical characteristics is toxic, corrosive, flammable, a strong sensitizer or irritant, a generator of sudden pressure by decomposition, heat, or other means, and may pose a substantial present or potential danger to human health or the environment when improperly processed, stored, transported, or otherwise managed, including hazardous industrial waste, as defined in §335.1 of this title (relating to Definitions) and §335.505 of this title (relating to Class I Waste Determination).

(B) Class II industrial solid waste is any individual solid waste or combination of industrial solid wastes that cannot be described as Class I or Class III, as defined in §335.506 of this title (relating to Class II Waste Determination).

(C) Class III industrial solid waste is any inert and essentially insoluble industrial solid waste, including materials such as rock, brick, glass, dirt, and certain plastics and rubber, etc., that are not readily decomposable as defined in §335.507 of this title (relating to Class III Waste Determination).

(61) Inert material--A naturally occurring nonputrescible material that is essentially insoluble such as soil, dirt, clay, sand, gravel, and rock.

(62) In situ--In natural or original position.

(63) Karst terrain--An area where karst topography, with its characteristic surface and/or subterranean features, is developed principally as the result of dissolution of limestone, dolomite, or other soluble rock. Characteristic physiographic features present in karst terrains include, but are not limited to, sinkholes, sinking streams, caves, large springs, and blind valleys.

(64) Lateral expansion--A horizontal expansion of the waste boundaries of an existing MSWLF unit.

(65) Land application of solid waste--The disposal or use of solid waste (including, but not limited to, sludge or septic tank pumpings or mixture of shredded waste and sludge) in which the solid waste is applied within three feet of the surface of the land.

(66) Leachate--A liquid that has passed through or emerged from solid waste and contains soluble, suspended, or miscible materials removed from such waste.

(67) Lead--The metal element, atomic number 82, atomic weight 207.2, with the chemical symbol Pb.

(68) Lead acid battery--A secondary or storage battery that uses lead as the electrode and dilute sulfuric acid as the electrolyte and is used to generate electrical current.

(69) License--

(A) A document issued by an approved county authorizing and governing the operation and maintenance of a municipal solid waste facility used to process, treat, store, or dispose of municipal solid waste, other than hazardous waste, in an area not in the territorial limits or extraterritorial jurisdiction of a municipality.

(B) An occupational license as defined in Chapter 30 of this title (relating to Occupational Licenses and Registrations).

(70) Liquid waste--Any waste material that is determined to contain "free liquids" as defined by EPA Method 9095 (Paint Filter Test), as described in "Test Methods for Evaluating Solid Wastes, Physical/Chemical Methods" (EPA Publication Number SW-846).

(71) Litter--Rubbish and putrescible waste.

(72) Lower explosive limit--The lowest percent by volume of a mixture of explosive gases in air that will propagate a flame at 25 degrees Celsius and atmospheric pressure.

(73) Man-made inert material--Those non-putrescible, essentially insoluble materials fabricated by man that are not included under the definition of rubbish.

(74) Medical waste--Waste generated by health-care-related facilities and associated with health-care activities, not including garbage or rubbish generated from offices, kitchens, or other non-health-care activities. The term includes special waste from health care-related facilities which is comprised of animal waste, bulk blood and blood products, microbiological waste, pathological waste, and sharps as those terms are defined in 25 TAC §1.132 (Definition, Treatment, and Disposition of Special Waste from Health-Care Related Facilities). The term does not include medical waste produced on farmland and ranchland as defined in Agriculture Code, §252.001(6) (Definitions--Farmland or ranchland), nor does the term include artificial, nonhuman materials removed from a patient and requested by the patient, including but not limited to orthopedic devices and breast implants.

(75) Monofill--A landfill or landfill trench into which only one type of waste is placed.

(76) MSWLF--Municipal solid waste landfill facility.

(77) Municipal hazardous waste--Any municipal solid waste or mixture of municipal solid wastes that has been identified or listed as a hazardous waste by the administrator, United States Environmental Protection Agency.

(78) Municipal solid waste (MSW)--Solid waste resulting from or incidental to municipal, community, commercial, institutional, and recreational activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste other than industrial solid waste.

(79) Municipal solid waste facility (MSW facility)--All contiguous land, structures, other appurtenances, and improvements on the land used for processing, storing, or disposing of solid waste. A facility may be publicly or privately owned and may consist of several processing, storage, or disposal operational units, e.g., one or more landfills, surface impoundments, or combinations of them.

(80) Municipal solid waste landfill unit (MSWLF unit)--A discrete area of land or an excavation that receives household waste and that is not a land application unit, surface impoundment, injection well, or waste pile, as those terms are defined under §257.2 of 40 CFR, Part 257. An MSWLF unit also may receive other types of RCRA Subtitle D wastes, such as commercial solid waste, nonhazardous sludge, conditionally exempt small-quantity generator waste, and industrial solid waste. Such a landfill may be publicly or privately owned. An MSWLF unit may be a new MSWLF unit, an existing MSWLF unit, or a lateral expansion.

(81) Municipal solid waste site (MSW site)--A plot of ground designated or used for the processing, storage, or disposal of solid waste.

(82) Navigable waters--The waters of the United States, including the territorial seas.

(83) New MSWLF unit--Any municipal solid waste landfill unit that has not received waste prior to October 9, 1993.

(84) Nonpoint source--Any origin from which pollutants emanate in an unconfined and unchanneled manner, including, but not limited to, surface runoff and leachate seeps.

(85) Non-RACM--Non-regulated asbestos-containing material as defined in 40 CFR 61. This is asbestos material in a form such that potential health risks resulting from exposure to it are minimal.

(86) Nuisance--Municipal solid waste that is stored, processed, or disposed of in a manner that causes the pollution of the surrounding land, the contamination of groundwater or surface water, the breeding of insects or rodents, or the creation of odors adverse to human health, safety, or welfare.

(87) Open burning--The combustion of solid waste without:

(A) control of combustion air to maintain adequate temperature for efficient combustion;

(B) containment of the combustion reaction in an enclosed device to provide sufficient residence time and mixing for complete combustion; and

(C) control of the emission of the combustion products.

(88) Operate--To conduct, work, run, manage, or control.

(89) Operating record--All plans, submittals, and correspondence for an MSWLF facility required under this chapter; required to be maintained at the facility or at a nearby site acceptable to the executive director.

(90) Operation--A municipal solid waste site or facility is considered to be in operation from the date that solid waste is first received or deposited at the municipal solid waste site or facility until the date that the site or facility is properly closed in accordance with this chapter.

(91) Operator--The person(s) responsible for operating the facility or part of a facility.

(92) Opposed case--A case when one or more parties appear, or make their appearance, in opposition to an application and are designated as opponent parties by the hearing examiner either at or before the public hearing on the application.

(93) Other regulated medical waste--Medical waste that is not included within special waste from health care-related facilities but that is subject to special handling requirements within the generating facility by other state or federal agencies, excluding medical waste subject to 25 TAC Chapter 289 (concerning Radiation Control).

(94) Owner--The person who owns a facility or part of a facility.

(95) PCB--Polychlorinated biphenyl molecule.

(96) PCB waste(s)--Those PCBs and PCB items that are subject to the disposal requirements of 40 CFR 761. Substances that are regulated by 40 CFR 761 include, but are not limited to: PCB articles, PCB article containers, PCB containers, PCB-contaminated electrical equipment, PCB equipment, PCB transformers, recycled PCBs, capacitors, microwave ovens, electronic equipment, and light ballasts and fixtures.

(97) Permit--A written permit issued by the commission that, by its conditions, may authorize the owner or operator to construct, install, modify, or operate a specified municipal solid waste storage, processing, or disposal facility in accordance with specific limitations.

(98) Person--An individual, corporation, organization, government or governmental subdivision or agency, business trust, partnership, association, or any other legal entity.

(99) Point of compliance--A vertical surface located no more than 500 feet from the hydraulically downgradient limit of the waste management unit boundary, extending down through the uppermost aquifer underlying the regulated units, and located on land owned by the owner of the permitted facility.

(100) Point source--Any discernible, confined, and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, or discrete fissure from which pollutants are or may be discharged.

(101) Pollutant--Contaminated dredged spoil, solid waste, contaminated incinerator residue, sewage, sewage sludge, munitions, chemical wastes, or biological materials discharged into water.

(102) Pollution--The man-made or man-induced alteration of the chemical, physical, biological, or radiological integrity of an aquatic ecosystem.

(103) Poor foundation conditions--Areas where features exist which indicate that a natural or man-induced event may result in inadequate foundation support for the structural components of an MSWLF unit.

(104) Population equivalent--The hypothetical population that would generate an amount of solid waste equivalent to that actually being managed based on a generation rate of five pounds per capita per day and applied to situations involving solid waste not necessarily generated by individuals. It is assumed, for the purpose of these sections, that the average volume per ton of waste entering a municipal solid waste disposal facility is three cubic yards. For the purposes of these sections, the following population equivalents shall apply:

(A) 8,000 persons--20 tons per day or 60 cubic yards per day;

(B) 5,000 persons--12 1/2 tons or 37 1/2 cubic yards per day;

(C) 1,500 persons--3 3/4 tons or 11 1/4 cubic yards per day;

(D) 1,000 persons--225 pounds of wastewater treatment plant sludge per day (dry-weight basis).

(105) Post-consumer waste--A material or product that has served its intended use and has been discarded after passing through the hands of a final user. For the purposes of this subchapter, the term does not include industrial or hazardous waste.

(106) Premises--A tract of land with the buildings thereon, or a building or part of a building with its grounds or other appurtenances.

(107) Processing--Activities including, but not limited to, the extraction of materials, transfer, volume reduction, conversion to energy, or other separation and preparation of solid waste for reuse or disposal, including the treatment or neutralization of hazardous waste, designed to change the physical, chemical, or biological character or composition of any hazardous waste to neutralize such waste, or to recover energy or material from the waste, or to render such waste nonhazardous or less hazardous; safer to transport, store, dispose of, or make it amenable for recovery, amenable for storage, or reduced in volume. Unless the executive director determines that regulation of such activity under these rules is necessary to protect human health or the environment, the definition of "processing" does not include activities relating to those materials exempted by the administrator of the

Environmental Protection Agency pursuant to the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 USC, §6901 *et seq*., as amended.

(108) Public highway--The entire width between property lines of any road, street, way, thoroughfare, bridge, public beach, or park in this state, not privately owned or controlled, if any part of the road, street, way, thoroughfare, bridge, public beach, or park is opened to the public for vehicular traffic, is used as a public recreational area, or is under the state's legislative jurisdiction through its police power.

(109) Putrescible waste--Organic wastes, such as garbage, wastewater treatment plant sludge, and grease trap waste, that is capable of being decomposed by microorganisms with sufficient rapidity as to cause odors or gases or is capable of providing food for or attracting birds, animals, and disease vectors.

(110) Qualified groundwater scientist--A scientist or engineer who has received a baccalaureate or post-graduate degree in the natural sciences or engineering and has sufficient training in groundwater hydrology and related fields as may be demonstrated by state registration, professional certifications, or completion of accredited university programs that enable the individual to make sound professional judgments regarding groundwater monitoring, contaminant fate and transport, and corrective action.

(111) RACM--Regulated asbestos-containing material as defined in 40 CFR 61, as amended, includes: friable asbestos material, Category I nonfriable ACM that has become friable; Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting, or abrading; or Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations.

(112) Radioactive waste--Waste that requires specific licensing under 25 TAC Chapter 401, concerning Radioactive Materials and Other Sources of Radiation, Health and Safety Code, and the rules adopted by the commission under that law.

(113) RCRA--Resource Conservation and Recovery Act.

(114) Recyclable material--A material that has been recovered or diverted from the nonhazardous waste stream for purposes of reuse, recycling, or reclamation, a substantial portion of which is consistently used in the manufacture of products that may otherwise be produced using raw or virgin materials. Recyclable material is not solid waste. However, recyclable material may become solid waste at such time, if any, as it is abandoned or disposed of rather than recycled, whereupon it will be solid waste with respect only to the party actually abandoning or disposing of the material.

(115) Recycling--A process by which materials that have served their intended use or are scrapped, discarded, used, surplus, or obsolete are collected, separated, or processed and returned to use in the form of raw materials in the production of new products. Except for mixed municipal solid waste composting, that is, composting of the typical mixed solid waste stream generated by residential, commercial, and/or institutional sources, recycling includes the composting process if the compost material is put to beneficial use.

(116) Refuse--Same as rubbish.

(117) Registration--The act of filing information for specific solid waste management activities that do not require a permit, as determined by this chapter.

(118) Regulated hazardous waste--A solid waste that is a hazardous waste as defined in 40 CFR, Part 261.3, and that is not excluded from regulation as a hazardous waste under 40 CFR, Part 261.4(b), or that was not generated by a conditionally exempt small-quantity generator.

(119) Relevant point of compliance--See point of compliance.

(120) Resource recovery--The recovery of material or energy from solid waste.

(121) Resource recovery site--A solid waste processing site at which solid waste is processed for the purpose of extracting, converting to energy, or otherwise separating and preparing solid waste for reuse.

(122) Rubbish--Nonputrescible solid waste (excluding ashes), consisting of both combustible and noncombustible waste materials. Combustible rubbish includes paper, rags, cartons, wood, excelsior, furniture, rubber, plastics, yard trimmings, leaves, or similar materials; noncombustible rubbish includes glass, crockery, tin cans, aluminum cans, metal furniture, and similar materials that will not burn at ordinary incinerator temperatures (1,600 degrees Fahrenheit to 1,800 degrees Fahrenheit).

(123) Run-off--Any rainwater, leachate, or other liquid that drains over land from any part of a facility.

(124) Run-on--Any rainwater, leachate, or other liquid that drains over land onto any part of a facility.

(125) Salvaging--The controlled removal of waste materials for utilization, recycling, or sale.

(126) Saturated zone--That part of the earth's crust in which all voids are filled with water.

(127) Scavenging--The uncontrolled and unauthorized removal of materials at any point in the solid waste management system.

(128) Scrap tire--Any tire that can no longer be used for its original intended purpose.

(129) Seasonal high water table--The highest measured or calculated water level in an aquifer during investigations for a permit application and/or any groundwater characterization studies at a site.

(130) Septage--The liquid and solid material pumped from a septic tank, cesspool, or similar sewage treatment system.

(131) Shall--The stated action is mandatory.

(132) Should--The stated action is recommended as a guide in completing the overall requirement.

(133) Site--Same as facility.

(134) Site development plan--A document, prepared by the design engineer, that provides a detailed design with supporting calculations and data for the development and operation of a solid waste site.

(135) Site operating plan--A document, prepared by the design engineer in collaboration with the site operator, that provides guidance to site management and operating personnel in sufficient detail to enable them to conduct day-to-day operations throughout the life of the site in a manner consistent with the engineer's design and the commission's regulations.

(136) Site operator--The holder of, or the applicant for, a permit (or license) for a municipal solid waste site.

(137) Sludge--Any solid, semi-solid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water-supply treatment plant, or air pollution control facility, exclusive of the treated effluent from a wastewater treatment plant.

(138) Small MSWLF--A municipal solid waste landfill at which less than 20 tons of municipal solid waste are disposed of daily based on an annual average.

(139) Solid waste--Garbage, rubbish, refuse, sludge from a wastewater treatment plant, water supply treatment plant, or air pollution control facility, and other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations and from community and institutional activities. The term does not include:

(A) solid or dissolved material in domestic sewage, or solid or dissolved material in irrigation return flows, or industrial discharges subject to regulation by permit issued under the Water Code, Chapter 26;

(B) soil, dirt, rock, sand, and other natural or man-made inert solid materials used to fill land if the object of the fill is to make the land suitable for the construction of surface improvements; or

(C) waste materials that result from activities associated with the exploration, development, or production of oil or gas or geothermal resources and other substance or material regulated by the Railroad Commission of Texas under the Natural Resources Code, §91.101, unless the waste, substance, or material results from activities associated with gasoline plants, natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants and is hazardous waste as defined by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by Resource Conservation and Recovery Act, as amended (42 USC, §6901 *et seq*.).

(140) Source-separated recyclable material--Recyclable material from residential, commercial, municipal, institutional, recreational, industrial, and other community activities, that at the point of generation has been separated, collected, and transported separately from municipal solid waste, or transported in the same vehicle as municipal solid waste, but in separate containers or compartments. Source-separation does not require the recovery or separation of non-recyclable components that are integral to a recyclable product, including:

(A) the non-recyclable components of white goods, whole computers, whole automobiles, or other manufactured items for which dismantling and separation of recyclable from non-recyclable components by the generator are impractical, such as insulation or electronic components in white goods;

(B) source-separated recyclable material rendered unmarketable by damage during collection, unloading, and sorting, such as broken recyclable glass; and

(C) tramp materials, such as:

(i) glass from recyclable metal windows;

(ii) nails and roofing felt attached to recyclable shingles;

(iii) nails and sheetrock attached to recyclable lumber generated through the demolition of buildings; and

(iv) pallets and packaging materials.

(141) Special waste--Any solid waste or combination of solid wastes that because of its quantity, concentration, physical or chemical characteristics, or biological properties requires special handling and disposal to protect the human health or the environment. If improperly handled, transported, stored, processed, or disposed of or otherwise managed, it may pose a present or potential danger to the human health or the environment. Special wastes are:

(A) hazardous waste from conditionally exempt small-quantity generators that may be exempt from full controls under §§335.401 - 335.412 of this title (relating to Household Materials Which Could Be Classified as Hazardous Waste);

(B) Class I industrial nonhazardous waste not routinely collected with municipal solid waste;

(C) special waste from health-care-related facilities (refers to certain items of medical waste);

(D) municipal wastewater treatment plant sludges, other types of domestic sewage treatment plant sludges, and water-supply treatment plant sludges;

(E) septic tank pumpings;

(F) grease and grit trap wastes;

(G) wastes from commercial or industrial wastewater treatment plants; air pollution control facilities; and tanks, drums, or containers used for shipping or storing any material that has been listed as a hazardous constituent in 40 CFR, Part 261, Appendix VIII but has not been listed as a commercial chemical product in 40 CFR §261.33(e) or (f);

(H) slaughterhouse wastes;

(I) dead animals;

(J) drugs, contaminated foods, or contaminated beverages, other than those contained in normal household waste;

(K) pesticide (insecticide, herbicide, fungicide, or rodenticide) containers;

(L) discarded materials containing asbestos;

(M) incinerator ash;

(N) soil contaminated by petroleum products, crude oils, or chemicals;

(O) used oil;

(P) light ballasts and/or small capacitors containing polychlorinated biphenyl (PCB) compounds;

(Q) waste from oil, gas, and geothermal activities subject to regulation by the Railroad Commission of Texas when those wastes are to be processed, treated, or disposed of at a solid waste management facility permitted under this chapter;

(R) waste generated outside the boundaries of Texas that contains:

(i) any industrial waste;

(ii) any waste associated with oil, gas, and geothermal exploration, production, or development activities; or

(iii) any item listed as a special waste in this paragraph;

(S) any waste stream other than household or commercial garbage, refuse, or rubbish;

(T) lead acid storage batteries; and

(U) used-oil filters from internal combustion engines.

(142) Special waste from health care-related facilities--Includes animal waste, bulk human blood, blood products, body fluids, microbiological waste, pathological waste, and sharps as defined in 25 TAC §1.132 (concerning Definitions).

(143) Stabilized sludges--Those sludges processed to significantly reduce pathogens, by processes specified in 40 CFR, Part 257, Appendix II.

(144) Storage--The holding of solid waste for a temporary period, at the end of which the solid waste is processed, disposed of, or stored elsewhere. Facilities established as a neighborhood collection point for only nonputrescible source-separated recyclable material, as a collection point for consolidation of parking lot or street sweepings or wastes collected and received in sealed plastic bags from such activities as periodic citywide cleanup campaigns and cleanup of rights-of-way or roadside parks, or for accumulation of used or scrap tires prior to transportation to a processing or disposal site are considered examples of storage facilities. Storage includes operation of pre-collection and post-collection as follows:

(A) pre-collection--that storage by the generator, normally on his premises, prior to initial collection;

(B) post-collection--that storage by a transporter or processor, at a processing site, while the waste is awaiting processing or transfer to another storage, disposal, or recovery facility.

(145) Storage battery--A secondary battery, so called because the conversion from chemical to electrical energy is reversible and the battery is thus rechargeable. Secondary or storage batteries contain an electrode made of sponge lead and lead dioxide, nickel-iron, nickel-cadmium, silver-zinc, or silver-cadmium. The electrolyte used is sulfuric acid. Other types of storage batteries contain lithium, sodium-liquid sulfur, or chlorine-zinc using titanium electrodes.

(146) Store--To keep, hold, accumulate, or aggregate.

(147) Structural components--Liners, leachate collection systems, final covers, run-on/run-off systems, and any other component used in the construction and operation of the MSWLF that is necessary for protection of human health and the environment.

(148) Surface impoundment--A facility or part of a facility that is a natural topographic depression, human-made excavation, or diked area formed primarily of earthen materials (although it may be lined with human-made materials) that is designed to hold an accumulation of liquids; examples include holding, storage, settling, and aeration pits, ponds, or lagoons.

(149) Surface water--Surface water as included in water in the state.

(150) SWDA--Texas Solid Waste Disposal Act.

(151) TACB--Texas Air Control Board and its successors.

(152) Texas Civil Statutes--Vernon's Texas Revised Civil Statutes Annotated.

(153) Transfer station--A fixed facility used for transferring solid waste from collection vehicles to long-haul vehicles (one transportation unit to another transportation unit). It is not a storage facility such as one where individual residents can dispose of their wastes in bulk storage containers that are serviced by collection vehicles.

(154) Transportation unit--A truck, trailer, open-top box, enclosed container, rail car, piggy-back trailer, ship, barge, or other transportation vehicle used to contain solid waste being transported from one geographical area to another.

(155) Transporter--A person who collects and transports solid waste; does not include a person transporting his or her household waste.

(156) Trash--Same as Rubbish.

(157) Treatment--Same as Processing.

(158) Triple rinse--To rinse a container three times using a volume of solvent capable of removing the contents equal to 10% of the volume of the container or liner for each rinse.

(159) TWC--Texas Water Commission.

(160) Uncompacted waste--Any waste that is not a liquid or a sludge, has not been mechanically compacted by a collection vehicle, has not been driven over by heavy equipment prior to collection, or has not been compacted prior to collection by any type of mechanical device other than small, in-house compactor devices owned and/or operated by the generator of the waste.

(161) Unified soil classification system--The standardized system devised by the United States Army Corps of Engineers for classifying soil types.

(162) Unconfined water--Water that is not controlled or impeded in its direction or velocity.

(163) Unit--Municipal solid waste landfill unit.

(164) Unstable area--A location that is susceptible to natural or human-induced events or forces capable of impairing the integrity of some or all of the landfill structural components responsible for preventing releases from a landfill. Unstable areas can include poor foundation conditions, areas susceptible to mass movements, and karst terrains.

(165) Uppermost aquifer--The geologic formation nearest the natural ground surface that is an aquifer; includes lower aquifers that are hydraulically interconnected with this aquifer within the facility's property boundary.

(166) Vector--An agent, such as an insect, snake, rodent, bird, or animal capable of mechanically or biologically transferring a pathogen from one organism to another.

(167) Washout--The carrying away of solid waste by waters.

(168) Waste management unit boundary--A vertical surface located at the hydraulically downgradient limit of the unit. This vertical surface extends down into the uppermost aquifer.

(169) Waste-separation/intermediate-processing center--A facility, sometimes referred to as a materials recovery facility, to which recyclable materials arrive as source-separated materials, or where recyclable materials are separated from the municipal waste stream and processed for transport off-site for reuse, recycling, or other beneficial use.

(170) Waste-separation/recycling facility--A facility, sometimes referred to as a material recovery facility, in which recyclable materials are removed from the waste stream for transport off-site for reuse, recycling, or other beneficial use.

(171) Water in the state--Groundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Gulf of Mexico inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or non-navigable, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state.

(172) Water table--The upper surface of the zone of saturation at which water pressure is equal to atmospheric pressure, except where that surface is formed by a confining unit.

(173) Waters of the United States--All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide, with their tributaries and adjacent wetlands, interstate waters and their tributaries, including interstate wetlands; all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters that are or could be used by interstate or foreign travelers for recreational or other purposes; from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; that are used or could be used for industrial purposes by industries in interstate commerce; and all impoundments of waters otherwise considered as navigable waters; including tributaries of and wetlands adjacent to waters identified herein.

(174) Wetlands--As defined in Chapter 307 of this title (relating to Texas Surface Water Quality Standards) and areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include playa lakes, swamps, marshes, bogs, and similar areas.

(175) Yard waste--Leaves, grass clippings, yard and garden debris, and brush, including clean woody vegetative material not greater than six inches in diameter, that results from landscaping maintenance and land-clearing operations. The term does not include stumps, roots, or shrubs with intact root balls.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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30 TAC §330.4

The Texas Commission on Environmenal Quality (commission) adopts an amendment to §330.4, Permit Required. Section 330.4 is adopted *with change* to the proposed text as published in the March 29, 2002 issue of the *Texas Register* (27 TexReg 2412).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

In accordance with 1 TAC §91.65, regarding the procedures for filing rule packages with the *Texas Register*, a rule shall only have one pending amendment at a time with the exception of rules containing only definitions. Therefore, to comply with this requirement, this rulemaking combines three separate solid waste provisions from House Bill (HB) 2912, 77th Legislature, 2001, each of which requires an amendment to §330.4. They are as follows: Closed Landfill Facilities; Recycling Facilities; and Disposal of Animal Remains.

The adopted closed landfills amendment implements HB 2912, Article 9, §9.04, which amended Texas Health and Safety Code (THSC), §361.120, requiring any municipal solid waste landfill that has either stopped accepting waste, or only accepted waste due to an emergency authorization, for a period of five years or longer, to obtain a permit amendment before it can be reopened to accept waste again. Reopened municipal waste landfills shall only accept waste if the permittee demonstrates compliance with all current state, federal, and local requirements including, but not limited to, the requirements of Subtitle D of the federal Resource Conservation and Recovery Act of 1976 (42 United States Code (USC), §§6901, *et seq*.) and the implementing Texas state regulations.

The adopted recycling facilities amendment implements HB 2912, Article 9, §9.03, which amended THSC, §361.119, by requiring the commission to ensure that solid waste processing facilities are regulated as solid waste facilities and are not allowed to operate unregulated as recycling facilities. Corresponding changes to 30 TAC Chapter 328, Waste Minimization and Recycling; 30 TAC Chapter 330, Municipal Solid Waste, §330.2; and 30 TAC Chapter 332, Composting are adopted in a concurrent rulemaking (Rule Log Number 2001-081-328-WS).

The adopted disposal of animal remains amendment implements HB 2912, Article 17, §17.01, which amended the Texas Occupations Code by adding §801.361, Disposal of Animal Remains, to allow veterinarians to dispose of animal remains by burial or burning under limited circumstances. Texas Occupations Code, §801.361 allows veterinarians to burn or bury animal remains without a permit or registration only if they do so on their own property, the property is in a county with a population of less than 10,000, and they do not charge for the burning or burial. The section also restricts the commission from adopting a rule that prohibits conduct authorized by the section. The existing §330.4 prohibits any person from storing, processing, removing, or disposing of any municipal solid waste unless such activity is authorized by a permit or other authorization from the commission, except as provided for in subsections (c) - (h). Animal remains are considered municipal solid waste, and there is no provision in subsections (c) - (h) that allows the disposal of animal remains consistent with the authorization provided in HB 2912. Therefore, the commission adopts an amendment to Chapter 330 to make the existing municipal solid waste rules consistent with the requirements of HB 2912. On May 22, 2002, the commission approved a separate rulemaking, adopting an amendment to 30 TAC Chapter 111, Control of Air Pollution from Visible Emissions and Particulate Matter, (Rule Log Number 2001-088-111-AI), in order to make existing rules on burning consistent with the new legislation.

SECTION DISCUSSION

Section 330.4(f), Permit Required, is adopted with change to the proposed text. Section 330.4(f) clarifies which facilities are exempt from registration and permit requirements, and makes some of those facilities subject to the requirements of new §§328.3 - 328.5, relating to General Requirements; Limitations on Storage of Recyclable Materials; and Reporting and Recordkeeping Requirements. Section 330.4(f) has been reorganized from one lengthy subsection into paragraphs and subparagraphs for clarity purposes. The term "recyclable material" replaces "recyclable waste" to be consistent with the definition of recyclable material in §330.2, which states that recyclable material is not solid waste. Section 330.4(f) has been reworded since proposal to clarify and simplify the rule

language. The commission has made a change from proposal to clarify that all composting facilities, not just those exempt under Chapter 332, are exempt from registration and permitting under Chapter 330, as long as they are in compliance with Chapter 332.

The prior §330.4(f) exempted facilities used as collection and processing points for nonputrescible recyclable wastes. Adopted §330.4(f)(1)(B) replaces the term "recyclable wastes" with "recyclable materials," as aforementioned, and specifies that solid waste permit and registration exemptions apply to a facility that serves as a collection and processing point for only nonputrescible source-separated recyclable materials. The addition of the terms "only" and "source-separated" creates a clear distinction, lacking in the prior rule, between an exempt recycling facility and a solid waste facility that also recycles. Additional adopted language in §330.4(f)(1)(B) requires facilities that are exempt from registration and permitting under that subsection to comply with the requirements of adopted new §§328.3 - 328.5, in order to maintain their exempt status.

A concurrent rulemaking (Rule Log Number 2001-081-328-WS) defines "Incidental amount(s) of non-recyclable waste." Examples of incidental amounts include "tramp materials" such as glass from recyclable metal windows, nails and roofing felt attached to recyclable shingles, nails and sheetrock attached to recyclable lumber generated through the demolition of buildings; and non-recyclable or food-contaminated containers or paper placed in a municipal curbside recylcing bin, provided that in each instance, dual collection and transportation systems are in place for recyclable material and non- recyclable waste, generators are informed of the source-separation requirements, and the recycling facility has instituted quality control measures such as inspection of incoming loads and rejection of mixed wastes.

Section 330.4(f)(1)(C) has been adopted with change to the proposed text by adding: "a collection and processing point for mulching or composting of only source-separated recyclable material, provided that the facility is in compliance with Chapter 332 of this title (relating to Composting)." The change was made in response to a commenter pointing out that mulching and composting facilities are appropriately regulated under Chapter 332, and should not be required to be authorized under the municipal solid waste regulations of Chapter 330. Adopted §330.4(f)(1)(C) modifies the definition of a compost facility that is exempt from registration and permitting under Chapter 330 to conform to the Chapter 332 definition of an exempt composting facility, and requires the facility to comply with Chapter 332 and the requirements of proposed new §328.4 and §328.5 in order to maintain its exemption.

The prior rule language exempting a baling operation at a recycling or materials recovery facility that handles only nonputrescible recyclable waste has been deleted because such baling operations are a subset of a more general type of facility exempt under the prior and adopted rules (those covered by §330.4(f)(1)(B) in the adopted rule); hence the "baling exemption" is redundant and unnecessary.

Adopted §330.4(x) is adopted with change to the proposed text. Section 330.4(x) implements the changes to THSC, §361.120, relating to notice of hearing and requirements for the reopening of Type I, Type I-AE, Type IV, or Type IV-AE municipal solid waste landfills that have either stopped accepting waste, or only accepted waste in accordance with an emergency authorization, for a period of five years or longer.

Section 330.4(y) is adopted with change to the proposed text. Section 330.4(y) allows any veterinarian who is licensed by the Texas State Board of Veterinary Medical Examiners within a county of population of less than 10,000 to dispose of the remains of an animal by burial and/or burning without a permit or registration if the disposal occurs on property owned by the veterinarian and the veterinarian does not charge for the disposal.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a).

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 rule does not satisfy the definition of a major environmental rule. This rulemaking made three changes to §330.4.First, §330.4(f) has been amended to limit the type of facilities or sites that are not required to obtain a municipal solid waste permit or registration. Although the intent of this amendment is to protect the environment by ensuring that solid waste processing facilities are not allowed to operate as unregulated recycling facilities, the amendment is not a major environmental rule because it is not expected to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. This amendment will not adversely affect these items because it will only apply to a limited number of solid waste processing facilities. Second, §330.4(x) was added which specifies that a major permit amendment is required to reopen certain municipal solid waste facilities. This amendment is not a major environmental rule because its specific intent is to alter the type of commission authorization required to reopen certain inactive municipal solid waste facilities. The requirements of this rule amendment will not impose any additional technical requirements on municipal solid waste permittees, but will only affect notice and procedural requirements. Third, §330.4(y) was added which specifies that veterinarians in certain counties will not be required to obtain a commission municipal solid waste permit or registration in order to burn or bury animal remains if specific requirements are met. This rule does not qualify as a major environmental rule because it does not have as its specific intent the protection of the environment or the reduction of risk to human health from environmental exposure. The specific intent of this amendment is to establish that the commission will not require certain veterinarians to obtain a municipal solid waste permit or registration prior to engaging in specific types of animal disposal.

In addition, the rule is not subject to §2001.0225 because the rule does not meet any of the four applicability requirements listed in §2001.0225(a). The rule does not exceed a standard set by federal law because there are no comparable federal standards on the specific points addressed by this rulemaking. The rule does not exceed an express requirement of state law because it is in direct response to HB 2912, 77th Legislature, 2001, and does not exceed the requirements of this bill. This rule does

not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. This rule does not adopt a rule solely under the general powers of the agency, but rather under specific state law, namely HB 2912, §§9.03, 9.04, and 17.01. Finally, this rulemaking is not adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure. The commission solicited public comment on the draft regulatory impact analysis determination, but no comments were received.

TAKINGS IMPACT ASSESSMENT

The commission performed a takings impact assessment for this rule in accordance with Texas Government Code, §2007.043. The specific purpose of the rulemaking is to implement certain provisions of HB 2912. The rule implements the provisions of HB 2912 that direct the commission to: 1) ensure that solid waste processing facilities are not allowed to operate as unregulated recycling facilities; 2) require that a permittee obtain a permit amendment to reopen certain municipal solid waste facilities; and 3) allow certain veterinarians to dispose of animal remains by burying or burning, if certain requirements are met, without obtaining a commission permit or registration. The rule will substantially advance these stated purposes by providing specific provisions in §330.4 on the aforementioned matters. The rule regarding solid waste processing facilities limits the type of facilities or sites that are not required to obtain a municipal solid waste permit or registration. While this rule will require that additional sites or facilities obtain a permit or registration, it will not restrict or limit the owner's right to the property. The rule regarding the disposal of animal remains by veterinarians does not affect real property because it specifies that a commission municipal solid waste permit or registration is not required in order for veterinarians in certain counties to bury or burn animal remains on their own property. The rule regarding closed landfills will not affect real property because it does not prohibit permittees from resuming operations at certain municipal solid waste facilities, but requires that a permittee obtain a permit amendment prior to reopening the facility. Therefore, the adopted rule will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this rulemaking and determined that the rule is identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and will affect an action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. In accordance with the regulations of the Coastal Coordination Council, the commission reviewed the rulemaking for consistency with the Texas Coastal Management Program (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 coastal natural resource areas (CNRAs) in accordance with 31 TAC §501.12(l). The CMP policy applicable to this rulemaking is 31 TAC §501.14(d)(1) - (2). In accordance with §501.14(d)(1), the construction and operation of solid waste facilities in the coastal zone shall comply with all policies for CNRAs relating to the construction and operation of solid waste treatment, storage, and disposal facilities for both new facilities and areal expansion of existing facilities. In accordance with §501.14(d)(2), the commission shall comply with all policies for CNRAs when issuing permits and adopting rules under THSC, Chapter 361.

The specific purpose of the rule is to make existing commission rules consistent with the new legislative changes made to THSC by HB 2912. The rule requires any municipal solid waste landfill that has either stopped accepting waste, or only accepted waste due to an emergency authorization, for a period of five years or longer, to obtain a permit amendment before it can be reopened to accept waste again. Reopened municipal waste landfills shall only accept waste if the permittee demonstrates compliance with all current state, federal, and local requirements including, but not limited to, the requirements of Subtitle D of the Federal Resource Conservation and Recovery Act of 1976 (42 USC, §§6901 *et seq*.) and the implementing Texas state regulations. The commission anticipates that promulgation and enforcement of the rule will not have a direct or significant adverse effect on any CNRAs, nor will the rulemaking have a substantial effect on commission actions subject to CMP. Therefore, the commission has made a finding of consistency with the applicable goals and policy. The commission solicited public comment, but no comments were received.

PUBLIC COMMENT

The public comment period closed on April 29, 2002. A total of six commenters provided both general and specific written comments on the proposed rule. The commenters are: Commercial Metals Company; Compost Advisory Council of the Recycling Alliance of Texas (the Council); Lone Star Chapter Solid Waste Association of North America; Texas Chapter National Solid Wastes Management Association; Texas Disposal Systems; and Trinity Waste Services (TWS).

RESPONSE TO COMMENTS

Recycling Facilities:

Commercial Metals Company (CMC), Texas Chapter National Solid Wastes Management Association (NSWMA), and Texas Disposal Systems commented that §330.4(f) should not apply to the legitimate metal recycling industry.

The commission disagrees with this comment. Statutory authority for the proposed rule includes HB 2912, §9.03, 77th Legislature, 2001, which directs the agency to ensure that solid waste processing facilities are not allowed to operate as unregulated recycling facilities. The legislation provides that, under certain conditions, facilities that reuse or smelt recyclable materials or metals are not subject to regulation under rules adopted under that statute. Provisions for this exclusion and others specified in the legislation (including local governments and landfill affiliates) are included in the adopted Chapter 328 recycling rules (Rule Log Number 2001-081-328-WS). The commission has made no changes in response to this comment.

The Council commented that some of the proposed language in §330.4(f)(1)(C) is not needed because compost facilities are not permitted through Chapter 330, but all composting facilities must comply with Chapter 332. The Council states that revision is needed to eliminate the need for double permitting (under both Chapters 330 and 332).

The commission agrees with this comment. Provisions for the registration and permitting of mulching and composting facilities are contained in Chapter 332, and are required in lieu of, not in addition to, the requirements of Chapter 330. The suggested change would clarify this distinction. In addition, the adopted amendments to Chapter 332 (Rule Log Number 2001-081-328-WS) will apply the requirements of §328.4 and §328.5 to exempt and notification-tier composting facilities. Since registered and

permitted composters would not be subject to regulation under Chapter 328, these references should appropriately be deleted as well. The rule has been changed in response to this comment.

The Texas Chapter National Solid Wastes Management Association and Texas Disposal Systems commented that §330.4(f) needs further clarification by adding a definition of "incidental amounts" of putrescible or non-recyclable waste, with an established threshold such as 5%, to be applied in enforcement of the regulation.

The commission finds that this comment does not apply to the rules considered in this proposal. A definition of "incidental amount(s) of non-recyclable waste" has been adopted in a concurrent rulemaking to §328.2 (Rule Log Number 2001-081-328-WS). The commission has made no changes in response to this comment.

The Texas Chapter National Solid Wastes Management Association and Texas Disposal Systems commented that commission employees should be authorized to inspect a facility's incoming loads and documentation of the sale and disposal of material leaving the facility.

The commission agrees with this comment; however, no changes to the rules proposed here are necessary. Commission employees currently have the authority to enter and inspect facilities as needed to exercise their enforcement authority under THSC, §361.032. Authority to inspect a facility's records is addressed in the concurrent rulemaking adopted in §328.5 (Rule Log Number 2001-081-328-WS).

TWS commented that the consideration of the proposed rules in §330.4 (Rule Log Number 2001-082-330-WS) should be postponed to coincide with the consideration of the proposed rules under Rule Log Number 2001-081-328-WS. TWS also commented that §330.4(f) could not be addressed in comment without discussing the definition of "incidental amounts of non-recyclable waste," and offered comments suggesting changes to the definition.

The commission disagrees with these comments. Discussion of the definition of "Incidental amounts of non-recyclable waste" was provided in the preamble of the Rule Log Number 2001-082-330-WS proposal. Both rulemakings were heard at the August 7, 2002 commission agenda and were adopted at the August 21, 2002 commission agenda. Comments submitted by TWS relating to the Rule Log Number 2001-081-328-WS proposal were responded to in the Response to Comments section of the Rule Log Number 2001-081-328-WS adoption preamble.

Closed Landfill Facilities:

Lone Star Chapter Solid Waste Association of North America and TWS commented that §330.4(x) should not apply to Type V facilities.

The commission agrees with this comment. Section 330.4(x) as proposed and adopted will not apply to Type V facilities; therefore, no changes have been made in response to this comment.

Lone Star Chapter Solid Waste Association of North America and Texas Disposal Systems commented that the provision in §330.4(x) excluding landfills that receive an approved Subtitle D permit modification before September 1, 2001 should be clarified or deleted.

THSC, §361.120(d) exempts any municipal solid waste landfill facility from the closed landfill requirements if the facility received an approved permit modification as of the section's effective date. However, §361.120(d) does not specify what type of permit modification a facility must receive to qualify for the exemption. This section could be interpreted to exempt any facility that had received any type of permit modification allowed by 30 TAC §305.70. The commission does not believe that it was the intent of the legislature to provide such a broad exemption from the requirements of THSC, §361.120. Therefore, the commission has clarified in the rule as proposed and adopted that a facility must have received an approved Subtitle D permit modification to qualify for the exemption. The commission has made no change to the rule as a result of this comment.

Texas Chapter National Solid Wastes Management Association and Texas Disposal Systems commented that §330.4(x) relating to the reopening of closed landfills should be adopted exactly as written in THSC, §361.120.

As stated in the response to the previous comment, the exact language as written in THSC, §361.120 could be interpreted to provide an overly broad exemption from the new closed landfill requirements. As a result, the commission has clarified in the rule that a facility had to receive a Subtitle D permit modification by September 1, 2001 to be exempt from the requirements of THSC, §361.120. The commission believes that the clarification is necessary to implement the intent of the legislation. However, to follow the statutory language more closely as recommended by the commenter, "and the implementing Texas state regulations" has been added for a permittee to demonstrate compliance with all applicable current requirements.

TWS commented that §330.4(x) should specify that the facility to be reopened is required to make the same compliance demonstrations that an applicant for a new landfill would have to make in order to obtain a permit.

The commission disagrees with this comment. Adopted §330.4(x) requires landfills to comply with all applicable federal, state, and local requirements, which may not be the same as those applicable to an applicant for a new landfill permit. No change has been made to the rule as a result of this comment.

Animal Burial:

Texas Chapter National Solid Wastes Management Association and Texas Disposal Systems commented that §330.4(y) relating to the disposal of animal remains by a veterinarian in the first and second sentences should be changed to read "a permit or registration is not required for the disposal of animal remains from an animal that dies in the care of the veterinarian and does not include any other type of medical waste where all of the following occur:".

The commission agrees with the intent of this suggested language. The rule has been changed in response to this comment.

Texas Chapter National Solid Wastes Management Association and Texas Disposal Systems commented that a new restriction number §330.4(y)(10) should also be included that the veterinarian is to be licensed to practice in the State of Texas to prevent out-of-state veterinarians from importing dead animals into Texas.

The commission agrees with this comment. HB 2912, §17.01 enacted the animal remains disposal exemption for veterinarians by adding §801.361 to the Texas Occupations Code. Texas Occupations Code, §801.002(6), defines a veterinarian as a person licensed by the State Board of Veterinary Medical Examiners to practice veterinary medicine. This definition of veterinarian applies throughout Chapter 801. As a result, a veterinarian must

be licensed by the State Board of Veterinary Medical Examiners to dispose of animal remains under Texas Occupations Code, §801.361. The commission believes that adding a requirement to the rule that a veterinarian must be licensed by the State Board of Veterinary Medical Examiners is necessary to implement the intent of the legislature.

The rule has been changed in response to this comment by making two changes in the introductory sentence.

STATUTORY AUTHORITY

The amendment is adopted under the authority of HB 2912, §§9.03, 9.04, and 17.01, 77th Legislature, 2001, which direct the agency to: 1) ensure that solid waste processing facilities are not allowed to operate as unregulated recycling facilities; 2) require that a permittee obtain a permit amendment to reopen certain municipal waste facilities; and 3) allow certain veterinarians to dispose of animal remains by burying or burning if certain requirements are met. Additionally, the commission takes this action under the following relevant sections of Texas Water Code: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority to carry out its jurisdiction; and §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under this code and other laws of this state; and THSC, §361.011, which provides the commission all powers necessary and convenient to carry out its responsibilities concerning the regulation and management of municipal solid waste; and §361.024, which provides the commission authority to adopt and promulgate rules consistent with the general intent and purposes of THSC.

§330.4. Permit Required.

(a) No person may cause, suffer, allow, or permit any activity of storage, processing, removal, or disposal of any municipal solid waste unless such activity is authorized by a permit or other authorization from the Texas Water Commission, except as provided for in subsections (c) - (h) of this section. Permits issued by the Texas Department of Health prior to the effective date of this chapter satisfy the requirements of this subsection. No person may commence physical construction of a new municipal solid waste management facility or a lateral expansion without first having submitted a permit application in accordance with §§330.50 - 330.65 of this title (relating to Permit Procedures) and received a permit from the commission, except as provided for specifically herein.

(b) In accordance with the requirements of subsection (a) of this section, no generator, transporter, owner or operator of a facility, or any other person may cause, suffer, allow, or permit wastes to be stored, processed, or disposed of at an unauthorized facility or in violation of a permit. In the event this requirement is violated, the executive director may seek recourse against not only the person who stored, processed, or disposed of the waste but also against the transporter, owner or operator, or other person who caused, suffered, allowed, or permitted its waste to be stored, processed, or disposed.

(c) A separate permit is not required for the storage or processing of municipal solid waste that is grease trap wastes, grit trap wastes, or septage that contains free liquids if the waste is treated/processed at a permitted municipal solid waste landfill. Any person who intends to conduct such activity under this subsection shall comply with the notification requirements of §330.8 of this title (relating to Notification Requirements).

(d) A permit is not required for a municipal solid waste transfer station facility that is used in the transfer of municipal solid waste to a solid waste processing or disposal facility from:

(1) a municipality with a population of less than 50,000;

(2) a county with a population of less than 85,000;

(3) a facility used in the transfer of municipal solid waste that transfers or will transfer 125 tons per day or less; or

(4) a transfer station located within the permitted boundaries of a municipal solid waste Type I, Type II, Type III, or Type IV facility as specified in §330.41 of this title (relating to Types of Municipal Solid Waste Facilities).

(e) A request for registration for sites or facilities exempted from permits under subsections (c) and (d) of this section shall be submitted in a format provided by the executive director and shall include all information requested thereon and any additional information considered necessary by the applicant or that may be requested by the executive director.

(f) Facilities must obtain a permit or registration as applicable under subsection (a), (d), or (q) of this section unless otherwise exempted under this chapter, or:

(1) the facility or site is used as:

(A) a citizens' collection station;

(B) a collection and processing point for only nonputrescible source-separated recyclable material, provided that the facility is in compliance with §§328.3 - 328.5 of this title (relating to General Requirements; Limitations on Storage of Recyclable Materials; and Reporting and Recordkeeping Requirements);

(C) a collection and processing point for mulching or composting of only source-separated recyclable material, provided that the facility is in compliance with Chapter 332 of this title (relating to Composting); or

(D) a collection point for parking lot or street sweepings or wastes collected and received in sealed plastic bags from such activities as periodic citywide cleanup campaigns and cleanup of rights-of-way or roadside parks; or

(2) the site is used for the disposal of soil, dirt, rock, sand, or other natural or man-made inert solid materials used to fill land if the object of the fill is to make the land suitable for the construction of surface improvements.

(g) A permit amendment is not required to establish a waste-separation/recycling facility established in conjunction with a permitted municipal solid waste site, or composting facility at an existing permitted municipal solid waste site if owned by the permittee of the existing site. Facilities exempted from a permit amendment under this subsection shall be registered with the executive director in accordance with §330.65 of this title (relating to Registration for Solid Waste Management Facilities). Failure to operate such registered facilities in accordance with the requirements established in §§330.150 - 330.159 of this title (relating to Operational Standards for Solid Waste Processing and Experimental Sites) may be grounds for the revocation of the registration.

(h) A permit is not required for a site or facility where the only operation is the storage and/or processing of used and scrap tires as provided for in §§330.801 - 330.889 of this title (relating to Management of Whole Used or Scrap Tires). Facilities exempted from a permit under this subsection shall be registered with the executive director in accordance with §330.53 of this title (relating to Technical Requirements of Part II of the Application). Failure to operate such registered facilities in accordance with the requirements established in §§330.801 - 330.889 of this title may be grounds for the revocation of the registration.

(i) A permit or registration under this chapter is not required for the operation of an approved treatment process unit (as provided in §330.1004(c)(1) of this title (relating to Generators of Medical Waste)) used only for the treatment of on-site (as defined in §330.1004(f) of this title) generated special waste from health care-related facilities.

(j) A separate permit is not required for a facility to treat petroleum-contaminated soil if the contaminated soil is treated/processed at a permitted solid waste landfill facility. The treated soil shall be disposed of at the facility or may be used as daily cover on the facility. Any person who intends to conduct such activity under this subsection shall comply with the notification requirements of §330.8 of this title (relating to Notification Requirements).

(k) A licensed hospital may function as a medical waste collection and transfer facility for generators that generate less than 50 pounds of untreated medical waste per month and that transports its own waste if:

(1) the hospital is located in an incorporated area with a population of less than 25,000 and in a county with a population of less than one million; or

(2) the hospital is located in an unincorporated area that is not within the extraterritorial jurisdiction of a city with a population more than 25,000 or within a county with a population of more than one million. The hospital shall submit a request to the executive director for registration as a medical waste collection station.

(l) A permit is not required for an on-site medical waste incinerator used by a licensed hospital for incineration of only on-site generated medical wastes.

(m) Any change to a condition or term of an issued permit requires a permit amendment in accordance with §305.62 of this title (relating to Amendment) or a permit modification in accordance with §305.70 of this title (relating to Municipal Solid Waste Permit Modification). The owner or operator shall submit an amendment or modification application in accordance with the requirements contained in §§330.50 - 330.65 of this title to address the items covered by the requested change.

(n) For energy and material recovery and gas recovery operations relating to municipal solid waste, a registration is required. A permit is not required for a municipal solid waste facility-Type IX that recovers gas for beneficial use. Those Type IX facilities that recover gas for beneficial use that are exempt from permitting under this subsection shall be registered with the executive director in accordance with §330.70 of this title (relating to Registration of Facilities That Recover Gas for Beneficial Use). However, exploratory and test operations for feasibility purposes may be conducted after approval of the operation by the executive director.

(o) Submission of a Soil and Liner Evaluation Report (SLER) and/or a Flexible Membrane Liner Evaluation Report (FMLER) required by §330.206 of this title (relating to Soil and Liner Evaluation Report and Flexible Membrane Liner Evaluation Report) for a liner design which meets all design and operational requirements of §§330.50 - 330.65 of this title and §§330.200 - 330.206 of this title (relating to Groundwater Protection Design and Operation) shall not require a permit amendment or modification.

(p) A permit or registration is not required for the drying of grit trap waste at a car wash facility as long as these wastes are disposed of in compliance with applicable federal, state, and local regulations. Grit trap waste from car wash facilities may be transported for drying purposes to another car wash facility if the facilities have the same owner and if the facilities are located within 50 miles of each other. This subsection is not intended to preempt or supersede local government regulation of grit trap waste-drying facilities. Drying facilities must comply with Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) if applicable.

(q) In addition to permit exemptions established in subsection (d) of this section, a permit is not required for any new municipal solid waste Type V transfer station that includes a material recovery operation that meets all of the requirements established by this subsection. Owners and operators of Type V transfer facilities meeting the requirements of this subsection are allowed to register their operations in lieu of permitting them. Owners and operators of transfer stations that meet the permit exemption requirements and wish to exercise the exemption option must register their operation in accordance with §330.65 of this title (relating to Registration for Solid Waste Management Facilities).

(1) Materials recovery. The transfer facility must recover 10% or more by weight or weight equivalent of the total incoming waste stream for reuse or recycling. The applicant must demonstrate in the registration application the method that will be used to assure the 10% requirement is achieved. The effective date of this subsection is February 2, 1995.

(2) Distance to a landfill. The transfer facility must demonstrate in the registration application that it will transfer the remaining nonrecyclable waste to a landfill not more than 50 miles from the facility.

(3) Exempt facilities. Transfer facilities exempted from a permit under this subsection shall register with the executive director in accordance with §330.65 of this title and meet the additional design criteria of §330.65(f) of this title.

(4) Revocation. Failure to operate such registered facilities in accordance with the requirements established in Subchapter G of this chapter (relating to Operational Standards for Solid Waste Processing and Experimental Sites) may be grounds for revocation of the registration.

(r) A permit is not required for a municipal solid waste transfer station that is used only in the transfer of grease trap waste, grit trap waste, septage, or other similar liquid waste if the facility used in the transfer will receive 32,000 gallons per day or less. Liquid waste transfer stations that will receive 32,000 gallons a day or less may operate if they notify the Executive Director 30 days prior to initiating operations and if the facility is designed and operated in accordance with the requirements of §330.66 of this title (relating to Liquid Waste Transfer Facility Design and Operation). Facilities that will receive over 32,000 gallons per day must apply for a permit.

(s) A permit is not required for a municipal solid waste Type V processing facility that processes only grease trap waste, grit trap waste, or septage or a combination of these three liquid wastes if:

(1) the facility can attain a 10% recovery of material for beneficial use from the incoming waste. Recovery of material for beneficial use is considered to be the recovery of fats, oils, greases and the recovery of food solids for composting, but does not include the recovery of water;

(2) the Type V processing facility is located within the permit boundaries of a commission permitted Type I landfill; or

(3) the Type V processing facility is located at a manned treatment facility permitted under the Texas Water Code, Chapter 26 and which is permitted to discharge at least 1 million gallons per day and which is owned by and operated for the benefit of a political subdivision of this state. Facilities meeting any of these exemptions must

obtain a registration by meeting the operational criteria and design criteria established in §330.71 of this title (relating to Registration for Municipal Solid Waste Facilities That Process Grease Trap Waste, Grit Trap Waste, or Septage).

(t) A registration is required for a mobile liquid waste processing facility that processes grease trap waste, grit trap waste, or septage or a combination of these three liquid wastes. Mobile liquid waste processing facilities must obtain a registration by meeting the operational criteria and design criteria established in §330.72 of this title (relating to Registration of Mobile Liquid Waste Processing Units).

(u) A permit is not required for a municipal solid waste Type VI facility that demonstrates new management methods for processing or handling grease trap waste, grit trap waste, or septage or a combination of these three liquid wastes. Those facilities meeting this exemption must obtain a registration by meeting the operational criteria and design criteria established in §330.73 of this title (relating to Registration of Demonstration Projects for Liquid Waste Processing Facilities).

(v) A permit, registration, or other authorization is not required for the disposal of litter or other solid waste, generated by an individual, on that individual's own land where:

(1) the litter or waste is generated on land the individual owns;

(2) the litter or waste is not generated as a result of an activity related to a commercial purpose;

(3) the disposal occurs on land the individual owns;

(4) the disposal is not for a commercial purpose;

(5) the waste disposed of is not hazardous waste or industrial waste;

(6) the volume of waste disposed of by the individual does not exceed 2,000 pounds per year;

(7) the waste disposal method complies with §§111.201 - 111.221 of this title (relating to Outdoor Burning);

(8) the waste disposal method does not contribute to a nuisance and does not endanger the public health or the environment. Exceeding 2,000 pounds per individual's residence per year is considered to be a nuisance; and

(9) the individual complies with the deed recordation and notification requirements in §330.7 of this title (relating to Deed Recordation) and §330.8 of this title.

(w) A permit or registration is not required for the disposal of animal carcasses from government roadway maintenance where:

(1) either of the following:

(A) the animals were killed on county or municipal roadways and the carcasses are buried on property owned by the entity that is responsible for road maintenance; or

(B) the animals were killed on state highway right-of-way and the carcasses are disposed of by the Texas Department of Transportation by burying the carcasses on state highway right-of-way; and

(2) the waste disposal method does not contribute to a nuisance and does not endanger the public health or the environment; and

(3) the animal carcasses are covered with at least two feet of soil within 24 hours of collection in accordance with §330.136(b)(2) of this title (relating to Disposal of Special Wastes).

(x) A major permit amendment, as defined by §305.62 of this title (relating to Amendment), is required to reopen a Type I, Type I-AE, Type IV, or Type IV-AE municipal solid waste facility permitted by the commission or any of its predecessor or successor agencies that has either stopped accepting waste, or only accepted waste in accordance with an emergency authorization, for a period of five years or longer. The municipal solid waste facilities covered by this subsection may not be reopened to accept waste again unless the permittee demonstrates compliance with all applicable current state, federal, and local requirements, including the requirements of Subtitle D of the federal Resource Conservation and Recovery Act of 1976 (42 United States Code, §§6901 *et seq*.) and the implementing Texas state regulations. If a municipal solid waste facility was subject to a contract of sale on January 1, 2001, the scope of any public hearing held on the permit amendment required by this subsection is limited to land use compatibility, as provided by §330.51(a) of this title (relating to Permit Application for Municipal Solid Waste Facilities) and §330.61 of this title (relating to Land-Use Public Hearing). This subsection does not apply to any municipal solid waste facility that has received a permit but never received waste, or that received an approved Subtitle D permit modification before September 1, 2001.

(y) A permit or registration is not required for disposal of the remains from an animal that dies in the care of a veterinarian licensed by the Texas State Board of Veterinary Medical Examiners where all of the following occur:

(1) the veterinarian disposes of the remains of an animal and the remains do not include any other type of medical waste;

(2) the veterinarian does not charge for the disposal;

(3) the disposal is on property owned by the veterinarian;

(4) the disposal occurs in a county with a population of less than 10,000;

(5) the waste disposal does not contribute to a nuisance and does not endanger the public health or the environment;

(6) the veterinarian complies with the deed recordation and notification requirements in §330.7 and §330.8 of this title;

(7) the animal carcasses are covered with at least two feet of soil within 24 hours of disposal in accordance with §330.136(b)(2) of this title;

(8) uncontrolled access is prevented; and

(9) the disposal complies with §111.209 of this title (relating to Exceptions for Disposal Fires).

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 23, 2002.

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Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
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Proposal publication date: March 29, 2002
For further information, please call: (512) 239-4712

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CHAPTER 331. UNDERGROUND INJECTION CONTROL

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §331.1

The Texas Commission on Environmental Quality (commission) adopts an amendment to §331.1. Section 331.1 is adopted *without change* to the proposed text as published in the June 7, 2002 issue of the *Texas Register* (27 TexReg 4915) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

House Bill (HB) 2912, 77th Legislature, 2001, amended Texas Water Code (TWC), §27.003, by adding the phrase "taking into consideration" before the words "economic development of the state." This rulemaking amends §331.1 by replacing the reference to TWC, §27.003 with language reflecting the amended text of §27.003.

SECTION DISCUSSION

Section 331.1, Purpose, Scope, and Applicability, adopts an amendment which clarifies that economic development of the state would be one of the factors taken into consideration when maintaining the quality of fresh water in the state.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the adopted rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the adopted rule is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. Major environmental rule means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rule does not meet the definition of a major environmental rule because the specific intent of the rule is to clarify commission policy to state that the commission must take into consideration the economic development of the state. The rule substantially advances this purpose by specifically stating that the commission will take into consideration the economic development of the state when preventing underground injection that may pollute the waters in the state. Since the adopted rule states a policy which requires the consideration of the economic development of the state, the adopted rule is not likely to adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs. The adopted rule is not anticipated to adversely affect in a material way the environment or the public health and safety of the state or a sector of the state because the requirement for consideration of the economic development of the state is inserted into policy statements which provide for the protection of the environment and the public health and safety.

In addition, the adopted rule does not exceed the four applicability requirements of Texas Government Code, §2001.0025(a)(1) - (4) in that the adopted rule does not: 1) exceed a standard set by federal law; 2) exceed an express requirement of state law; 3) exceed a requirement of a delegation agreement; or 4) adopt a rule solely under the general powers of the agency.

The adopted rule does not exceed a standard set by federal law because there are no such corresponding federal standards relating to the commission taking into consideration the economic development of the state in preventing underground injection that may pollute the waters in the state. Further, the adopted rule does not exceed an express requirement of state law because it is mandated by state law. The adopted rule does not exceed the requirements of a delegation agreement concerning injection wells because the delegation agreement does not establish express requirements for taking into consideration the economic development of the state. Finally, this rule is not adopted solely under the general powers of the agency, but is adopted under the specific provisions of TWC, §27.003 and §27.019. No public comment was received on the regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this adopted rule in accordance with Texas Government Code, §2007.043. The commission's assessment indicates that Texas Government Code, Chapter 2007 applies to the adopted rule and that the rule does not constitute a statutory or constitutional taking.

The specific purpose of the adopted rule is to conform commission policy to HB 2912, §1.27, which changed state policy to provide that the commission take into consideration the economic development of the state in preventing underground injection that may pollute the waters in the state. Before enactment of HB 2912, §1.27, the state policy provided that the commission should prevent underground injection that may pollute the waters in the state consistent with the economic development of the state, in TWC, §27.003.

The adopted rule substantially advances the purpose stated previously by changing the policy of the commission to conform to HB 2912, §1.27.

The adopted rule does not place any burden on real property and it does not obtain any benefit to society from the use of private real property because it does not directly apply to the ownership or use of a particular parcel of private real property.

Promulgation of the adopted rule setting a policy to take into consideration the economic development of the state will not constitute a taking because the adopted rule does not directly apply to the ownership or use of a particular parcel of private real property.

There are no reasonable alternative actions that the commission may take regarding this adopted rule because the policy of the state on this issue has been determined by law through the enactment of HB 2912, §1.27.

Since the adopted rule does not directly apply to the ownership or use of a particular parcel of real property, it does not burden real property in a manner which would be a statutory or constitutional taking. Specifically, the adopted rule does 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 adopted rule.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31

TAC §505.11. Therefore, the adopted rule is not subject to the Texas Coastal Management Program.

PUBLIC COMMENT

No public hearing was held on this rulemaking and no comments were received during the comment period that closed on July 8, 2002.

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which provides the commission with 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 §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells.

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 23, 2002.

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For further information, please call: (512) 239-4712

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CHAPTER 332. COMPOSTING

The Texas Commission on Environmental Quality (commission) adopts amendments to §§332.3, 332.4, 332.23, 332.33, and 332.43 *without changes* to the proposed text as published in the April 26, 2002 issue of the *Texas Register* (27 TexReg 3542).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The adopted rule amendments implement the requirements of House Bill (HB) 2912, Article 9, §9.03, 77th Legislature, 2001. HB 2912 became effective on September 1, 2001. HB 2912 amends Texas Health and Safety Code (THSC) by adding §361.119, which requires the commission to ensure solid waste processing facilities are regulated as solid waste facilities and are not allowed to operate unregulated as recycling facilities. Corresponding changes to 30 TAC Chapter 328, Waste Minimization and Recycling, and 30 TAC Chapter 330, Municipal Solid Waste, are adopted in a concurrent rulemaking (Rule Log Number 2001-081-328-WS).

SECTION BY SECTION DISCUSSION

Section 332.3, Applicability, has been amended to subject mulching operations and composting facilities that are exempt from notification, registration, and permitting requirements under subsection (d) to the recordkeeping, reporting, and storage limitation requirements in new §328.4 and §328.5. The adopted sections in Chapter 328 apply to mulching and composting facilities because THSC, §361.119 addresses recycling facilities, and composting is specifically included in the definition of recycling found in THSC, §361.421(8) and in 30 TAC §330.2(115). In addition, the intent of the legislation was to apply to facilities that handle compostable materials, such as yard waste.

Section 332.4, General Requirements, has been amended by adding language to the introductory paragraph that refers to applicable penalties for violations. Amendments to several paragraphs include grammatical changes and appropriate references to statutes and regulations, consistent with §328.3, relating to general requirements for recycling facilities. The enforcement language of paragraph (3) has been deleted, because this is covered in the introductory paragraph. Paragraph (7) has been amended by providing an appropriate reference to 30 TAC §305.70, relating to Municipal Solid Waste Permit and Registration Modifications, which governs the addition or deletion of composting and recycling operations within the boundaries of permitted and registered municipal solid waste facilities. The amendment also parallels the language of the §328.3 to ensure that the management of all recyclable material does not create a nuisance or threaten or impair the environment or public health and safety, as directed in the statute. Paragraph (12) has been amended to add a heading, consistent with all other paragraphs in the section.

Section 332.23, Operational Requirements, has been amended to subject composting facilities requiring a notification under §332.3(c) to the requirements of the proposed new §328.4, relating to Limitations on Storage of Recyclable Materials and proposed new §328.5, relating to Reporting and Recordkeeping Requirements, in order that the requirements for composting facilities exempt from authorization under Chapter 332 not be more stringent than those for composting facilities requiring notification under Chapter 332.

Section 332.33, Required Forms, Applications, Reports, and Request to Use the Sludge Byproduct of Paper Production, has been amended by deleting a reference to TNRCC Form Number 3, "Annual Report Form for Compost Facilities Requiring Registration or Permit," because the requirement for the annual report that remains in the rule is sufficient to satisfy the recordkeeping requirements of §328.5(c), Reporting and Recordkeeping Requirements.

Section 332.43, Required Forms, Applications, and Reports, has been amended by deleting a reference to TNRCC Form Number 3, "Annual Report Form for Composting Facilities Requiring Registration or Permit," because the requirement for the annual report that remains in the rule is sufficient to satisfy the recordkeeping requirements of new §328.5(c), Reporting and Recordkeeping Requirements.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rules are not subject to §2001.0225 because they do not meet the definition of a "major environmental rule" as defined in that statute. Although the intent of the rules is to protect the environment or reduce risks to human health from environmental exposure, the rules will not have an adverse material impact on 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 amendments to Chapter 332 are intended to identify and affect only those facilities improperly disposing of municipal solid waste without an authorization and, therefore, do not meet the definition of a major environmental rule. Furthermore, the

rules do not meet any of the four applicability requirements listed in §2001.0225(a). These rules do not exceed any standard set by federal law for distinguishing facilities improperly disposing of municipal solid waste from legitimate recycling facilities, and these rules are specifically required by state law under THSC, §361.119. These rules do not exceed the requirements of state law under THSC, §361.119, and the rules are not required by federal law. There is no delegation agreement or contract between the state and an agency or representative of the federal government to implement any state and federal program on distinguishing facilities improperly disposing of municipal solid waste without authorization from legitimate recycling facilities. These rules are not adopted solely under the general powers of the agency, but rather specifically under THSC, §361.119, as well as the other general powers of the agency. The commission solicited public comment on the draft regulatory impact analysis determination, but no comments were received.

TAKINGS IMPACT ASSESSMENT

The commission performed a takings impact assessment for these rules in accordance with Texas Government Code, §2007.043. The commission determined that Texas Government Code, Chapter 2007 does not apply to these rules because this is an action taken to prohibit or restrict a condition or use of private real property that constitutes a public or private nuisance, which is exempt under Texas Government Code, §2007.003(b)(6). Specifically, the statutory basis for these rules, THSC, §361.119, directs the commission to develop these rules to ensure that a solid waste processing facility is regulated as a solid waste facility under the Texas Solid Waste Disposal Act and is not allowed to operate unregulated as a recycling facility, and to ensure that recyclable material is reused and not abandoned or disposed of and that recyclable material does not create a nuisance or threaten or impair the environment or public health and safety. Garbage or other organic wastes deposited, stored, discharged, or exposed in such a way as to be a potential instrument or medium in disease transmission to a person or between persons is a public health nuisance by law under THSC, §341.011(5). A facility that operates without appropriate controls can become a private nuisance. The recordkeeping and reporting requirements in these rules attempt to identify municipal solid waste facilities operating unregulated as recycling facilities and require that they obtain the proper authorization with regulatory controls.

Nevertheless, the commission further evaluated these rules and performed an analysis of whether these rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of these rules is to ensure that recyclable material is reused and not abandoned or improperly disposed of, and that recyclable material does not create a nuisance or threaten or impair the environment or public health and safety. The rules would substantially advance the stated purpose by requiring recordkeeping and reporting and imposing limitations on the storage of recyclable material. The records required to be kept and reports required to be filed will assist agency enforcement staff to easily distinguish legitimate recycling facilities from municipal solid waste facilities operating without proper authorization.

Promulgation and enforcement of these rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the rules do not affect a landowner's rights in private real property because these rules do not burden (constitutionally), nor restrict or limit the owner's right to property, or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, these rules do not prevent property owners from operating legitimate recycling facilities, which reuse or recycle materials and thus legitimately protect the environment and public health and safety by reducing the volume of the municipal solid waste stream.

There are no burdens imposed on private real property, and the benefits to society are facilities properly and legitimately recycling materials and reducing the volume of the municipal solid waste stream and facilities properly and legitimately processing municipal solid waste with appropriate environmental or health and safety controls. Therefore, the adopted rules will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has prepared a consistency determination for the rules pursuant to 31 TAC §505.22, and has found that the rules are consistent with the applicable Texas Coastal Management Program (CMP) goals and policies. The rules are subject to the CMP and must be consistent with applicable goals and policies that are found in 31 TAC §501.12 and §501.14. The CMP goal applicable to the rules is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values in Coastal Natural Resource Areas. However, the rules do not govern any of the activities that are within the designated coastal zone management area or otherwise specifically identified under the Texas Coastal Management Act or related rules of the Coastal Coordination Council. The commission solicited public comment, but no comments were received.

PUBLIC COMMENT

The public comment period closed on June 7, 2002. A total of two commenters provided both general and specific written comments on the proposed rules. The commenters are: Texas Chapter National Solid Wastes Management Association (NSWMA) and Trinity Waste Services (TWS).

RESPONSE TO COMMENTS

NSWMA commented that proposed §332.23(5) cross-references the storage limitation and recordkeeping requirements in §328.4 and §328.5 that will apply to composting facilities. The statement "unless exempted from those requirements under the terms of those sections" should be inserted at the end to acknowledge that certain exemptions could also apply to composting facilities.

The commission disagrees with the proposed additional language in §332.23(5), as the references in that subsection to the requirements of §328.4 and §328.5 apply to the exemptions specified in those sections as well. The commission has made no changes in response to this comment.

TWS commented that the commission should expand its current draft rule to impose additional management obligations on composting facilities. The commission has proposed one set of rules that would be applicable to both recycling facilities and composting facilities. TWS believes this is not appropriate because composting facilities are more complex and pose more of an environmental risk than do recycling facilities. TWS believes that since composting facilities are more likely to result in a nuisance and present more of a risk to the environment and public health and safety, more strict rules are necessary to guard against those risks.

The commission rules should, and generally do, vary the level of oversight of a facility based on where that facility would be placed on the continuum that runs between those facilities that are least likely to pose environmental risks to those facilities that are more likely to pose environmental risks. Composting facilities handle organic matter with the potential to impact air quality and water quality. Composting facilities are subject to air quality requirements under §328.8. Composting facilities are also subject to regulations for the protection of surface water and groundwater. Given that composting facilities have been recognized as being more likely to cause environmental hazards than recycling facilities, TWS believes this rule package should provide stricter requirements for composting facilities than for recycling facilities.

The commission disagrees with this comment due to the fact that the particular characteristics and regulatory requirements applicable to composting facilities are addressed in the prior and adopted rules in Chapter 332. The commission has made no changes in response to this comment.

SUBCHAPTER A. GENERAL INFORMATION

30 TAC §332.3, §332.4

STATUTORY AUTHORITY

The amendments are adopted under THSC, Texas Solid Waste Disposal Act, §361.119, which provides the commission with the authority to adopt rules to ensure that a solid waste processing facility is regulated as a solid waste facility under Texas Solid Waste Disposal Act and is not allowed to operate unregulated as a recycling facility; §§361.011, 361.017, and 361.024, which provide the commission with the authority to adopt rules necessary to carry out its powers and duties under Texas Solid Waste Disposal Act; §361.022, which establishes state public policy concerning municipal solid waste to include recycling of waste as a preferred method and requires the commission to consider that policy when adopting rules; and §361.428, which provides the commission with the authority to adopt rules establishing standards and guidelines for composting facilities. The amendments are also authorized by Texas Water Code (TWC), §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under TWC.

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 23, 2002.

TRD-200205601
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
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Proposal publication date: April 26, 2002
For further information, please call: (512) 239-4712

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SUBCHAPTER B. OPERATIONS REQUIRING A NOTIFICATION

30 TAC §332.23

STATUTORY AUTHORITY

The amendment is adopted under THSC, Texas Solid Waste Disposal Act, §361.119, which provides the commission with the authority to adopt rules to ensure that a solid waste processing facility is regulated as a solid waste facility under Texas Solid Waste Disposal Act and is not allowed to operate unregulated as a recycling facility; §§361.011, 361.017 and 361.024, which provide the commission with the authority to adopt rules necessary to carry out its powers and duties under Texas Solid Waste Disposal Act; §361.022, which establishes state public policy concerning municipal solid waste to include recycling of waste as a preferred method and requires the commission to consider that policy when adopting rules; and §361.428, which provides the commission with the authority to adopt rules establishing standards and guidelines for composting facilities. The amendment is also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under TWC.

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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Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-4712

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SUBCHAPTER C. OPERATIONS REQUIRING A REGISTRATION

30 TAC §332.33

STATUTORY AUTHORITY

The amendment is adopted under THSC, Texas Solid Waste Disposal Act, §361.119, which provides the commission with the authority to adopt rules to ensure that a solid waste processing facility is regulated as a solid waste facility under Texas Solid Waste Disposal Act and is not allowed to operate unregulated as a recycling facility; §§361.011, 361.017, and 361.024, which provide the commission with the authority to adopt rules necessary to carry out its powers and duties under Texas Solid Waste Disposal Act; §361.022, which establishes state public policy concerning municipal solid waste to include recycling of waste as a preferred method and requires the commission to consider that policy when adopting rules; and §361.428, which provides the commission with the authority to adopt rules establishing standards and guidelines for composting facilities. The amendment is also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC.

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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Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-4712

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SUBCHAPTER D. OPERATIONS REQUIRING A PERMIT

30 TAC §332.43

STATUTORY AUTHORITY

The amendment is adopted under THSC, Texas Solid Waste Disposal Act, §361.119, which provides the commission with the authority to adopt rules to ensure that a solid waste processing facility is regulated as a solid waste facility under Texas Solid Waste Disposal Act and is not allowed to operate unregulated as a recycling facility; §§361.011, 361.017, and 361.024, which provide the commission with the authority to adopt rules necessary to carry out its powers and duties under Texas Solid Waste Disposal Act; §361.022, which establishes state public policy concerning municipal solid waste to include recycling of waste as a preferred method and requires the commission to consider that policy when adopting rules; and §361.428, which provides the commission with the authority to adopt rules establishing standards and guidelines for composting facilities. The amendment is also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC.

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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Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 3. GENERAL PROVISIONS

SUBCHAPTER C. SERVICES AND PRODUCTS

31 TAC §3.31

The General Land Office (GLO) adopts an amendment to Chapter 3, Subchapter C, §3.31, relating to Fees without changes to the text as published in the April 19, 2002, edition of the *Texas Register* (27 TexReg 3306). The amendment is being adopted simultaneously with the adoption of new 31 TAC, Part 1, Chapter 13, Subchapter G, §§13.87 through 13.94 to correspond to an application fee charge for processing vacancy applications proposed in §13.89.

The adopted new §13.89, relating to Applications, explains how to request an application to purchase or lease vacant land and the non-refundable filing fees payable to the GLO for processing an application. The adopted amendment to §3.31(b)(7)(A) reflects the increase from $100 to $150. The adopted amendment to §3.31 also corrects an error on the paper sizes available to reproduce black and white photocopies, microfilm copies and color photocopies.

No comments were received regarding the proposed amendment.

The amendment is adopted under Texas Natural Resources Code, §§31.051, 51.174 and 52.324 which provides the GLO with the authority to set and collect certain fees and to make and enforce rules consistent with the law.

Texas Government Code, Chapter 552, and Texas Natural Resources Code, Chapters 31, 32, 51, and 52 are affected by this adopted action.

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 21, 2002.

TRD-200205503
Larry Soward
Chief Clerk
General Land Office
Effective date: September 10, 2002
Proposal publication date: April 19, 2002
For further information, please call: (512) 305-9129

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CHAPTER 13. LAND RESOURCES

SUBCHAPTER G. VACANT LAND

31 TAC §§13.87 - 13.94

The General Land Office (GLO) and the School Land Board (SLB) adopt new Subchapter G, §§13.87-13.94, relating to Vacant Land, in Title 31, Part 1, Chapter 13 of the Texas Administrative Code without changes to the text as published in the April 19, 2002, issue of the *Texas Register* (27 TexReg 3306). The adopted new subchapter G contains rules governing the procedures for the purchase or lease of vacant land. These rules are adopted pursuant to new legislation that requires the GLO and the SLB to adopt rules governing the administration of the statute and the terms and conditions for the sale or lease of vacant land in accordance with Tex. Nat. Res. Code §51.174 and §51.175.

The GLO and the SLB adopt new subchapter G, §§13.87, relating to General Provisions; 13.88, relating to Terms of Sale or Lease; 13.89, relating to Applications; 13.90, relating to Deposits; 13.91, relating to Notifications and Publication; 13.92; relating to Determination of Good-Faith Claimant Status; 13.93, relating to Exceptions; and 13.94, relating to Investigations. The new sections are adopted pursuant to Tex. S.B. 1806, 77th Leg., R. S. (2001) which amended Texas Natural Resource Code, Chapter 51, Subchapter E, §§51.171-51.192. S.B. 1806's amendments expedite and simplify the vacancy process for

landowners, interested and affected property interest owners, good faith claimants, applicants and the commissioner.

One comment was received from the Jarvis Law Firm in response to the proposed rules. The commenter stated that the proposed rules should apply to pending applications and not just to applications received after September 1, 2001 and that therefore §13.87(a) should be deleted. This section states that the rules apply only to applications received after September 1, 2001 and it is based upon the effective date of the statute. The GLO has reviewed statutes and cases applicable to retroactivity, which is generally disfavored, and concluded that S.B. 1806 does not apply retroactively. Therefore the rules cannot be made to apply retroactively.

There is a presumption that statutes are prospective only, unless expressly made retroactive. Tex. Gov't. Code §311.022 and Ex Parte Abell, 613 S.W. 2d 255, 258. (Tex. 1981). The U.S. Supreme Court in Landgraf v. USI Film Products, 511 U.S. 244 (1994) and the Texas Supreme Court in Quick v. City of Austin, 7 S.W. 2d 109 (1999) have provided guidance for evaluating a claim of statutory retroactivity. Under the factors and analyses in those two cases, the GLO has determined that S.B. 1806 should not apply retroactively. Additionally, S.B. 1806 is styled as an amendment to the vacancy statute and the prior statute was not repealed. The previous statutory processes were more complicated and provided for a full contested case hearing at the agency level. The retroactive application of the statute could change the results of those previously held hearings by giving them less weight in district court then they are entitled to under the previous vacancy statute. The invalidation of previously completed procedures is a clearly disfavored result. See Landgraf @ 280.

Finally the GLO declines to apply the rules or the statute retroactively because §51.172 explicitly defines "vacancy" as "an area of unsurveyed public school land that . . .was not, on the date of filing an application: subject to an earlier subsisting application." This definition of "vacancy" has existed in every version of the vacancy statutes and is relevant to the issue of retroactivity. The timing of the filing of the application determines an applicant's rights. Time is always a critical factor in the filing of applications. There in nothing in S.B. 1806 to indicate that the Legislature intended to change a fundamental concept in vacancy law. For the foregoing reasons, no change was made based on this comment.

These sections govern actions of the GLO, the commissioner and the SLB when processing applications to purchase or lease vacant land and the rules are jointly proposed. Section 13.87, relating to General Provisions, describes the rules' applicability; delegations by the commissioner to the chief of the surveying division and the commissioners' obligation to present the SLB with information regarding fair market value of vacant land. This section also clarifies that while the SLB may set the price; it cannot set a price below fair market value. Section 13.88, relating to Terms of Sale or Lease, describes the SLB's role in setting the terms of a sale or lease of vacant land, including mineral reservations and preferential purchase rights of good-faith claimants and applicants. The purpose of this section is to provide notice to applicants and other persons interested in a sale or lease of vacant land that all minerals will be reserved to the State and in that the SLB will consider existing mineral rights. The purpose of §13.88 is to provide notice of the parameters for the minimum conditions required in any sale or lease of vacant land.

Applications to purchase or lease vacant land must strictly conform to statutory requirements and proposed §13.89, relating to Applications, explains how to request an application and when an application may be rejected or terminated. This section simplifies the application process by allowing the provision of an affidavit to prove a search of applicable land records; the section also creates an opportunity for the GLO to reject an incomplete application without prejudicing the rights of subsequent applicants. The statute explicitly allows the land commissioner to decide whether or not a deposit is required for processing the application and §13.90, relating to Deposits, describes the limits on expenditure of such deposits and emphasizes the commissioner's discretion. §13.91, relating to Notifications and Publication, requires the applicant to notify all necessary parties when the commissioner accepts the application and also to publish notice of acceptance of the application in a newspaper of general circulation. The purpose of this section is to fully describe the responsibilities of the applicant and to detail the methods and manner in which notice must be given. The notice to potentially affected parties is an integral component of the vacancy determination process because the finding of a vacancy can affect property rights.

S.B. 1806 also simplified the definition of good-faith claimant and proposed §13.92, relating to Determination of Good-Faith Claimant Status, details the criteria to be used and the information to be submitted for a finding of good-faith claimant status. The enumeration of the evidence that must be provided enhances the objectivity of the decision and helps to ensure fairness and consistency. Proposed §13.93, relating to Exceptions, explains the procedures of and form for exceptions to a filed survey report. Any necessary party may, but is not required to, file exceptions to a surveyor's report. This rule is necessary to minimize the submissions to the land office. This section assists in paperwork reduction rule by limiting the quantity of information submitted. The rule is also intended to minimize redundancy and reduce the costs of administration of the statute. Finally proposed §13.94, relating to Investigations, reiterates that the commissioner is not required to hold any hearing on an application and lists factors that will be considered in deciding whether to conduct a hearing. The listing of the factors to be considered helps ensure consistency and fairness and provides notice to applicants regarding the likelihood that a hearing may be conducted.

These rules apply to all applications filed after September 1, 2001, the effective date of new Tex. Nat. Res. Code §§51.171 through 51.192. The statute, §51.171(c) explicitly exempts the vacancy determination process from the Tex. Gov't. Code chapter 2001.

No requests for a copy of the Takings Impact Assessment were received regarding this rulemaking action.

These rules are adopted under the authority of Tex. Nat. Res. Code §§51.171 through 51.192.

Tex. Nat. Res. Code, Sales and Lease of Vacancies, §§ 51.171 through 51.192, are affected by these adopted rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200205505

Larry Soward
Chief Clerk
General Land Office
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PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 355. RESEARCH AND PLANNING FUND

SUBCHAPTER A. GENERAL RESEARCH AND PLANNING

31 TAC §355.5, §355.10

The Texas Water Development Board (the board) adopts amendments to 31 TAC §355.5 and §355.10 concerning the repayment of grants from the Research and Planning Fund. Section 355.10 is adopted with change to the proposed text as published in the May 31, 2002, issue of the *Texas Register* (27 TexReg 4673). Section 355.5 is adopted without change and will not be republished. The amendments are designed to require recipients of facility planning grants to repay all or part of the grants if projects are not constructed within a specified time period after the facility planning study is complete. This requirement is added to provide greater assurance that the limited funds available for planning grants are awarded to applicants which are most serious about going forward with a project.

Section 355.5(4)(H) requires the board's executive administrator to evaluate applications for regional facility planning grants by considering the ability of a recipient of funds to repay the assistance if construction of a project is not commenced within the time specified by rule. This will assure that if a grant recipient is required to repay a grant, it has the legal and financial capability to do so.

Section 355.10(f) allows the board to condition grants for regional facility planning to require that recipients agree to repay the grant to the board if construction of a project described by the planning grant is not timely commenced. The proposed rule would have set two years from closing the grant account as the initiation of the requirements to repay portions of the grant. In response to public comment, this period has been extended to six years. If construction is not commenced within six years of the time the executive administrator notifies the grant recipient that the agency has closed the account for the grant, the loan recipient shall repay 25 percent of the grant. For each additional year that a project has not commenced construction, the grant recipient shall repay an additional 25 percent, up to repayment of 100 percent of the grant. The subsection also requires the execution of any necessary documents to assure that the grant recipient is required to make the required grant repayment. The board adopts these amendments to ensure that it focuses its limited facility planning funds on those entities that are most likely to move projects from planning to construction. The board has found that only approximately one-third of the projects for which it has provided regional facility planning funds actually move into construction. The board believes that only applicants with clear intent to proceed with projects will accept grant funds with the requirement that they be repaid if the project does not commence.

Section 355.10(g) would provide for the entity to make the payment to the board no later than within the entity's first fiscal year following the date on which each repayment obligation is triggered. This will allow the entities to provide for the repayment in its next budget cycle, either from current revenues or through the establishment of a sinking fund and levy of taxes, if needed.

Section 355.10(h) establishes that construction of a project is considered to have begun when either an entity closes a debt issuance that will fund a project that the executive administrator verifies is substantially the same as the project recommended in the regional facility planning grant report, or the effective date of a contract for the construction of a project the executive administrator verifies is substantially the same as the project recommended in the regional facility planning grant report, if the project costs are not funded by a debt issuance. This provision will establish a definite time to determine when construction begins. Use of debt issuance or effective date of a construction contract will assure that an entity is bound to begin the construction.

New §355.10(i) was added in response to public comment that if the regional planning study concludes there is no feasible regional solution, repayment should not be required. New subsection (i) will provide such exemption.

Comments were received from the Lower Colorado River Authority on the proposed amendments that requested changes if the rules were to be adopted.

The LCRA commented that requiring grant recipients to repay grants for projects that are not implemented because conditions have changed will have the undesirable effect of delaying planning until all facts are known. Change was not made because the intent of the rule is to focus planning on viable projects. The planning effort should focus on a realistic approach to regional planning and should anticipate changes that might occur during the course of the plan. While some unexpected changes could occur, the board does not consider that possibility sufficient to overcome the benefit of focusing funding of projects on those that will be more likely to proceed.

The LCRA commented that the two year time frame was insufficient to bring a project from planning to implementation and recommended instead a 10 year time period. The Board agrees that the two year time period may be insufficient and changed the time period from two to six years. The purpose of this funding program is to help communities plan for regional facilities and not long-range planning. The goal of this planning program is to identify the problem, find the solution, and implement. A ten year time period could increase the chances of changed conditions which could cause the regional facility plan to be obsolete.

The LCRA commented that limiting planning to projects that will be implemented in two years or less will force a short-term focus that, in many situations, will produce poor long-term planning results and that the results of facility plan could be that a regional solution is not financially or physically feasible. A finding that solution is "not feasible" is a realistic answer in many cases and this finding should not require reimbursement back to the board. The board has made changes to the time period from two to six years in response to LCRA's concerns forcing a short term focus. The board also agrees that if the study shows that a regional solution is not feasible, repayment would not be required. New §355.10(i) will exempt from repayment those studies that do not result in a proposed regional project.

The LCRA commented that the proposed language may have the effect of countering the purpose of "regional" facility planning and that larger projects with a greater number of participants will have a slower planning process. This could lead to results contrary to the legislative intent of promoting regional plans. The board makes no change in response to this comment because the initiation of the time period of which repayment is required is keyed on completion of the regional planning and will take into account slower planning which may result from these larger regional efforts.

The LCRA commented that the board's grant process requires a lead agency to execute the contract and that repayment could discourage these agencies from assuming this lead role. The board makes no change in response to this comment. Entities which work together on a planning effort may agree on methods to divide the responsibility of repayment if implementation is not initiated.

The amendments are adopted under the authority of the Texas Water Code §6.101 and §15.403 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

§355.10. Funding Limitations.

(a) Grants for regional facility planning and flood control planning shall be limited to 50% of the total cost of the project, except that the board may supply up to 75% of the total cost to political subdivisions which have unemployment rates exceeding the state average by 50% or more, and which have per capita income which is 65% or less of the state average for the last reporting period available.

(b) In-kind services may be substituted for any part of the local share, if such services are directly in support of the planning effort, are properly documented, and approved in advance by the board.

(c) Up to 100% of the cost of research projects may be provided by the board.

(d) Funds will be released only as reimbursement of costs actually incurred for approved activities.

(e) Grants in excess of 75% for regional facility planning or flood control planning will be provided if authorized by specific legislation or legislative appropriation language.

(f) The board may condition grants for regional facility planning to require that the recipients agree in the contract for assistance, and by the execution of any other documents necessary to secure such agreement, to pay back to the board the following specified percentages of the grant if construction on a project described by the regional facility planning grant is not begun within the following specified times:

(1) if construction is not begun within six years of the time the executive administrator notifies the grant recipient that the agency has closed the account for the grant, the recipient shall repay to the board 25% of the amount of the grant;

(2) if construction is not begun within seven years of the time the executive administrator notifies the grant recipient that the agency has closed the account for the grant, the recipient shall repay to the board an additional 25% of the amount of the grant;

(3) if construction is not begun within eight years of the time the executive administrator notifies the grant recipient that the agency has closed the account for the grant, the recipient shall repay to the board an additional 25% of the amount of the grant; and

(4) if construction is not begun within nine years of the time the executive administrator notifies the grant recipient that the agency has closed the account for the grant, the recipient shall repay to the board an additional 25% of the amount of the grant.

(g) Repayment under subsection (f) of this section shall occur no later than within the entity's first fiscal year following the date on which each repayment obligation is triggered.

(h) For the purposes of subsection (f) of this section, construction will be considered to have begun when:

(1) an entity closes a debt issuance that will fund a project that the executive administrator verifies is substantially the same as the project recommended in the regional facility planning grant report; or

(2) the effective date of a contract for the construction of a project the executive administrator verifies is substantially the same as the project recommended in the regional facility planning grant report, if the project costs are not funded by a debt issuance.

(i) If the regional plan determines that a regional project is not feasible, repayment will not be required under the provisions of subsection (f) of this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 22, 2002.

TRD-200205555
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: September 11, 2002
Proposal publication date: May 31, 2002
For further information, please call: (512) 936-2246

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 23. VEHICLE INSPECTION
SUBCHAPTER A. VEHICLE INSPECTION STATION LICENSING

37 TAC §23.15

The Texas Department of Public Safety (DPS) adopts amendments to §23.15, concerning Inspection Station and Certified Inspector Denial, Revocation, Suspensions, and Administrative Hearings with changes to the proposed text as published in the May 10, 2002, issue of the *Texas Register* (27 TexReg 3967) and will be republished. The amendment clarifies the grounds for denial, revocation, and suspensions of certificate for inspection stations and vehicle inspectors, notification procedures, and rights to an administrative hearing. The amendment implements changes to Texas Transportation Code, Chapter 548, §548.405 as amended by Tex. H.B. 3071, Acts 2001, 77th Leg., R.S., ch. 1169, §2.

The department held a public hearing on the amendment at the Texas Department of Public Safety Criminal Law Enforcement Building on June 4, 2002. An attorney representing the Texas State Inspection Association (TSIA-1), the Legislative Director of the Texas State Inspection Association (TSIA-2), several inspection station owners/operators (operator), an out-of-state limited partnership (LP) starting the inspection business in this state, and a corporation that owns or franchises (owner/franchiser) businesses which participate in the inspection program commented concerning the proposed rule. Comments were both written and oral. The comments were extensive and ranged from general comments concerning the rule and the rule making process to specific comments concerning the proposed rule amendment. To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

Comment: TSIA, in its request for a public hearing, requested the department to hold public hearings in all cities and counties of the State of Texas or in several different locations within the state containing safety and emissions testing stations, including rural areas.

Response: DPS proposes and adopts administrative rules as stipulated in Texas Government Code §§2001.001-2001.039. §2001.029 requires state agencies to give all interested persons a reasonable opportunity to submit data, views, oral or written arguments. The statute does not require multiple public hearings in every county or municipality affected by a rule.

Comment: TSIA-1, during the public hearing, requested a public hearing in front of the DPS Commissioners to provide DPS, TSIA, and other interested persons, an opportunity to exchange information about the rule and its effects on the inspection industry.

Response: Public Safety Commission (commission) meetings are held at the call of the Chairman. All meetings are open to the public and announced in the *Texas Register* and the Open Meetings website at http://www.sos.state.tx.us/texreg/. The public is invited to attend all meetings. Each meeting agenda includes public comments to the commissioners. The department also posts the proposed rule amendment as an agenda item before final adoption.

Comment: TSIA-1 states DPS did not consult or advise TSIA of this rule until publication in the *Texas Register*.

Response: Department staff prepares proposed rules and/or amendments and then presents them to the commission for approval for publication in the *Texas Register* to receive public comment. The department staff receives, reviews, and summarizes all comments and if appropriate incorporates changes to the proposed rule or amendment. The summarized comments, department staff's responses, and the final proposed text is then presented to the commission for its consideration. The Texas State Inspection Association is an association of 300 members consisting of owners and operators of department certified inspection stations. TSIA was represented at the Public Safety Commission meeting held on April 23, 2002, when the rule amendment was proposed, and TSIA participated in the June 4, 2002, public hearing on the rule.

Comment: TSIA-1 and one station operator states DPS did not advise TSIA of the date of the public hearing in time to notify inspection stations to attend. Furthermore, due to the significance of this rule, TSIA-1 asked that hearings be held in more than one county, and that the hearing be publicized to inspection stations by DPS.

Response: The department staff received the initial TSIA request for public hearings on May 8, 2002. The proposed amendment was published in the *Texas Register* on May 10, 2001 (27 TexReg 3968). Department staff set up a public hearing date and the announcement was published in the *Texas Register* on May 24, 2002 (27 TexReg 4635). Department staff received four more requests from TSIA members, postmarked May 28, 2002. To insure TSIA was aware of the details of the public hearing, staff sent the information by email and fax to TSIA. After the fax communication failed, department staff faxed the information to another telephone number used by the organization and called to confirm delivery. During the telephone conversation, the TSIA member confirmed that TSIA was aware of the public hearing details. As stated above, Texas Government Code §2001.029 does not require for multiple public hearings in every county or municipality affected by the rule and the *Texas Register* is the official method of public notification.

Comment: One station operator stated that the proposed rules were not discussed with the Inspection and Maintenance Advisory Committee and its members were not aware of the pending rules until he informed them. The station owner said the inspection industry and DPS are not enemies and DPS should take a more active role in including the industry in its rulemaking.

Response: Texas Transportation Code, §548.006 establishes the Vehicle Emissions Inspection and Maintenance Advisory Committee (advisory committee) and entitles the committee to review and comment on rules to be considered for adoption by the commission or department under Subchapter F, before the rules are published. This rule is proposed for adoption under Transportation Code, Chapter 548, Subchapter A, §548.002, and Subchapter G, §548.405 and therefore prior review by the advisory committee is not required.

Comment: TSIA-1 orally commented that the impact of the rules is an absolute bar to the workforce for conviction of certain misdemeanors and felonies. TSIA-1 pointed out as a "far less than perfect example" that some current licensed members of the State Bar of Texas have been convicted of each and every one of the rule's laundry list of offenses. TSIA-1 stated the Board of Bar Examiners has a very workable plan for determining whether there is an actual nexus or relationship between the conviction and unsuitability for having the public trust as a lawyer. TSIA stated that the entry level, minimum wage, job is attractive to the universe of people who have youthful indiscretions. While TSIA does not have a single problem with making sure that people dealing with the public in this area be appropriate, TSIA-1 contends that this type of blanket bar to inspectors is unworkable and if the rule is adopted eighty percent of the work force would have to be fired the next day.

Response: The proposed amendment did act as an absolute bar to individuals seeking certification as inspectors and station operators for certain misdemeanors and felonies. A prospective attorney denied permission to take the bar exam receives an administrative hearing as does a prospective inspector denied certification. Before 1953, members of the Texas Highway Patrol performed vehicle inspection via roadside stops. §141(a), Vernon's Annotated Civil Statutes (V.A.C.S.) Article 6701d (codified as Transportation Code, § 548.003) authorized the department to certify, instruct, and supervise inspection stations and mechanics to perform the annual inspections of vehicles. Under this statutory relationship, inspectors and inspection stations

are empowered to perform a regulatory function. Citizens are required to take their vehicles to a department certified inspection station. The station determines if the vehicle is properly equipped to operate on the State's roadways. If the station fails the vehicle then it may not legally operate on the public roadways. Operating a vehicle without certification from the inspection station or after a vehicle fails will result in a traffic citation by any law enforcement personnel. The department bars individuals with certain misdemeanor and felony convictions from its employment because public policy requires those who enforce the law to meet a higher standard. Since inspection stations, under department supervision, also enforce vehicle equipment laws, inspection station operators, and inspectors should meet a high standard. Transportation Code, §548.405(a)(7) allows the department to deny, revoke, or suspend the certification of any person who has been convicted of a felony, Class A, or Class B misdemeanor. In subparagraph (e)(4)(D) and subsection (f) of the proposed rule, which displaces 37 TAC §23.16 concerning persons with a criminal background, the department proposed that individuals convicted of serious crimes such as murder, rape, sexual assault, child molestation, aggravated assault, burglary; crimes involving theft, fraud, and unlawful business practices; and criminal violations of the vehicle inspection laws did not meet this high standard. The aforementioned crimes are not those typically classified as youthful indiscretions. However, in view of this comment and others that follow, it appears that inspection station owners/operators are more than willing to entrust employees with these types of convictions. The department has thus made changes to the proposed rule based on comments received. The change in subparagraph (e)(4)(D) allows certification of individuals convicted of these crimes if they are under no further impediment by the court.

Comment: TSIA-1 and one station operator contend that the rule will eliminate the inspector station workforce, will require replacement of the workforce, and is unrealistic. TSIA-1 believes that inspection industry employees, especially in safety- only counties, tend to have blemishes on their criminal records. TSIA-1 states that historically the workforce is comprised of entry level automotive technicians with specific educational and economical limits, who come from a segment of society where such criminal history blemishes are more common. TSIA-1 contends that requiring inspectors to have no record or a limited record creates an unprecedented shift in the current workforce, and will cause a severe shortage of inspectors. Additionally, TSIA-1 believes the proposed rule places station operators in a trap requiring them to have inspectors on duty, yet unable to recruit or retain them, which subject stations to possible suspension action. Further, stations will have to recruit employees from a different educational and economical background, increasing the cost of performing inspections. TSIA-1 believes that many stations will not be able to accomplish this and may cease operations and fewer inspection stations will mean longer customer waits. Finally, TSIA-1 believes DPS, by enacting this rule, is actually decreasing service to the public, and increasing wait times.

Response: During the current application process, the department performs a criminal history check on inspector and station operator applicants. The department has the statutory authority to deny, revoke, or suspend the certification of any person who has been convicted of a felony, Class A, or Class B misdemeanor. Under the current rule (37 TAC §23.16) which this rule supercedes, the department denies, revokes, or suspends the certification of any station operator or inspector convicted of a felony, Class A, or a Class B misdemeanor until after the court imposed punishment or supervision has elapsed. In calendar year 2001, only 44 inspector applications out of 5,564 were denied, approximately 29 denials were for criminal history and 19 for invalid driver license. The intent of the proposed amendment was to exclude those individuals convicted of crimes of violence and crimes that establish untrustworthy behavior. The department disagrees that holding inspectors and station operators to this standard is unworkable and unrealistic. However, based on the comments from station owners and operators, the department will not bar those individuals who have completed any sentence, probation, or parole for offenses listed. Subparagraph (e)(4)(D) of the adopted rule will include additional sentences to allow certification of individuals convicted of these crimes if they are under no further impediment by the court.

Comment: The corporate owner/franchiser stated the proposed penalty schedule focuses on the punishment of inspection station owners and operators rather than an individual inspector. The owner/franchiser believes the company should not be unreasonably held responsible for the actions of an unscrupulous, rogue employee - especially where the station owner maintains adequate policies, procedures and training and is willing to cooperate with the department in bringing forth the employee for prosecution. The corporate owner urged the department to revise the proposed rule so that individual inspectors are held accountable for improper activities; and, owners and operators that develop and maintain adequate policies, procedures and training practices are not unduly penalized for the act of rogue employees. The corporate owner/franchiser stresses to the department that by not refocusing the penalty schedule in this manner, the department puts the emissions testing program at risk because operators who have expended significant capital and who maintain adequate procedures will have little choice financially but to exit the program if stations rather than individual inspectors are suspended.

Response: The department disagrees that the proposed rule unreasonably holds owners/operators responsible for the actions of rogue inspectors whom they employ. In the proposed rule, the department sought to bar inspector certification of individuals convicted of crimes of violence and dishonesty. It is unreasonable to expect the department to totally exonerate station owners/operators from rule violations because they establish minimal procedures. The department will look into the totality of the circumstances before citing the station owner/operator. If the owner/operator intentionally, knowingly, or through their own disregard allows an inspector to violate department rules, then the station owner/operator will be held responsible no matter how many procedures or policies are written and posted, or how significant the capital expenditure involved. The department also disagrees that the proposed penalty schedule focuses on punishment of the inspection station owner/operator rather than the individual inspector. Of the forty-six items listed as violations, only twelve violations, arguably, focus primarily on the operation of the inspection station. Examples of these violations are failure to display the official department issued station sign and allowing a suspended or revoked inspector to inspect a vehicle. However, the wording of subparagraphs (e)(5)(A) and (B) may cause readers to believe that Category E violations, fifteen violations of which four are duplicative between emissions and non-emissions stations, apply only to inspection stations. To clarify, the department has changed the proposed rule text to add "inspectors and" before the words "inspection stations" in both subparagraphs.

Comment: TSIA-1 and two station operators contend the proposed rule does not distinguish between violations committed by

the individual inspector and the station owner. TSIA-1 notes that DPS has no published operational standards for single or multiple inspection stations and therefore owners are now responsible for the formulation of their own management standards. TSIA-1 therefore believes that if an inspection station owner has reasonable written standards in place that require inspectors to abide by DPS rules and regulations and these written standards are communicated and reasonably enforced, then DPS should take action against the inspector that violates these established rules and not the station owner or operator.

Response: The rule proposed for amendment covers the denial, revocation, suspension and administrative hearing procedures regarding departmental certification to perform statutorily required vehicle inspections. The thrust of the rule has always been to delineate the circumstances whereby certification is denied or withdrawn. The violations specified in the proposed amendment are either statutorily prohibited, illegal, prohibited by administrative rule, or prevent the department from properly administering the program, irrespective to the status of the actor. Therefore, the proposed rule does not distinguish between violations committed by the individual inspector and the station owner. The distinction lies with culpability. For example, an individual inspector charges more than the authorized inspection fee. The inspector turns in the correct fee amount to the station owner. The owner/operator has no knowledge of the inspector's action. Under these circumstances, the inspector and not the station owner is accountable. However, if the station owner instructs the inspector to charge more than the authorized fee "off the books" or the work order indicates the excessive fee then both inspector and station owner/operator are accountable. The inspector, if under the duress of job loss, may not be culpable. The department has published operational standards for an inspection station. Those standards are included in the Title 37 TAC Chapter 23 and the Rules and Regulations Manual for Operation of Official Vehicle Inspection Stations (DPS Rules and Regulations Manual), incorporated by reference into the Texas Administrative Code by 37 TAC §§23.78 and 23.93. The department certifies the stations individually and oversees the operation of each inspection station individually. The department does not see the need to establish different operational standards for owners of multiple stations. Station owners/operators should have standards, whether written or not, that require inspectors to comply with department rules. Thorough communication and full enforcement of such station policies will preclude the necessity of any enforcement action by the department.

Comment: TSIA-1 and one station operator believe that the proposed rule does not balance the risks and the rewards for inspection station participation. TSIA-1 points out that in emissions testing counties, inspection station owners have recently invested over $60 million dollars to continue to participate in the program. TSIA-1 contends that DPS chose not to publish the rule until after station owners had invested substantial amounts of money and installed the necessary equipment. TSIA-1 believes that under the proposed rule, the same owners can essentially face bankruptcy for a minor violation. TSIA-1 uses a hypothetical based on a DPS technician's opinion of the cleanliness of the facility. In the example, a technician decides that an inspection area is not "clean" and writes a warning to the station operator. Then the same technician comes back the next day and suspends the station license. Under these circumstances these station owners would be unable to make equipment payments, and would likely be unable to recover. TSIA-1 contends that any judge would not allow such a minor violation, based on an "opinion" to bankrupt a station operator.

Response: The proposed rule amendment covers the denial, revocation, suspension, and administrative hearing procedures regarding departmental certification to perform statutorily required vehicle inspections. It is unrealistic to expect this rule alone to balance risks and rewards for participation in the program in this state. The expenditures cited in the comment are risks associated in participating in a highly regulated service industry. Regulation of vehicle emissions testing is by state law and regulation. The timing of the publication of the proposed rule amendment is inconsequential since Transportation Code, §548.405(c) has required the same six-month suspension since 1997. Failure to adhere to administrative rules may adversely affect businesses involved in a highly regulated service industry. The hypothetical example used in the comment is extremely improbable. A review of the department files reveals only one occurrence of the suspension of a station for not being "clean". In that matter, the inspection bay was cluttered with spare parts and a vehicle on which work was being performed blocked the entrance. The same situation had existed on two previous monthly audit visits, each time the station had promised to remove the parts so that inspections could be performed in the inspection bay. The department agrees suspensions should not be based on subjective judgments and has not suspended or revoked the certification of any station on that type of judgment. Any station owner/operator is entitled to judicial review of an adverse department action as specified in Transportation Code, §548.408.

Comment: An out-of-state limited partnership (LP) chose to start in the inspection business in this state due to representations by the program administrators (Department of Public Safety (DPS) and Texas Natural Resource Conservation Commission (TNRCC)) that the program implementation and enforcement would take into account the "business side" of the program. LP believes the proposed rule changes policy to base enforcement on "culpability" and not prior enforcement practices. LP also states that inspectors are human and every one of them, without exception, will make a human mistake. LP believes it is more efficient from enforcement and a business standpoint to train people and allow for correction of errors/infractions rather than to simply eliminate the inspector/station and replace them with untrained inspectors/stations that will probably make the same, or similar, error/infraction. LP believes the penalty schedule does not take this into account and the penalties clearly do not "fit the crime." LP states culpability is not reflected in the proposed penalty matrix; for example, a station owner should not be held definitively accountable for the actions of an inspector, just as a carrier business should not be held definitively accountable for a driver speeding. LP strongly urges that the rules be withdrawn. LP believes that a committee to draft a new rule be formed with strong participation from the inspection station industry and DPS and drawing upon other states' program enforcement schedules and experience, to openly address the issues that would add to the success of the program. LP attached Georgia's enforcement policy and suggested it follows a more "common sense approach" than the proposed rule. LP concludes that the ultimate success of the program is not based on how many inspectors of businesses can be "written up" and enforcement actions taken.

Response: In a meeting between LP and the staff from both agencies, LP received information that the department welcomed anyone interested in providing vehicle inspections to the public. The department has always taken into account the

"business side" of the program - providing an adequate number of stations so that every vehicle may be properly inspected with reasonable convenience at a reasonable profit for the business. While the department will accommodate reasonable business concerns, it can not abandon its duty to administer the program. Enforcement of rule violations must be based on "culpability." The violations listed in the rule resulting in mandatory suspensions are intentional acts of misconduct rather than human mistakes, e.g., issuing a certificate without inspecting the vehicle, allowing uncertified person to inspect a vehicle, and fraudulently testing another "clean" vehicle so that a failing vehicle passes. It may be more efficient for a business to allow inspectors and stations with these violations to continue, regardless of the infraction. It is, however, unreasonable to expect the department to ignore applicable laws and regulations regarding these serious infractions. The culpability for any violation, be it inspector or station, will be determined during an investigation of the actions of the participants and not assigned arbitrarily. The department staff drafted the proposed rule amendment based on thorough research. Department staff has reviewed the attached enforcement policy and matrix from Georgia. It is policy guidance only, not an administrative rule, and does not limit the state from any adverse action it deems appropriate. Notably the text of the Georgia policy does not support the comment. Regarding administrative violations, the Georgia policy makes it clear that they are primarily the responsibility of the station owner. It also allows for monetary penalties. The enforcement policy of Georgia and its adoption procedure does not comport with Texas Government Code, §§2001.001-2001.39, nor Texas Transportation Code, Chapter 548. The department does not rate the success of the state inspection program on the number of enforcement actions.

Comment: TSIA-1 and one station operator allege that the proposed rule promotes favoritism and personal retribution, and allows hearsay to cause expense and possible financial ruin to honest business people. TSIA-1 contends that if a technician does not personally "like" an inspection station owner, that nothing prohibits the DPS technician from harassing the owner with minor violations in an effort to put the operator out of business. TSIA-1 states that the rule is akin to the punishment of execution for jaywalking. TSIA-1 states that if the rule is unaltered, it will promote such activity.

Response: The department disagrees that the proposed rule promotes favoritism and personal retribution. The proposed rule reduces the discretion of the department personnel (technician) and standardizes the penalties of adverse administrative action taken against any inspector or station. Department policy instructs technicians never to rely on hearsay, but to use it as a clue as to what the inspection station may be doing. Exclusion of hearsay is a judicial rule of evidence and not precluded from the investigative process. All adverse administrative actions must be reviewed and approved by the technician's Field Supervisor, the Regional Supervisor, and the Regional Commander. Sufficient evidence of violations must support such actions. The inspector or station has the option of accepting a consensual administrative penalty or requesting an administrative hearing. During supervisory audits, supervisory personnel visit stations to review technician/station relationships. The only penalty that is equivalent to the death penalty, lifetime revocation, is a Category C, third offense, where the violator is a habitual offender of the most serious infractions. The offender would have had the three separate opportunities to receive an administrative hearing. Based on this comment, the department, to insure that inspection stations are not closed based solely on minor violations, has made three changes to the adopted rule. The first is a change to the penalty schedule, subsection (d), to prevent escalation of Category A violations to Category B and thereby subject to certificate revocation. The second change is to add subparagraph (e)(1)(M) to limit the time-period for determining subsequent offenses of Category A violations to two years. The third change is to add paragraph (g)(2) to prevent the aggregation of Category A violations penalties so that multiple Category A violations found on one visit will be reported but run concurrently and not consecutively.

Comment: TSIA-1 and one station operator contend that the proposed rule is very broad, vague, open to multiple interpretations by different DPS technicians, and does not account for honest human error. TSIA-1 believes that with the great number of inspections, tens of thousands performed each year, some honest mistakes will occur. TSIA-1 contends that it is patently unfair to suspend an inspection station with a rule that is so broad and vague that no two people interpret it the same way. TSIA-1 states that a DPS Regional Supervisor should substantiate violations of a rule open to such interpretation. Further TSIA-1 contends that station owners and operators are held to a higher standard than DPS holds its own technicians and employees and that a more reasonable and workable standard must be formulated.

Response: The department disagrees. The proposed amendment to the rule contains a categorized list of violations and corresponding penalty categories for infractions of department rules contained in Title 37 TAC Chapter 23 and the DPS Rules and Regulations Manual. Its scope requires it to be broad enough to encompass violations that result in the denial, suspension, or revocation of inspector and station certification. The department understands that human errors occur which is why with over thirteen million inspections, performed by more than thirty-four thousand inspectors, at more than nine thousand stations, only two hundred eighty-five certificates have been suspended and twenty certificates have been revoked statewide in calendar year 2001. The violations listed in each category are not for interpretation but used to determine the severity of penalty once the violation has been substantiated. As stated before, each violation requires the review and approval of each supervisor in the department technician's chain of supervision. The department also recognizes that its employees are capable of human error; some of the procedures earlier discussed are to correct these errors. Any complaints about department personnel should be submitted in accordance with rule 37 TAC §1.38, the department's personnel complaint policy.

Comments: The corporate owner/franchiser and TSIA-2 stated the proposed rule does not implement the law as written in HB 3071, §2(g), to safeguard the interests of an inspection station owner of multiple inspection stations where proof of culpable conduct has not been proven in relation to prior actions. The corporate owner/franchiser recommends that the proposed rule should reflect the Legislature's intent by including specific language that there will be no pooling of offenses for an inspection station owner and operator of multiple inspection stations where proof of culpable conduct has not been proven in relation to prior actions. TSIA-1 contends that DPS should clarify when DPS will suspend or revoke all the certificates of the entity. TSIA-1 proposes the following language be added to the rule, "[t]he department shall not suspend revoke or deny all certificates of a person who holds more than one inspection station certificate

based on a suspension, revocation or denial of one of that person's inspection station certificates without proof of culpability related to a prior action under this section" to clarify this point.

Response: The department, when proposing rules to carry out its duties, does not duplicate statutory language that is patently clear in its meaning. The proposed amendment does not state that the department aggregates or pools all certificates held by a multiple station owner/operator where the loss of one would lead to the loss of all. The proposed amendment also does not allow a violation of one station to count towards a second violation to another station certificate held by the certificate holder of the first. Under HB 3071, 77th Legislature, the department may not deny, suspend, or revoke all certificates of a person who is a multiple certificate holder based on such action against one of those certificates, unless there is proof of their culpability in the previous action. The recommended language in the comment changes the character of the statute by the use of the word "shall." The department has changed the proposed rule to add a new subsection (g) to clarify the circumstances under which an owner/operator with multiple certifications may lose certification after being found culpable and the prohibition of violation "pooling."

Comment: TSIA-1 and one station operator contend that proposed rule's expanded penalties extend to members, shareholders, directors, and officers of partnerships, corporations, and other business associations. The owner cites an example of hiring an inspector who miss-logs a vehicle. The inspector and station would then be suspended, and the station would not be allowed to reopen in another family member's name as a partnership or corporation. The result is that the station owner is put out of business for good.

Response: The proposed rule amendment expands the applicability to the individuals listed in the comment because Transportation Code, §548.405(f), as amended by the 77th Legislature in HB 3071, extends application of the statute to them. The Inspection Station Report Form, VI-8, used as the example in the comment, is the single most important document maintained by a certified inspection station and is covered by separate rule 37 TAC §23.53. This form documents all inspections conducted by the station and accounts for all certificates issued by the station. Inspectors are required to properly complete and sign the inspection station report for each vehicle inspected. Failing to maintain the VI-8 in safety-only counties is the equivalent of keeping no records at all, and careless and slipshod preparation of the form is a category A violation punishable by re-education for a first time violation. The comment's reference to inability of a family member to reopen a suspended station refers to Transportation Code, § 548.405(e), the language of which was not included in the proposed rule, since the legislative intent was clear. The statute however does not provide for the method of proof for the non-involvement of the suspended or revoked family member. To clarify, the department has made changes to the proposed rule by adding a new subsection (h) that describes the required proof necessary to reopen a suspended or revoked station by another immediate family member.

Comment: One station operator states that the department has created an unnatural risk for the industry by creating severe penalties for violations based on inherent human errors. The station owner complained that DPS requires inspection records to be created and maintained by hand and inspection stations may lose their business in transposing one number in a seventeen- digit vehicle identification number (VIN) number. In order to account for the expanded accountability of this section the inspection stations should be reimbursed for the certificate fee.

Response: The department disagrees. The industry exists because of state regulation. All highly regulated businesses are required to keep accurate records of transactions. The proposed rule does not expand this accountability, but does limit the administrative punishment for infractions. The error of transposing one of the VIN numbers, if detectable, is a minor violation that would result in required re-education. The safety- only inspection fee, referenced by this comment, is set by Transportation Code, §548.501 and outside the scope of this rule.

Comment: TSIA-1 and one station operator state that during safety inspections, stations are continuously required to take on additional items of inspection without adequate training or compensation. TSIA-1 submitted an exhibit which indicates the increased tasks, since 1990, to be completed by stations during inspection: proof of financial responsibility (insurance), sun screening with added equipment, steering system check, emission component check, vehicle registration check for required emissions test, and the affidavit for vehicles no longer subject to the program. TSIA-1 recognizes that while these additions may seem like a natural progression of the annual safety program, through these new penalties, these additions carry an even greater liability to inspectors and inspection stations owners. TSIA-1 contends that the current $7 retained by the station does not afford the self-monitoring or company supervision that now must be in place with the expanded applicability of this section.

Response: This comment is outside the scope of the rule. The items of safety inspection are required either directly or indirectly by statute. Of the six inspection items named, Transportation Code, §§548.051 and 548.105 directly require the first four. The last two items result from the application of Transportation Code, §548.304. Transportation Code, § 548.501 requires each inspection station to pay DPS $5.50 for each inspection certificate, of which $2.00 goes to the Clean Air Fund with the remainder going to the State's general revenue fund.

Comment: TSIA-1 contends the inspection fees, both safety inspection and emission testing, are inadequate to cover the costs to a station necessary to ensure compliance with this rule. However, many of the station owners are financially committed to conducting safety and emission inspections since they have bought equipment or signed leases for equipment and cannot simply stop doing inspections because of the investment they have made.

Response: This comment is outside the scope of the rule. As noted above, the safety inspection fee is set by statute. The emissions testing fee is set by the Texas Natural Resource Conservation Commission.

Comment: TSIA-1 states that while the need to ensure that inspection stations are meeting their obligations and complying with the laws of the State of Texas to maintain certificates, many of the proposed offenses lack a meaningful standard with which an inspector could comply; the penalties imposed appear to be inconsistently applied and impossible to equally enforce. TSIA-1 contends the penalty schedule (30 TAC §23.15(d)) is too onerous, particularly because many of the violations listed in subsection (e) are without standard, making it difficult for the certificate holder to comply. Additionally, it will be impossible for DPS to equally enforce this rule across the State.

Response: The intent of the proposed rule amendment was not to create an administrative "penal code" containing the violations, elements of each violation, general defenses, and justifications excluding punishment. The intent of the proposed rule amendment is to state the reasons for denial of certification to individuals; once certified, the violations which would cause the certification to be suspended or revoked; and if so, for how long. The department disagrees that the penalty schedule is onerous, but is a measured and equitable response to violations of Chapter 548 of the Transportation Code, Title 37 TAC Chapter 23, and the DPS Rules and Regulations Manual. Under the current rule, the severity of the penalty and the term involved is totally at the discretion of the DPS regional personnel. The impact of the proposed rule amendment limits and equalizes the penalty for the same violation throughout the State.

Comment: TSIA-1 contends that multiple Category A violations should not result in an upgrade to a Category B violation. It is unclear how many Category A violations will be needed before the violation is upgraded to a Category B. For example, if a person commits two Category A offenses, will that person' s certificate be suspended for 3 months (2nd Category A offense) or 6 months (Category B 1st offense of multiple violations of Category A). What happens if a person receives four or more offenses? Is a person's fourth offense a Category A violation, or is it a first offense under Category B?

Response: The department agrees that the penalty schedule may be confusing regarding multiple Category A offenses. The department has made changes to the penalty chart based on this comment as well as others. The penalty schedule no longer upgrades from one violation category to another.

Comment: TSIA-1 contends that Category C violations, subsection (e)(3)(A)(B) and (D), identify multiple Category B and E violations and queries how many of these lower category violations would constitute these Category C offenses. TSIA-1 states that three Category B offenses would either face certificate revocation (Category B - third) or a twelve-month suspension (Category C - first). The rule is unclear how many multiple violations will be assessed.

Response: The department agrees that the multiple violation elevation feature of the penalty chart may be confusing. While Category C violations, subsection (e)(3)(A) and (B), are similar, the Category B violations in subsection (e)(2)(A) and (B), they differ in that the Category B violations are isolated and singular infractions, whereas the Category C violations are repetitive and aggravated infractions. The same holds true for the Category C violation, subsection (e)(3)(D), as it relates to Category E violations. The department has made changes to the penalty chart based on this comment as well as others. Category violation penalties will not be elevated to other category penalty levels.

Comment: TSIA-1 proposes an alternative penalty schedule, which TSIA believes more appropriately addresses violations, be considered and adopted. TSIA's alternative schedule incorporates "re-education" as an additional consequence to receiving a violation. TSIA-1 proposes that the definition of "Re-education" be included in §23.15(c) and defined as follows: "(5) Re- education - means an inspector must attend a DPS certified inspector training course and pay any applicable fees associated with that course before being allowed to resume performing inspections."

Response: The department has reviewed and considered TSIA's alternative penalty schedule, but can not adopt it as written. The format and style of the alternative penalty schedule is not conducive to publication. The proposed violations and schedule are two and one quarter pages, whereas the alternative combined violation and penalty chart is approximately nine pages in length. TSIA's alternative penalty schedule reallocates the application of the forty-six violations to thirty-one inspector specific, seven station specific, and eight inspector as well as station violations. This removes station liability from most violations or significantly lowers the penalty. For example, Subsection (e)(3)(E), a violation for a station allowing a person with a suspended or revoked certification to participate in vehicle inspection or station operations, is a Category C or serious violation. TSIA's alternative schedule only permits a warning, one-month suspension, six-month suspension, and a one- year suspension, respectively, for a first through fourth violation. TSIA's revision of the text for the violation requires the department to furnish formal notification of the status of the individual employed by the station before starting any action. TSIA's penalty schedule prevents the department from suspending or revoking the station for any emissions testing violation, no matter how serious the violation. This is not reasonable in light of Transportation Code, §548.405(c). However, TSIA's schedule permits full applicability where a station owner/operator is also an inspector. The department did not include re-education in the proposed rule amendment and based on this comment and others has changed the adopted rule amendment to include re-education. Re-education is defined as additional or remedial training for minor violations. TSIA's definition of re-education is more appropriate for re-certification, which the department uses after certificate suspension or revocation. Re- education and re-certification are included and defined in the adopted rule amendment to clarify the difference.

Comment: The corporate owner/franchiser and TSIA-2 stated that even though HB 3071 specifies that the penalty schedule should include re-education, the proposed rule does not provide for re-education in the penalty schedule. The owner/franchiser recommends the option of a re-education course before a suspension or revocation and as a mitigation to reduce the length of suspension. TSIA-2 commented that the inspector could be required to attend another inspector class, charged for it, and with the private entities providing this training it could be a substantial financial penalty.

Response: The department has included re-education in the adopted rule amendment. Generally, re-education will be used for minor first violations before a warning is used. It will not be used instead of, or to mitigate a suspension, and re- certification is required after a suspension or revocation. Since re-education is remedial, only the department will conduct it.

Comment: TSIA-1 cites as a standardless proposed rule provision subsection (e)(1)(D). Where is the proper location for a sticker? Is the inspector required to remove all other decals including vehicle registration sticker in order to comply? How will the DPS handle customer complaints if this is the case?

Response: The proposed rule amendment is not a complete compendium of the entire program. The standard for this violation is located in 37 TAC §§23.21 and 23.22, which state that the inspection certificate shall be attached firmly to the lower left-hand, inside corner of the windshield as viewed from the driver's seat, as close to the frame as possible. The certificate shall be affixed by the inspector so that it does not interfere with the vision of the driver through the windshield or any rearview mirror on the left fender of the vehicle; and does not interfere with

reading from outside the vehicle the vehicle identification number on the left-hand corner of the dashboard. Any other certificate, decal, or sticker, such as parking permit or property owner identification, shall be removed if it is in the lower left-hand corner of the windshield where the inspection certificate is to be affixed. Station owners are instructed to advise the vehicle owner or operator that the department designates this location for the inspection certificate, and that the vehicle owner should obtain a replacement permit or decal and locate it on another place on the vehicle. These instructions are also contained in the DPS Rules and Regulations Manual, § 03.20.02, page 3-2. Any complaining customer may contact the department.

Comment: TSIA-1 cites as a standardless proposed rule provision subsection (e)(1)(F). What is an "objective" reason? Is an inspector allowed to refuse to inspect a vehicle for misconduct or inappropriate behavior by the customer?

Response: The violation has easily understandable standards. Those standards are contained DPS Rules and Regulations Manual, §03.45.00, page 3-3. It states that no station during approved business hours shall refuse to inspect a vehicle that is presented for inspection. Stations will be required to inspect only those types of vehicles authorized by the endorsement(s) to their Certificate of Appointment. However, a station must refuse to inspect any motor vehicle for which no evidence of financial responsibility is presented or if the motor vehicle is too large for the inspection station entrance except trailers, semitrailers, and mobile homes. These are the authorized reasons for refusing to inspect a vehicle. The department understands there might be unique circumstances to reject a vehicle. These circumstance may be that the vehicle is obviously unsafe to drive during the brake test, leaking fuel and presenting a fire hazard, or a customer acting in an inappropriate or threatening manner. DPS Rules and Regulations Manual, §01.25.05(9), (10), page 1-7 provides that stations shall not refuse to inspect a vehicle unless there is a justified cause. The use of the word "objective" allows for such unique circumstances where any objective observer would agree with the decision as opposed to only the station personnel subjectively feeling or thinking it to be the case. This prevents a fictitious or arbitrary reason for refusing to inspect a vehicle.

Comment: TSIA-1 cites as a standardless proposed rule provision subsection (e)(1)(G). What is the "proper" safeguard of inspection certificates and department issued forms? What is considered to be "department issued forms"? Is a station owner responsible for a forced entry, theft, or illegal taking of inspection certificates and department issued forms if they were reasonably safeguarded? Is an inspection station owner responsible for items taken in an armed robbery or in the case of employee dishonesty or theft?

Response: The safeguarding of certificates is controlled by 37 TAC §23.25. Generally, it states that station owners and operators are responsible for all certificates issued and adequate facilities shall be provided for safeguarding all certificates. Specifically, the certificates shall be kept under lock and key at all times in a metal box or a secure container with a locking device. DPS Rules and Regulations Manual, §03.10.00, page 3-1, provides additional instruction on the subject. The word "proper" is used in the common meaning of the term, i.e., meeting a required standard of competence (Webster's II New College Dictionary). Stations and inspectors are not responsible for the criminal acts of others, such as burglars.

Comment: TSIA-1 cites as a standardless proposed rule provision subsection (e)(1)(H). What is the "proper" maintenance of required records?

Response: Vehicle inspection records are addressed in 37 TAC Chapter 23, Subchapter D, §§23.51-23.53 and DPS Rules and Regulations Manual, Chapter Five. The word "proper" is used in the common meaning of the term, i.e., meeting a required standard of competence.

Comment: TSIA-1 cites as a standardless proposed rule provision subsection (e)(1)(I). What is an "adequate" supply of certificates? Further, it is often not within the control of the station how many certificates it has on hand since a failure of DPS to have adequate stickers could prevent an owner from having an adequate supply. Moreover, a station could experience an unexpected high volume of customers wanting inspections.

Response: The purpose of certifying inspection stations is to perform vehicle inspections. If a station does not have inspection certificates to issue, it can not inspect vehicles. The department has established an extensive system for the sale of certificates to inspection stations with more than 208 outlets. Stations may purchase certificates at the department headquarters, regional, and district offices as well as many driver license offices. While it is possible for a station to exhaust its supply of certificates or, under rare circumstances, for a sales point to exhaust its supplies, the department does not penalize stations under these conditions. However, when a station, for whatever reason, repeatedly neglects or refuses to purchase certificates, it is refusing to perform vehicle inspections. The word "adequate" is used in the common meaning of the term, i.e., barely sufficient, satisfactory, or in other words, the requisite number to service the normal number of vehicles presented for inspection without running out. This type of violation occurs, if ever, after a department technician repeatedly visits a station, no certificates are on hand and there have been no attempts to purchase any.

Comment: TSIA-1 cites as a standardless proposed rule provision subsection (e)(1)(K). What is the "proper" display of a certificate of appointment, procedure chart, and other notices required by the department? What do these include?

Response: The word "proper" is used in the common meaning of the term, i.e., meeting a required standard. The standard is contained primarily in 37 TAC §23.10 that states each station shall post the certificate of appointment, vehicle inspection station sign, procedure chart, posters, or other informational material as directed by the department. It shall be mounted on the wall in an area of sufficient size and in a conspicuous place. Fleet and governmental vehicle inspection stations are only required to display the certificate of appointment and procedure chart. Additionally, 37 TAC §§23.71-23.72 provides further instructions for the certificate of appointment and the procedure chart.

Comment: TSIA-1 cites as a standardless proposed rule provision subsection (e)(1)(L). How is "clean" defined?

Response: The word "clean" is used in the common meaning of the term, i.e., free from dirt, stain, or impurities; free from foreign matter; and without restrictions or encumbrances. The inspection area should be free of obstructions so that a vehicle can be inspected there. 37 TAC §23.2 states it should be as clean and orderly as could be reasonably expected. Further, DPS Rules and Regulations Manual, §03.45.00, page 3-3, 01.25.05(5) & (8) states it must be kept clean and clear of obstructions and all necessary equipment in place and ready for use, and free from mechanical repair work for the purpose of inspection. While minor

repair jobs can be performed in the inspection area, it must be of a nature that the vehicle undergoing such repair work can easily be moved out of the area for the inspection of another vehicle. TSIA's penalty chart uses the same wording for this violation.

Comment: TSIA-1 cites as a standardless proposed rule provision subsection (e)(2)(C). What proof will the DPS require to substantiate this claim?

Response: This concerns a criminal violation of Transportation Code, §548.601(a)(2) as well as a violation of 37 TAC §23.26. The department will substantiate this violation based on its investigation of customer complaints and/or covert audits. This type of violation stems from an inspection station mandating the repair of a non-inspection item or requiring a repair to be performed at that inspection station to receive an inspection certificate. Covert audit vehicles receive a pre- inspection and post-inspection check of a vehicle by department personnel to insure that no repairs are needed.

Comment: TSIA-1 cites as a standardless proposed rule provision subsection (e)(2)(D). What proof will the DPS require to substantiate this claim?

Response: This is also a violation of Transportation Code, §548.053(a), a criminal violation of Transportation Code, §548.601(a)(7), and 37 TAC §23.26. The department will substantiate this violation based on its investigation of customer complaints and/or covert audits.

Comment: TSIA-1 cites as a standardless proposed rule provision subsection (e)(2)(E). What activities are considered to be part of the inspection of a vehicle? Does this eliminate on the job training?

Response: Transportation Code, §548.005 is clear "the department may permit inspection to be made by an inspector" which means a singular inspector. 37 TAC §23.61(a)(9) states, "[t]he certified inspector shall not delegate responsibility for a proper and thorough inspection to any other person, and shall have complete control of the vehicle to be tested during the entire test procedure." The DPS Rules and Regulations Manual, §02.10.01(20), page 2-3, states the inspector will not delegate responsibility for the proper and thorough inspection to any other person. The items listed in the DPS Rules and Regulations Manual, Chapter Four and Vehicle Emissions Inspection and Maintenance Rules & Regulations Manual for Official Vehicle Inspection Stations and Certified Inspectors (Emission Rules & Regulations Manual) are considered parts of a vehicle inspection. If the department authorized the tag team method, use of multiple inspectors on one vehicle, then it would be impossible to determine who erred when a vehicle is not properly inspected. Each inspector could say it was the other's responsibility. For this reason, participation in inspections as on-the-job training is not permitted. A new inspector may observe a vehicle inspection but not conduct one until certified. The standard is one inspection - one inspector.

Comment: TSIA-1 cites as a standardless proposed rule provision subsection (e)(2)(G). What proof will the DPS require to substantiate this claim? If said fee is voluntary, and customer elects for service/product and customer utilizes service/product, may station withhold issuance of inspection sticker if customer then refuses to pay additional fee after additional authorized service/product is rendered?

Response: The clear intent of Transportation Code, §548.501 and in turn 37 TAC §23.73 is to regulate the amount a customer has to pay for the statutorily required annual vehicle inspection. To charge more is a criminal violation of Transportation Code, § 548.601(a)(8). Stations may not refuse to inspect vehicles of a class they are certified to inspect. While recent changes allow inspection stations to offer and advertise other services in combination with the inspection, the inspection fee must be billed separately. This allows the customer to reject these additional services with any corresponding additional fees. Labeling an additional fee as voluntary and then refusing to inspect vehicles whose owners elect not to pay is not a voluntary fee. Such a practice is contrary to state law. A station may not withhold issuance of the inspection sticker if a customer then refuses to pay the additional "voluntary" fee.

Comment: TSIA-1 cites as a standardless proposed rule provision subsection (e)(2)(H). What type of "drugs" are included? Does this mean illegal, prescription, over-the-counter drugs? What proof will the DPS require to substantiate this claim?

Response: This violation is for infractions of 37 TAC §23.61(a)(4), which states "[a] certified inspector shall not use alcohol or drugs, nor be under the influence of either while on duty. Prescription drugs may be used when prescribed by a licensed physician, provided the inspector is not impaired while on duty." Any substance that impairs the ability of the inspector to operate a vehicle, required for the brake test, is a violation. Observations of the inspector's speech, driving, and other motor functions, witnessed ingestion, and any smell of alcoholic beverages on the inspector may support proof of the violation.

Comment: TSIA-1 cites as a standardless proposed rule provision subsection (e)(3)(B). How many instances of issuing inspection certificates to vehicles with multiple defects would constitute a violation?

Response: This subsection addresses an aggravated violation of Transportation Code, § 548.053(a), §548.104(b), and §548.601(a)(5). Multiple is used in its common meaning, "having to, relating to, or consisting of more than one individual, element, component, or part" - simply more than one.

Comment: TSIA-1 cites as a standardless proposed rule provision subsection (e)(3)(D). How many emission related violations would constitute a Category C violation? What constitutes an emission violation in Safety-only counties? Does the visual Parameter check of the Exhaust Emission items under the hood and the gas cap check count toward this?

Response: Multiple is used in it common meaning - more than one. A prime example of this violation in the emissions testing stations would be the fraudulent inspection of a vehicle with engine tampering of emissions components that also failed the emissions test. An example in a safety only station would be a fraudulent inspection where the fuel cap was not inspected and the vehicle's catalytic converter had been removed, a violation of Transportation Code, §547.605. Transportation Code, §548.051 requires the inspection of the emission exhaust components and the fuel tank cap.

Comment: TSIA-1 cites as a standardless proposed rule provision subsection (e)(3)(E). What is considered to be part of the "operation of the inspection station"? What constitutes "participating in the operation of the inspection station"? Could a manager of a station make a mistake on an inspection and have his license pulled and then would he be prohibited from any involvement of the station?

Response: This violation is an infraction of Transportation Code, §548.405(e) under which a station certificate is issued to the immediate family member after the loss of the previous certificate at the same location. The department based the new certificate on furnished proof of no involvement by the prior certificate holder. The department then finds that not to be the case. "Operation" and "participate" are used in this context as in common usage. "Operation" means an act, process, or way of operating. "Participate" means to take part. It is a violation for a statutorily prohibited person from taking part in any act, process, or procedure related to vehicle inspection. This violation only relates to the special circumstances of §548.405(e). A manager who is a certificate holder would have to make more than a mistake to have their license suspended. Under these circumstances, the new certificate holder must not allow the prior certificate holder's participation in the vehicle inspection operation of the business.

Comment: TSIA-1 cites as a standardless proposed rule provision subsection (e)(4)(B). Does this affect current station owners or inspectors who hold certificates prior to these rules?

Response: The items of inspection equipment are specified by department rules contained in 37 TAC Chapter 23 and specifically in 37 TAC §§23.8 and 23.93. These are previously adopted and published regulations that affect all current inspection stations.

Comment: TSIA-1 cites as a standardless proposed rule provision subsection (e)(5)(B). Does this affect all Safety-only counties? Why are these penalties so severe? How will the stations be properly trained, tested and compensated by the DPS in order to comply with these? How will the DPS balance Risk vs. Reward related to these rules? Will the DPS allow the stations to balance Risk vs. Reward for providing a parameter visual and gas cap emission test by allowing them to collect and retain the certificate fee of $5.50? If not, how will the DPS allow for the compensation of these emission tests?

Response: The violations contained in subsection (e)(5)(B) affect all safety only inspection stations and are discussed following each comment addressing them. The department trains all inspectors, in safety-only and safety & emissions counties, during department conducted training before certification. The $5.50 the inspection station pays for each certificate is per Transportation Code, §548.501 and the department does not have the statutory authority to waive this fee. The safety-only stations are not required to perform emissions testing under Transportation Code, Chapter 548, Subchapter F (Subchapter F).

Comment: TSIA-1 cites as a standardless proposed rule provision subsection (e)(5)(B)(i). Because this is an emissions test, how will the safety-only stations be properly trained, tested and compensated?

Response: The department disagrees. Transportation Code, §548.051(a)(15) requires fuel-cap testing of gasoline-powered vehicles, model year through twenty-four years, in all inspection stations across the state. This is not an emissions test under Subchapter F. The department has removed the violation from Category E and it is a Category A violation under subparagraph (e)(1)(A). The department trains inspectors during department conducted training before certification.

Comment: TSIA-1 cites as a standardless proposed rule provision subsection (e)(5)(B)(ii) and (iii). Because this is an emissions test, how will the safety-only stations be properly trained, tested and compensated?

Response: Some safety-only stations in attainment areas may attempt to charge for emissions testing and repairs, e.g., on-board diagnostic systems MIL illumination and unnecessary replacement of the catalytic converter. The department will clarify by removing these violations from Category E and penalize these violations under (e)(2)(C), Category B. This is not an emissions test under Subchapter F. The department trains inspectors during department conducted training before certification.

Comment: TSIA-1 cites as a standardless proposed rule provision subsection (e)(5)(B)(iv). How will the stations be properly trained, tested and compensated by the DPS in order to comply with this rule?

Response: The department disagrees. The infraction is for violation of 37 TAC § 23.93(d)(3) to carry out Transportation Code, §548.302. This prevents vehicles subject to emissions testing from avoiding the test. This violation will remain a Category E violation. The department trains inspectors during department conducted training before certification.

Comment: TSIA-1 cites as a standardless proposed rule provision subsection (f). What is the timeframe for such violations? Do these violations have a sunset? Does this apply to station owners and inspectors who currently hold certificates? If so, then how will DPS inform them of their now-ineligibility to hold their current certificates?

Response: The department disagrees that the subsection is without standard. As stated earlier, Transportation Code, §548.405(a)(7) allows DPS to deny, revoke, or suspend the certification of any person who has been convicted of a felony, Class A, or Class B misdemeanor. Subsection (f) of the proposed rule amendment, which takes the place of 37 TAC §23.16, identifies exactly those convictions for which the department will deny or revoke certification. However, the department has, based on earlier comments, made changes to the rule. The change is to include additional sentences to subparagraph (e)(4)(D) to allow certification of individuals convicted of these crimes if they are under no further impediment by the court. The change is less of an impediment than is the current rule, so no current certificate holders will be penalized unless the information concerning a conviction has been withheld from the department.

Comment: TSIA-1 states the proposed rule imposes strict liability on the inspector and the inspection station to comply with the rule, citing as example: §§23.15(e)(1)(A), (e)(2)(B), and (e)(4)(B)). TSIA-1 believes this is too onerous, especially if this same rule applies equally to inspectors and station owners. A station owner may have taken all the necessary and required steps to ensure inspections are conducted properly and legally, but nevertheless, an employee acts fraudulently or illegally. TSIA-1 believes the station should not automatically be liable for the employee's illegal activity but should be judged on its enforcement of its policies and procedures and whether or not it has knowledge of, directs or condones the inspector's fraudulent or illegal activity.

Response: The department does not have a strict liability enforcement policy where stations are automatically liable for an employee's illegal activity. The department considers whether the inspection station certificate holders effectively enforce department rules. The department looks to whether the certificate holder is knowledgeable, directs or condones the inspector's fraudulent or illegal activity. If the certificate holder is derelict, reckless or supervision is absent, then the certificate holders

may be penalized accordingly for their own activities. The department disagrees that the penalties are onerous but are appropriate and well reasoned for a highly regulated business activity.

Comment: TSIA-1 believes the rule should provide an opportunity for an inspector or inspection station owner to dispute in writing a warning issued by DPS.

Response: The proposed rule amendment neither specifically prohibits nor authorizes an inspector or inspection station owner/operator from disputing a warning issued by department personnel. The inspector or inspection owner/operator who wishes to dispute a warning issued by a DPS technician should do so with the technician's Field Supervisor. If they desire this written correspondence to be included in the station file, they may indicate such on the correspondence.

Comment: TSIA-2 cited Transportation Code, §548.409 regarding department rules for handling investigations and complaints against employees and agents of the department investigating compliance of inspections stations and inspectors, and stated it would have been nice to include it in this rulemaking process.

Response: The department has rules regarding complaints against employees and agents, including certified vehicle inspectors, contained in 37 TAC §§1.38 and 23.29, respectively.

Comment: TSIA-1 contends the proposed rule is arbitrary and capricious for the reasons, among others, identified by its comments.

Response: The department disagrees and believes that the proposed rule amendment is reasoned and measured in its approach to adverse administrative actions regarding inspectors and inspection station owners/operators who fail to adhere to department rules,

Comment: TSIA-1 contends that the impact on a number of small businesses is squarely understated, and the proposed rule, together with the Texas Natural Resource Conservation Commission emission testing rules, amounts to a regulatory taking.

Response: The department disagrees. The proposed rule amendment does not amount to a regulatory taking.

Comment: TSIA-1 believes that DPS should reevaluate its proposed rules and work with the industry to develop a rule to eliminate the bad actors while preserving the honest industry base.

Response: The department has reevaluated the proposed rule amendment and made changes based on comments received. The department continues to work with businesses it certifies for vehicle inspections. The department will continue to pursue adverse administrative actions against inspectors and station owners/operators who do not comply with state law and department rules.

The amendment is adopted pursuant proposed under the Texas Government Code, § 411.004(3), which authorizes the Public Safety Commission (commission) to adopt rules considered necessary for carrying out the department's work, and the Transportation Code, Chapter 548, Subchapter A, §548.002, which authorizes the department to adopt rules to administer and enforce the compulsory inspection of vehicles, and Subchapter G, §548.405, which allows the department to deny, revoke or suspend the certificate of an inspection station and or inspector.

§23.15. Inspection Station and Certified Inspector Denial, Revocation, Suspensions, and Administrative Hearings.

(a) As provided in Transportation Code, Chapter 548, §548.405, the department may deny an application for a certificate, revoke or suspend the certificate of a person, inspection station, or inspector, place on probation, or reprimand a person who holds a certificate in accordance with this section.

(b) Applicability. This section applies to any entity capable of applying for or holding a certificate from the department to include:

(1) a natural person,

(2) a business association entitled to do business in the state, including but not limited to:

(A) a corporation,

(B) a partnership,

(C) a limited liability partnership, and

(D) a limited liability company,

(3) each member of a partnership or association issued a certificate under this title,

(4) each director or officer of a corporation issued a certificate under this title, and

(5) a shareholder that receives compensation, in the form of a salary, from the day-to-day operation of an inspection station by a corporation issued a certificate.

(c) Terms and/or Definitions. Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the Texas Department of Public Safety (DPS), the terms used in this section have the meanings commonly ascribed to them in the fields of air pollution control and vehicle inspection. In addition to the terms that are defined by the TCAA, the following words and terms, when used in this section, shall have the following meanings.

(1) Suspension--means a temporary cessation of the authority associated with the certification of an inspection station or inspector.

(2) Revocation--means the withdrawal of the authority granted by the department to inspect vehicles under the certificate of an inspection station or inspector and the inability to re-apply for such a certificate for a period of at least three years.

(3) Lifetime Revocation--means the withdrawal of the authority granted by the department to inspect vehicles under the certificate of an inspection station or inspector and the inability to re-apply for such a certificate for the lifetime of the applicant.

(4) Warning--means a written reprimand based on a minor violation which if repeated will result in a more severe administrative sanction.

(5) Re-education--means to provide mandatory, additional and/or remedial training to a certificate holder to correct errors observed or discovered by department personnel. The technician provides this training immediately on-site, or later as scheduling permits. It is for errors sufficient to warrant adverse administrative action against the certificate holder but is administered for first time infractions, as opposed to re- certification.

(A) Re-education shall be recorded in the certificate holder's department file. This record will contain the date of re-education, the violation requiring re-education, and the name of the department personnel who administered the re-education.

(B) Re-education will not be administered again for a subsequent Category A violation.

(6) Re-certification - means required training and examination, both written and practical demonstration tests, required by the department per 37 TAC §23.61 after a holder's certificate has been suspended or revoked.

(d) Penalty Schedule. Pursuant to Transportation Code, Chapter 548, §548.405(h)-(i) the department will administer penalties by the category of the violation as follows:
Figure: 37 TAC §23.15(d)

(e) Violation categories are as follows:

(1) Category A.

(A) Issuing an inspection certificate without inspecting an item of inspection.

(B) Performing inspection in an unapproved inspection area.

(C) Failure to complete the reverse side of an inspection certificate.

(D) Failure to place an inspection certificate in the proper location.

(E) Issuing out of date inspection certificates.

(F) Refusing to inspect a vehicle without an objective justifiable cause, i.e. fuel leak, unsafe tires, etc.

(G) Failure to properly safeguard inspection certificates or department issued forms.

(H) Failure to properly maintain required records.

(I) Failure to keep an adequate supply of certificates.

(J) Failure to display the official department issued station sign.

(K) Failure to properly display the certificate of appointment, procedure chart, and other notices required by the department.

(L) Failure to keep department approved inspection area clean.

(M) Subsequent violations. Determination of second and subsequent violations is made based on previous violations in this same category within a two year period.

(2) Category B.

(A) Issuing inspection certificate without inspecting the vehicle.

(B) Improperly issuing inspection certificate to vehicle with more than one failing item of inspection.

(C) Requiring repair or adjustment not required by law, rule, or regulation.

(D) Refusing to allow owner to have repairs or adjustments made at location of owner's choice.

(E) Allowing uncertified person to conduct or participate in the inspection of a vehicle.

(F) Charging more than statutory fee.

(G) Requiring an additional fee or service charge in conjunction with the inspection.

(H) Inspector performing inspection while under the influence of alcohol or drugs.

(3) Category C.

(A) Issuing more than one inspection certificate without inspecting the vehicles.

(B) Multiple instances of issuing inspection certificates to vehicles with multiple defects.

(C) Emissions testing the exhaust or electronic connector of another (clean) vehicle fraudulently causing a vehicle to pass the emissions test (clean piping or clean scanning).

(D) Multiple emissions related violations on one vehicle or violations on more than one vehicle.

(E) Allowing a person whose certificate has been suspended or revoked to participate in a vehicle inspection or to participate in the operation of the inspection station where the current certificate holder was required to provide proof as prescribed in Transportation Code, Chapter 548, §548.405(e).

(F) Charging more than statutory fee in addition to not inspecting vehicle.

(G) Material misrepresentation in any application to the department or any other information filed pursuant to Transportation Code, Chapter 548, or department rules.

(4) Category D.

(A) Failure to possess a valid driver's license from state of residence.

(B) Failure to posses an operational item of inspection equipment required by the department.

(C) Failure to enter into and maintain a business arrangement with the Texas Information Management System contractor to obtain a telecommunications link to the Texas Information Management System Vehicle Identification Database (VID) for each vehicle exhaust gas analyzer, if in an affected county as defined in §23.93(b)(1) of this title (relating to Vehicle Emissions Inspection Requirements).

(D) Conviction under the laws of this state, another state, or the United States of any crime as detailed in subsection (f) of this section. A conviction will be cause for denial, suspension, or revocation, under this subsection, until after the court imposed punishment or supervision has elapsed. For the purposes of this section, a person is convicted of an offense when an adjudication of guilt for the offense is entered against the person by a court of competent jurisdiction. A dismissal and discharge in a deferred adjudication proceeding shall not be considered a conviction for the purpose of this section.

(5) Category E.

(A) The following applies to inspectors and inspection stations in which §23.93 of this title applies:

(i) Failure to perform applicable emission test as required.

(ii) Issuing an emissions inspection certificate without performing the emissions test on the vehicle as required.

(iii) Failure to perform the gas cap test or use of unauthorized bypass for gas cap test.

(iv) Issuing an emissions inspection certificate when the required emissions adjustments, corrections, or repairs have not been made after an inspection disclosed the necessity for such adjustments, corrections or repairs.

(v) Falsely representing to an owner or operator of a vehicle that an emission related component(s) must be repaired, adjusted, or replaced in order to pass emissions inspection.

(vi) Requiring emissions repair or adjustment not required by law, rule or regulation.

(vii) Tampering with the emissions system or an emission related component in order to cause vehicle to fail emissions test.

(viii) Refusing to allow owner to have emissions repairs or adjustments made at location of owner's choice.

(ix) Allowing uncertified person to conduct an emission inspection.

(x) Charging more than the authorized emissions inspection fee.

(B) The following applies to inspectors and inspection stations in which §23.93 of this title is not applicable: issuing a safety only inspection certificate to a vehicle required to undergo a safety and emissions inspection without requiring a signed and legible affidavit, approved by the department (VIE- 12), from the owner or operator of the vehicle.

(f) The department has determined a certified inspection station and certified vehicle inspector is in a position of trust, performing a service to members of the public where the Transportation Code, Chapter 548, requires the public to report for vehicle inspection. Therefore, the department has determined the following crimes relate directly to the duties and responsibilities of a certified vehicle inspector and/or those for whom this section is applicable as detailed in subsection (b) of this section. Those crimes include:

(1) any felony or misdemeanor of which fraud is a factor,

(2) any criminal violation of statutes that protect consumers against unlawful business practices,

(3) murder,

(4) burglary,

(5) rape,

(6) child molestation,

(7) sexual assault,

(8) aggravated assault,

(9) any violent crime against a person involving knowledge or purpose,

(10) theft,

(11) possession of a controlled substance,

(12) conviction of driving while intoxicated, and

(13) conviction of an offense as detailed in Transportation Code, Chapter 548, §548.601 and §548.603.

(g) When assessing administrative penalties, the following procedures will be observed.

(1) Multiple certificate holders. Violations will not be aggregated or pooled in the case of a multiple inspection station certificate holder. The department will deny, suspend and/or revoke all certificates of a certificate holder only if they have been found culpable in a prior adverse administrative action resulting in a denial, suspension, or revocation.

(2) Multiple violations. If multiple violations are found, the department will impose separate penalties for each violation as required by the penalty schedule. All suspensions will be served concurrently.

(3) Subsequent violations. Determination of second and subsequent violations is made based on previous violations in the same category.

(h) Where the department suspends or revokes the certification of an inspection station, an immediate family member may not be certified to operate an inspection station at the same location. The department may permit certification with proof that the prior certificate holder has no further involvement in the place of business. Proof is established by a notarized affidavit signed by the applicant. This affidavit must state that the previous certificate holder may not inspect vehicles, deal with inspection customers, handle any department forms or certificate related materials, supervise, or to any extent manage any portion of the inspection station business. The affidavit must also contain the statement that the affiant understands and agrees that in the event the department finds that the restricted person is involved in the inspection business at that location, the certificate will be revoked immediately.

(i) When there is cause to deny an application for a certificate of any inspection station or the certificate of any person to inspect vehicles or revoke or suspend the outstanding certificate, the director shall, in less than 30 days before refusal, suspension, or revocation action is taken, notify the person in writing, in person, or by certified mail at the last address supplied to the department by the person, of the impending refusal, suspension, or revocation, the reasons for taking that action, and of his right to an administrative hearing for the purpose of determining whether or not the evidence is sufficient to warrant the refusal, suspension, or revocation action proposed to be taken by the director.

(j) The director, without a hearing, may suspend or revoke or refuse to issue any certificate if, within 20 days after the personal notice of the notice is sent or notice has been deposited in the United States mail, the person has not made a written request to the director for this administrative hearing.

(k) On receipt by the director of a written request of the person within the 20 day period, an opportunity for an administrative hearing shall be afforded as early as is practicable.

(l) Said hearing shall be held in accordance with Texas Transportation Code, Chapter 548, and applicable rules of the department.

(m) On the basis of the evidence submitted at the hearing, the director, acting for himself or upon the recommendation of his designee, may refuse the application or suspend or revoke the certificate.

(n) Any person dissatisfied with the action of the director, may appeal the action of the director in accordance with Texas Transportation Code, Chapter 548.

(o) The department will investigate all violations of Texas Transportation Code, Chapter 548, and all violations of rules and regulations promulgated under Texas Transportation Code, Chapter 548.

(p) Vehicle inspection station or certified inspector may waive the right to an administrative hearing in writing by completing Form VI-63, voluntary waiver of administrative hearing.

(q) The procedure of the administrative hearing shall be covered by the general rules of practice and procedure of the Texas Department of Public Safety, Chapter 29 of this title (relating to Practice and Procedure), except where other provisions are provided herein.

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 20, 2002.

TRD-200205445
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: September 9, 2002
Proposal publication date: May 10, 2002
For further information, please call: (512) 424-2135

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37 TAC §23.16

The Texas Department of Public Safety adopts the repeal of §23.16, concerning Persons with a Criminal Background, without changes to the proposed text as published in the May 10, 2002, issue of the *Texas Register* (27 TexReg 3970). §23.16 is being repealed, because with the simultaneous adoption of new §23.15 which provides the grounds for denial, revocation, and suspensions of certificate for inspection stations and vehicle inspectors, it is obsolete.

No comments were received regarding adoption of the repeal.

The repeal is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Transportation Code, Chapter 548, Subchapter A, §548.002, which authorizes the department to adopt rules to administer and enforce the compulsory inspection of vehicles, and Subchapter G, §548.405, which allows the department to deny, revoke or suspend the certificate of an inspection station or operator.

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 20, 2002.

TRD-200205444
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: September 9, 2002
Proposal publication date: May 10, 2002
For further information, please call: (512) 424-2135

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 11. TEXAS COMMISSION ON HUMAN RIGHTS

CHAPTER 334. REVIEW OF FIRE FIGHTER TESTS

40 TAC §334.1

The Commissioners of the Texas Commission on Human Rights (TCHR) adopt a new §334.1, concerning review of paid or combination local fire department tests. This section is adopted with changes to the proposed text as published in the May 3, 2002, issue of the *Texas Register* (27 TexReg 3749). This change is necessary to more accurately reflect the number of reviews the TCHR can conduct in a fiscal year given its current staffing levels. This change will allow for a more concise measure of work output by the staff of the TCHR. The rule will be republished.

The adoption of this section is necessary to provide procedures for the TCHR to determine how to select the departments the TCHR will review and when the TCHR will review a certain department.

The purpose and objective of this adoption is to set an objective standard for the selection and review of a fire department such that the Commission will be able to make a determination as to whether the initial tests administered by a fire department to entry level firefighters are in compliance with Chapter 21 of the Labor Code.

The change to the proposed rule that is being adopted is a follows: In §334.1(d) the words and number "five percent (5)" in the first sentence are being changed to "three percent (3)."

The following comments were received by TCHR concerning the proposed new rule. Following each comment is the response from the TCHR.

Comment: Concerning §334.1(a), one commenter stated the first sentence should be deleted.

Response: The TCHR disagrees and believes that this section is critical in setting forth the purpose of the rule.

Comment: Concerning §334.1(c), one commenter stated that the proposed language should be deleted and replaced with language that mandates that paid or combination departments conduct an adverse impact analysis within the first year after the adoption of this rule and that the impact analysis conducted utilize the 4/5ths (805) rule.

Response: The TCHR disagrees. Nothing in the Uniform Guidelines on Employee Selection Procedures or the governing statute mandates the conducting of an independent adverse impact analysis. Accordingly, the TCHR is not inclined to create new and more stringent requirements on the departments. In addition, the Uniform Guidelines on Employee Selection Procedures incorporates the Rule of 4/5ths; therefore, the TCHR believes that it would be duplicative in nature to specifically set forth that formula.

Comment: Concerning §334.1(d) and (e), one commenter stated that the language should be deleted and replaced with language that mandates that paid or combination departments submit to the TCHR for review the adverse impact analysis that it would have the departments perform within the first year after the adoption of this rule. The commenter also states that this section should be revised to state that if the adverse impact analysis shows a disproportionate impact on a covered class, the TCHR shall recommend changes to the procedures.

Response: The TCHR disagrees. Again, the TCHR is not inclined to mandate that departments conduct an adverse impact analysis on their initial tests. To mandate as such would be outside the purview of the guidelines and the statute. As such, additional language that those findings be submitted to the TCHR is

not needed in the rule. Also, §334.1(e) speaks to the TCHR conducting, completing and making recommendations in the review process. Therefore, adding any language based on the TCHR making recommendations is superfluous in nature.

This new section is adopted under the Texas Government Code, § 419.102(b) that provides the Texas Commission on Human Rights the authority to adopt procedural rules to carry out the purposes Subchapter F of Senate Bill Number 382.

§334.1. Review of Fire Department Tests.

(a) The Texas Commission on Human Rights shall review the administration of tests by paid or combination local fire departments to determine whether the tests are administered in a manner that complies with the Texas Labor Code. The initial tests, which are defined as; written tests, physical tests, and assessment center tests for a beginning firefighter position, are used to measure the ability of a person to perform the essential functions of a job as a paid or combination local fire protection personnel.

(b) The Texas Commission on Human Rights shall exercise those general powers as provided in the TEX. GOVT. CODE, Chapter 419, §§419.103 - 419.105.

(c) The Texas Commission on Human Rights shall adopt the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. 1607, to conduct the administration of initial tests by paid or combination local fire departments.

(d) The Texas Commission on Human Rights will review no less than three percent (3%) of the total number of paid or combination local fire departments each fiscal year. The Texas Commission on Human Rights will divide the number of paid or combination local fire departments into the five major regions of the state. Within each region, the Texas Commission on Human Rights shall determine the paid or combination local fire departments to review by random selection with a predetermined parameter based on geography. The selections will be made by the twentieth day of each September for the fiscal year.

(e) If a paid or combination local fire department's initial tests are to be reviewed, said fire department shall receive notice via certified mail and on the commission's website. The review of each fire department's initial tests shall be completed and recommendations issued on or before the one year anniversary date in which the Texas Commission on Human Rights issued its notification letter to the head of the fire department and the review thereby commenced.

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 23, 2002.

TRD-200205572
Katherine A. Antwi
General Counsel
Texas Commission on Human Rights
Effective date: September 12, 2002
Proposal publication date: May 3, 2002
For further information, please call: (512) 437-3458

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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 Department 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 proposal is adopted. Notice of action proposed under Article 5.97 must be published in the ***Texas Register*** not later than the 10th day before the proposal is adopted. The Administrative Procedure Act, Government Code, Chapters 2001 and 2002, does not apply to department 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 78701.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Administrative Procedure Act.

Proposed Action on Rules

EXEMPT FILING NOTIFICATION PURSUANT TO THE INSURANCE CODE CHAPTER 5, SUBCHAPTER L, ARTICLE 5.96

Notice is given that the Commissioner of Insurance will consider a proposal made in a staff petition which seeks amendments of the Texas Automobile Rules and Rating Manual (the Manual), to adopt 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-0802-34-I), was filed on August 26, 2002.

The new and/or adjusted symbols for the Manual's Symbols and Identification Section reflect data compiled on damageability, repairability, and other relevant loss factors for the listed 2001 and 2002 model vehicles.

A copy of the petition, including an exhibit with the full text of the proposed amendments to the Manual is available for review in the office of the Chief Clerk of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas. For further information or to request copies of the petition, please contact Sylvia Gutierrez at (512) 463-6327; refer to (Ref. No. A-0802-34-I).

Comments on the proposed changes must be submitted in writing no later than 5:00 p.m. on October 7, 2002 to the Office of the Chief Clerk, Texas Department of Insurance, P. O. Box 149104, MC 113-2A, Austin, Texas 78714-9104. An additional copy of comments is to be submitted to Marilyn Hamilton, Associate Commissioner, Property & Casualty Program, Texas Department of Insurance, P. O. Box 149104, MC 104-PC, Austin, Texas 78714-9104.

A public hearing on this matter will not be held unless a separate request for a hearing is submitted to the Office of the Chief Clerk during the comment period defined above.

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).

TRD-200205659
Gene C. Jarmon
Acting General Counsel and Chief Clerk
Texas Department of Insurance
Filed: August 28, 2002

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Final Action on Rules

(Editor's Note: The Texas Department of Insurance filed an Adopted Exempt Notification that was published in the August 23, 2002, issue of the Texas Register (27 TexReg 7995). Due to incorrect language submitted by the Texas Department of Insurance the adopted exempt notice is being republished.)

The Commissioner of Insurance adopted amendments proposed by Staff to the Texas Automobile Rules and Rating Manual (the Manual). The amendments consist of new identification information for 2001, 2002 and 2003 model private passenger automobiles. Staff's petition (Ref. No. A-0702-27-I) was published in the July 12, 2002, issue of the *Texas Register* (27 TexReg 6381).

Vehicle specifications and other identification information do not affect rates, whereas Private Passenger Automobile Physical Damage Rating Symbols are used in calculating rates. No change in symbols is made in these amendments to the Manual's Symbol and Identification Section. 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).

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-200205708
Gene C. Jarmon
Acting General Counsel and Chief Clerk
Texas Department of Insurance
Filed: August 29, 2002

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas Commission on Environmental Quality

Title 30, Part 1

The Commission on Environmental Quality (commission) files this notice of intention to review and proposes the readoption of Chapter 291, Utility Regulations.

This review of Chapter 291 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

The rules in Chapter 291 provide a comprehensive regulatory system for retail public utilities and a fee component to fund commission review of utility matters. The rules are necessary to assure water and sewer rates, operations, and services that are just and reasonable to the consumers and to the. Chapter 291 is divided into Subchapters A - K, which set forth general administrative provisions and provisions governing rate changes and appeals; recordkeeping and reporting; quality of service; service area delineations and utility transfers; submetering and allocation; wholesale water or sewer service, enforcement and related compliance alternatives; and certain requirements applicable to utility services provided by municipalities.

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 291 continue to exist. These rules implement the provisions of Texas Water Code (TWC), Chapter 13, which authorize the commission to regulate and supervise retail public utilities within its jurisdiction. TWC, §13.041 specifically authorizes the commission to adopt and enforce rules required to perform its duties under the chapter. These rules also implement provisions of TWC, §§5.701, 13.4521, and 13.4522 authorizing certain application filing fees and assessments.

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 291 continue to exist. Comments may be submitted to Patricia Durón, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711- 3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2002-010-291- WT. Comments must be received in writing by 5:00 p.m., October 7, 2002. For further information or questions concerning this proposal, please contact Auburn Mitchell, Policy and Regulations Division, at (512) 239-1873.

TRD-200205506
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: August 21, 2002

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Department of Information Resources

Title 1, Part 10

The Department of Information Resources (DIR) files this notice of intention to review and consider for readoption, revision or repeal Title 1, Texas Administrative Code, Chapter 201, §201.3, "Information Resources Managers." The review and consideration are being conducted in accordance with Texas Government Code §2001.039. The review will include, at a minimum, an assessment by DIR of whether the reasons the rule was initially adopted continue to exist and whether the rule should be readopted.

Any questions or written comments pertaining to this rule review may be submitted to Renee Mauzy, General Counsel, via mail at P. O. Box 13564, Austin, Texas 78711, via facsimile transmission at (512) 475-4759 or via electronic mail at renee.mauzy@dir.state.tx.us. The deadline for comments is thirty (30) days after publication of this notice in the Texas Register. Any proposed changes to this rule as a result of the rule review will be published in the Proposed Rule section of the Texas Register. The proposed rule changes will be open for public comment prior to final adoption or repeal of the rule by DIR in accordance with the requirements of the Administrative Procedure Act, Chapter 2001, Texas Government Code.

TRD-200205663
Renee Mauzy
General Counsel
Department of Information Resources
Filed: August 28, 2002

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The Department of Information Resources (DIR) files this notice of intention to review and consider for readoption, revision or repeal Title 1, Texas Administrative Code, Chapter 201, §201.15, "Charges for Copies of Public Records." This review and consideration of the rule are conducted in accordance with Texas Government Code §2001.039. The review will include, at a minimum, an assessment by

DIR of whether the reasons the rule was initially adopted continue to exist and whether the rule should be readopted.

Any questions or written comments pertaining to this rule review may be submitted to Renee Mauzy, General Counsel, via mail at P. O. Box 13564, Austin, Texas 78711, via facsimile transmission at (512) 475-4759 or via electronic mail at renee.mauzy@dir.state.tx.us. The deadline for comments is thirty (30) days after publication of this notice in the Texas Register. Any proposed changes to these rules as a result of the rule review will be published in the Proposed Rule section of the *Texas Register*. The proposed rule changes will be open for public comment prior to final adoption or repeal of the rule by DIR in accordance with the requirements of the Administrative Procedure Act, Texas Government Code, Chapter 2001.

TRD-200205664
Renee Mauzy
General Counsel
Department of Information Resources
Filed: August 28, 2002

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Texas Department of Mental Health and Mental Retardation

Title 25, Part 2

The Texas Department of Mental Health and Mental Retardation (department) will review Texas Administrative Code Title 25, Part II, Chapter 417, Subchapter K, concerning abuse, neglect, and exploitation in TDMHMR facilities in accordance with the requirements of the Texas Government Code, §2001.039.

The department believes that the reasons for initially adopting the subchapter continue to exist.

Interested persons are invited to submit written comments concerning the review of this subchapter to Linda Logan, director, Policy Development, Texas Department of Mental Health and Mental Retardation, by mail to P.O. Box 12668, Austin, Texas 78711, or by fax to 512/206-4744, within 30 days of publication of this notice.

TRD-200205633
Andrew Hardin
Chairman, TDMHMR Board
Texas Department of Mental Health and Mental Retardation
Filed: August 26, 2002

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Texas State Board of Examiners of Psychologists

Title 22, Part 21

The Texas State Board of Examiners of Psychologists proposes to review Board rules §§465.11 - 465.20, concerning Rules of Practice, in accordance with the Appropriations Act, Section 167. As part of this review process, the Board proposes to amend the existing §465.11, Informed Consent, §465.12, Privacy and Confidentiality, §465.13, Personal Problems, Conflicts and Dual Relationships, §465.15, Fees and Financial Arrangements, §465.16, Evaluation, Assessment, Testing and Reports, and §465.17, Therapy and Counseling in accordance with the Appropriations Act, Section 167. The proposed amendments may be found in the Proposed Rules section of the *Texas Register*. The Board is not proposing any changes to existing Board rules §465.14 and §465.18 through §465.20.

Comments on the proposals may be submitted to Kourtney D. McDonald, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Tower II, Suite 2-450, Austin, Texas 78701.

TRD-200205617
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Filed: August 23, 2002

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State Securities Board

Title 7, Part 7

The State Securities Board (Agency), beginning September 2002, will review and consider for readoption, revision, or repeal Chapters 101, General Administration; 103, Rulemaking Procedure; and 104, Procedure for Review of Applications, in accordance with Texas Government Code, Section 2001.039. The rules to be reviewed are located in Title 7, Part VII, of the Texas Administrative Code.

The assessment made by the Agency at this time indicates that the reasons for readopting these chapters continue to exist.

The Agency's Board will consider, among other things, whether the reasons for adoption of these rules continue to exist and whether amendments are needed. Any changes to the rules proposed by the Agency's Board after reviewing the rules and considering the comments received in response to this notice will appear in the "Rules Proposed" section of the Texas Register and will be adopted in accordance with the requirements of the Administrative Procedure Act, Texas Government Code Annotated, Chapter 2001. The comment period will last for 30 days beginning with the publication of this notice of intention to review.

Comments or questions regarding this notice of intention to review may be submitted in writing, within 30 days following the publication of this notice in the *Texas Register*, to David Weaver, General Counsel, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to Mr. Weaver at (512) 305-8310. Comments will be reviewed and discussed in a future Board meeting.

TRD-200205590
Denise Voigt Crawford
Securities Commissioner
State Securtities Board
Filed: August 23, 2002

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Texas Water Development Board

Title 31, Part 10

Chapter 360. Designation of River and Coastal Basins

The Texas Water Development Board (Board) files this notice of intent to review 31 TAC, Part 10, Chapter 360, Designation of River and Coastal Basins, in accordance with the Texas Government Code, §2001.039. The Board finds that the reason for adopting the chapter continues to exist.

As required by §2001.039 of the Texas Government Code, the Board will accept comments and make a final assessment regarding whether the reason for adopting each of the rules in Chapter 360 continues to exist. The comment period will last 30 days beginning with the publication of this notice of intention to review.

Comments or questions regarding this rule review may be submitted to Suzanne Schwartz, General Counsel, Texas Water Development, P.O. Box 13231, Austin, Texas, 78711-3231, by e-mail to suzanne.schwartz@twdb.state.tx.us or by fax @ 512/463-5580.

TRD-200205554
Suzanne Schwartz
General Counsel
Texas Water Development Board
Filed: August 22, 2002

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Adopted Rule Review

Texas State Board of Examiners of Psychologists

Title 22, Part 21

The Texas State Board of Examiners of Psychologists adopts the review of Board rules §§465.1 - 465.10, concerning Rules of Practice, in accordance with the Appropriations Act, Section 167. As part of this review process, the Board adopted amendments to the existing §465.1, Definitions, and §465.9, Competence, in accordance with the Appropriations Act, Section 167. The adopted amendments may be found in the Adopted Rules section of the Texas Register. The Board is not adopting any changes to existing Board rules §465.3 through §465.8 and §465.10.

The Texas State Board of Examiners of Psychologists adopts the review of Chapter 473, Fees, §§473.1-473.8, in accordance with the Appropriations Act, Section 167. The Board is not adopting any changes to existing Rules §473.1 through §473.8.

TRD-200205618
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Filed: August 23, 2002

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TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 16 TAC §25.43(f)(1)(A)

Terms of Service Agreement

[*Insert POLR Provider Name*] (Certificate No. ____)
Provider of Last Resort (POLR) Residential Service

This Terms of Service Agreement applies to residential customers receiving Provider of Last Resort (POLR) service from [*insert POLR Provider name*] under Public Utility Commission of Texas (PUCT) Retail Electric Provider (REP) Certificate No. ____. These terms of service are subject to current and future customer protection laws or rules as prescribed by local, state or federal authorities and to changes in applicable charges or transmission and distribution service provider (TDSP) rates. Customers will be notified of material changes in these terms of service resulting from changes in local, state or federal legislation or rules, applicable charges, or TDSP rates, [*insert if option A below applies:* except for changes in the energy-charge component of the price for basic service as described below,] at least 45 days before such changes take effect unless otherwise directed by law. Each Terms of Service Agreement will be given a unique version number for quick reference.

SPANISH LANGUAGE (IDIOMA ESPANOL) Si usted quiere obtener el mismo documento impreso detallando los Términos de Servicio en español comunicandose con nosotros al [*insert toll-free number*].

1. PRICE FOR BASIC FIRM SERVICE

POLR Provider will provide basic firm service, defined as electric service not subject to interruption for economic reasons and that does not include value-added options offered in the competitive market. The rate for your electric service from POLR Provider will be based on the following [*insert if option A applies*: plus any applicable recurring monthly charges identified below.] Non-recurring charges (i.e., charges not occurring every month) will be billed as they are incurred and are set out in section 3 **SERVICE CHARGES AND FEES,** below.

A. Your rate for POLR service will consist of an energy charge, [*insert if applicable*: monthly customer charge], and non-bypassable charges as described below.

Energy charge: The energy charge shall be recalculated at the beginning of each month in accordance with the formula provided below. If the recalculated energy charge varies by more than 5% from the existing energy charge, then the energy charge component of your rate for that billing month shall be the recalculated charge (see note below).* If the recalculated energy charge does not vary by more than 5% from the existing energy charge, then the energy charge component of your rate for that billing month shall remain unchanged. The applicable energy charge for the billing month will be stated on your monthly bill from POLR Provider. For additional information on the current energy charge, refer to [*insert website address*] or contact POLR Provider at [*insert phone number*].

$$\text{Energy Charge}_N = \text{Energy Charge}_E * \text{Gas Price}_N / \text{Gas Price}_E$$

Where:

Energy Charge_N = recalculated energy charge

Energy Charge_E = existing energy charge

Gas Price_N = the average of the closing one-month forward New York Mercantile Exchange (NYMEX) Henry Hub natural gas prices as reported in the *Wall Street Journal* for the last five trading days of the month ended 30 days prior to the effective date of the recalculated energy charge.

Gas Price $_E$ = the average of the closing one-month forward NYMEX Henry Hub natural gas prices as reported in the *Wall Street Journal* for the last five business days preceding the bid due date for the first gas price adjustment of the POLR term. For subsequent calculations, Gas Price $_E$ = the average of the closing one-month forward NYMEX Henry Hub natural gas prices as reported in the *Wall Street Journal*, at the time the existing energy charge was last adjusted.

*NOTE: If the recalculated energy charge results in the overall POLR price being lower than the price-to-beat rate charged by [*specify affiliated REP*] under [*specify applicable tariff*], the POLR price will be set at the price-to-beat rate for that billing month.
[*If applicable*] Monthly customer charge: [*Insert $ amount*]

Nonbypassable charges: These charges are billed to POLR Provider and include, but are not limited to: Transmission and Distribution Service Provider's (TDSP) wires usage and miscellaneous discretionary charges, transition to competition (CTC) charges, system benefit fund (SBF) payments, taxes or charges from various taxing or regulatory authorities, including POLR Provider's Gross Receipts tax, and other non-bypassable charges.

OR [insert if applicable]

B. [Insert rate = 125% of the applicable price to beat] This rate is 125% of the price-to-beat rate charged by [*specify affiliated REP*] under [*specify applicable tariff*]. You will be notified of any change in the rate that may result from changes in the price-to-beat rate.

2. SECURITY AND BILLING

[PAY-IN-ADVANCE LANGUAGE TO BE INCLUDED IN TOSS AT THE OPTION OF THE POLR PROVIDER:

POLR Provider will offer the option to either pay a cash deposit to secure your service pursuant to subsection (a) CASH DEPOSIT below or to choose PAY-IN-ADVANCE BILLING OPTION IN LIEU OF CASH DEPOSIT pursuant to subsection (b) below.]

POLR Provider may not require a cash deposit if you are able to provide the POLR Provider with a Credit Reference Letter that includes following representations: 1) you have been a customer of any retail electric provider or the electric utility (prior to 2002) within the two years prior to your request for electric service; 2) you are not delinquent in payment of any such electric service account; and 3) you were not late in paying a bill more than once during the last 12 consecutive months.

A residential customer may be deemed as having established satisfactory credit if the customer possesses a satisfactory credit rating obtained through an accredited credit reporting agency.

If these conditions do not apply, POLR Provider may require a cash deposit unless you can demonstrate to the POLR Provider any of the following prior to the due date of the cash deposit: 1) you are 65 years of age or older and your account with any retail electric provider or the electric utility (prior to 2002) has not had a delinquent balance within the last 12 months for the same type of service; 2) you are a victim of family violence as defined by the Texas Family Code § 71.004, by a family violence center, or by treating medical personnel;* or 3) you are medically indigent.**

*This determination shall be evidenced by submission of a certification letter developed by the Texas Council on Family Violence. The certification letter may be submitted directly by use of the toll-free fax number listed below to POLR Provider.
** To be considered medically indigent, the customer must make a demonstration that the following criteria are met: the customer's household income must be at or below 150% of the poverty guidelines as certified by a governmental entity or government funded energy assistance program provider, and either of the following must apply: (i) the customer or the customer's spouse has been certified by that person's physician (for the purposes of this subsection, the term "physician" shall mean any medical doctor, doctor of osteopathy, nurse practitioner, registered nurse, state-licensed social worker, state-licensed

physical and occupational therapist, and an employee of an agency certified to provide home health services pursuant to 42 U.S.C. §1395 *et seq* as being unable to perform three or more activities of daily living, as defined in Title 22, Texas Administrative Code, Section 218.2, or (ii) the customer's monthly out-of-pocket medical expenses exceed 20% of the household's gross income.

a) **TRADITIONAL CASH DEPOSIT**

1) Your initial cash deposit, if required, will be based on one-sixth (1/6) of your estimated annual billing. You may also be required, in the future, to pay an initial or additional cash deposit if you have been issued a disconnection notice within the last 12 months or if you have been a customer for 12 months and your billings are more than twice the amount estimated to determine your initial cash deposit. Instead of an additional cash deposit, you may pay the total amount due by the due date of the bill, provided you have not exercised this option in the previous 12 months.
2) Your total cash deposit shall not exceed an amount equivalent to one-sixth (1/6) of your estimated annual billing.
3) POLR Provider may require payment of an initial cash deposit within ten days of receiving confirmation from the Registration Agent of the effective date you become a customer of the POLR.
4) A customer who has applied for or is enrolled currently in LITE UP Texas (Low Income Telephone and Electric Utilities Program) may pay the initial cash deposit to POLR Provider in two installments. The first installment shall not exceed the estimated billing for the next month or one-twelfth (1/12) of the estimated annual billing and shall be due within ten days of POLR Provider's issuance of the written notice requiring the cash deposit. The second installment for the remainder of the cash deposit shall be due within 40 days of the issuance of the original written notice. For more information regarding LITE UP Texas, contact POLR Provider or call toll-free 1-866-4-LITE-UP (1-866-454-8387) to determine eligibility or to receive an application.
5) A written letter of guarantee may be used in lieu of paying a cash deposit. The guarantor must become or remain a customer of the POLR or its affiliated REP for the term in which the guarantee is in effect. If the guarantor fails to become, or ceases to be, a customer of the POLR or its affiliated REP, the POLR may require the customer to pay the initial or additional cash deposit as a condition of continuing the contract for service.
6) Upon default by a residential customer, the guarantor of the customer's account shall be responsible for the unpaid balance of the account only up to the agreed amount in the letter of guarantee. The POLR, or its affiliated REP shall provide written notification to the guarantor of the customer's default, the amount owed by the guarantor, and the due date for the amount owed. The guarantor will have 16 days from the date the notice is issued to pay the amount owed on the defaulted account. If the 16th day falls on a holiday or weekend, the due date shall be the next business day. The POLR or its affiliated REP may transfer the amount owed on the defaulted account to the guarantor's own electric service bill provided the guaranteed amount owed is identified separately on the bill.
7) The POLR or its affiliated REP may initiate disconnection of service to the guarantor for nonpayment of the guaranteed amount within ten days of issuance of a notice of disconnection.
8) Your service may be disconnected for failure to pay a required cash deposit (initial or additional) within ten days of issuance of a notice of disconnection of service.
9) A disconnection notice may be issued concurrently with either the written request for the initial or additional cash deposit or current monthly bill for electric service. Disconnection means a physical interruption of electric service.
10) You will accrue interest on your cash deposit(s) with POLR Provider. Each year in December, the PUCT establishes the interest rate POLR Provider will apply to your cash deposit for the next calendar year.
11) Your cash deposit and accrued interest, less any outstanding balance owed for electric service, will be refunded to you upon closing of your account with POLR Provider.
12) Your cash deposit and accrued interest will be refunded if you pay your bills for 12 consecutive months without your service being disconnected for nonpayment and without having more than two delinquent payments.
13) The guarantee agreement will be terminated if you pay your bills for 12 consecutive months without your service being disconnected for nonpayment and without having more than two delinquent payments within the last 12 months.

b) *[PAY-IN-ADVANCE LANGUAGE TO BE INCLUDED IN TERMS OF SERVICE AT THE OPTION OF POLR PROVIDER]* **PAY-IN-ADVANCE BILLING OPTION IN LIEU OF CASH DEPOSIT**

1) If you select the pay-in-advance option, you will be billed in advance for your electric service after POLR Provider receives confirmation from the Registration Agent of the effective date you are to become a POLR customer of POLR Provider. All bills, except the initial one requesting your payment in advance, will include, where

applicable, the monthly charge, energy charge, non-bypassable charges, applicable taxes, service charges and other costs as permitted by governmental or regulatory authorities.

2) Your initial pay-in-advance billing will include charges for two months average kWh consumption during the prior year and will include, where applicable, an estimate for two months of non-bypassable charges, applicable taxes, service charges and other costs as permitted by governmental or regulatory authorities. The pay-in-advance amount will be used in lieu of the cash deposit and will be no greater than $200 or less than $75. The initial pay-in-advance option in lieu of cash deposit will be due within ten days of issuance of a notice requiring a pay-in-advance billing.
3) Pay-in-advance billing requires that you maintain a balance of the two months initial total estimated charges for the time that you are a POLR customer and will be billed monthly on approximately 30-day periods.
4) Your bill will be due upon receipt and will be considered delinquent if it is not paid by the 16th calendar day after issuance of the bill.
5) If your pay-in-advance billing exceeds the initial pay-in-advance amount, then the pay-in-advance billing amount will be reset to the highest amount for the next billing cycle.
6) There is no interest accrued on pay-in-advance billing.
7) If historical usage is not available, POLR Provider in its sole judgment may develop reasonable good faith estimates to determine your billing and establish a pay-in-advance billing amount accordingly. Estimates will be based on key energy determinants such as square footage, and HVAC type and size. Once there is an established history of six months usage, POLR Provider will review the pay-in-advance amount and adjust it, if necessary.
8) Billing statements will reflect the total charges for POLR services provided by POLR Provider.
9) Your service may be disconnected if you fail to pay the required pay-in-advance bill within ten days of issuance of a notice of disconnection of service.
10) A disconnection notice may be issued concurrently with the written request for the required pay-in-advance bill.

c) BILLING

1) You will be billed monthly for your electric service.
2) Your monthly billing period will be approximately 30 days.
3) You will be billed monthly after your scheduled monthly meter read date. Billing statements will reflect the total charges for POLR services provided by POLR Provider.
4) Your bill will be due upon receipt and will be considered delinquent if it is not paid by the 16th day after issuance of the bill.
5) POLR Provider offers deferred and level payment (also known as budget) plans. Budget plans will be reconciled quarterly. Please contact POLR Provider at the 24-hour customer service number below for information about these options.

3. SERVICE CHARGES AND FEES

You will be subject to the following charges and fees in addition to the **PRICE FOR BASIC SERVICE** in section 1:

Service Charges and Fees	Amount
Account History charge if you request and are provided a premise usage history for more than the most recent 12 months or if a 12-month history is requested more than once within a 12-month period. If you are a low-income customer, the first two premise usage histories provided on your behalf to an agency providing bill payment assistance shall not be counted in determining whether you are subject to an account history charge.	$25.00
Collection Letter charge for processing a registered or certified letter demanding payment of past due accounts.	$15.00
Disconnection charge for disconnection of service pursuant to TDSP's tariffs.	[Insert pass through charge from TDSP]
Account Reinstatement fee for handling accounts for reconnection after disconnection for non-payment (in addition to any applicable disconnect or reconnect charges).	No charge
Equipment charge for providing testing, monitoring or other special equipment at the request of the customer.	[Insert pass through charge from TDSP]
Reconnection charge for reconnection of service pursuant to TDSP's tariffs.	[Insert pass through charge from TDSP]
Unmetered Guardlight/Security lighting charge applies to existing guardlights.	[Insert applicable $/kWh charge equivalent to 125% of applicable PTB]
Late fees will be assessed on delinquent deferred payment arrangements. Deferred payment arrangements are delinquent if not paid by the date specified by the deferred payment plan.	5% assessed on the late deferred payment amount
Out-of-cycle meter reading charge may be charged if you request an out-of-cycle meter reading:	
During regular hours	[Insert pass through charge from TDSP]
Outside regular working hours – Non-holiday	[Insert pass through charge from TDSP]
Outside regular working hours – Holidays	[Insert pass through charge from TDSP]
Reread charge will be assessed if requested by the customer.	[Insert pass through charge from TDSP]
Return check charge for each check returned for insufficient funds.	$25.00

Service Charges and Fees	Amount
Tampering charge for unauthorized reconnection of service, tampering with the electric meter, theft of electric service by any person on customer's premise, or evidence thereof, at customer's premise. Additional charges for repair, replacement, relocation of equipment and estimated amount of electric service not recorded may also be billed to you.	[Insert pass through charge from TDSP]
Disconnection Reminder Notification charge for notifying customer that disconnection of service may be in progress. This notification may be made by telephone, electronically or by any means of communication appropriate for the customer.	$5.00
POLR Provider reserves the right to charge for court costs, legal fees, and other costs associated with collection of delinquent amounts.	
POLR Provider reserves the right to charge for services requested by you that are rendered on your behalf after your approval of disclosed charges for those services, as well as the right to pass through tariff charges for services rendered by the TDSP.	

4. DISCONNECTION OF SERVICE

Disconnection means a physical interruption of electric service. Disconnection is subject to the rules of the PUCT.

a) Your account will be considered delinquent if your monthly bill or pay-in-advance bill is not paid on or before the 16th day after issuance of the bill. If your account becomes delinquent, your service may be disconnected ten days after notice is issued.

b) Your service may be disconnected after you are notified of your failure to comply with the terms of this Terms of Service Agreement or any payment plan.

c) Service may not be reconnected by the POLR Provider until all delinquent amounts and charges owed to POLR Provider have been paid.

d) Your service may be disconnected without notice if a dangerous or hazardous condition exists, if the service has been connected without proper authority or for the reasons prescribed in the PUCT substantive rules. Service will not be reconnected until the dangerous or hazardous condition has been corrected.

e) If you choose to cancel service under this Terms of Service Agreement, your service will be disconnected unless you have made arrangements with another retail electric provider and a switch of provider has been successfully completed by the Registration Agent by the date you choose to cancel service. You will be responsible for any charges pursuant to section 1 **PRICE FOR BASIC SERVICE,** section 2 **SECURITY AND BILLING** and section 3 **SERVICE CHARGES AND FEES** of this agreement up to the date you choose to cancel service.

f) A disconnection notice may be issued concurrently with the written requests for either the initial or additional cash deposit or with a pay-in-advance in lieu of cash deposit billing.

g) A disconnection notice may be issued concurrently with your bill.

h) You may be disconnected for failure to pay an initial pay-in-advance bill in lieu of cash deposit or a monthly pay-in-advance bill.

5. CUSTOMER INFORMATION

You will be required to provide your social security number, a valid driver's license number, or other verifiable means of personal identification.

You authorize the TDSP, any previous retail electric provider, or the Independent Organization to provide POLR Provider information including, but not limited to: previous billings and usage of electricity, meter readings and types of service received, credit history, any records of tampering, and other names in which service has been provided, social security number, contact telephone number(s), driver's license, etc.

You authorize POLR Provider to release your customer payment information to credit reporting agencies, regulatory agents, agents of POLR Provider, energy assistance agencies, law enforcement agencies or the TDSP.

You authorize POLR Provider to use credit-reporting agencies to evaluate your credit history.

6. LENGTH OF AGREEMENT

NOTICE: POLR PROVIDER CANNOT REQUIRE THAT YOU SIGN UP FOR A MINIMUM CONTRACT TERM AS A CONDITION OF PROVIDING SERVICE.
No term of service is required under this agreement unless by mutual agreement a term is agreed to in writing between you and POLR Provider or unless you enter a level payment plan or deferred payment plan. If you decide to be placed on POLR Provider's:

a) Level (also known as Budget) Payment Plan, your term of service shall be six months from the date of the first monthly billing subsequent to being placed on the level payment plan. The term shall start on the date you enter the Level Payment Plan; or
b) Deferred Payment Plan, your term of service shall be a minimum of three months or the length agreed to for making deferred payments, whichever is longer. The term shall start on the date you enter the Deferred Payment Plan.
c) You will not be charged a penalty for canceling your service before the end of the term but you will be responsible for all outstanding amounts due including Level and Deferred Payment Plan reconciliation amounts.

7. END OF POLR TERM

POLR Provider's terms of service and obligations to offer the POLR rate specified under subsection 2, PRICE FOR BASIC SERVICE, will expire on [*insert last date of POLR term*]. At least 60 days before that date, POLR Provider will provide you notice of available options for securing electric service after POLR's existing term has expired. If you obtain electric service from a provider other than POLR Provider, your final bill from POLR Provider will be offset against your deposit and any remaining balance will be refunded to you within 20 days from the final meter read date.

8. CONTACT INFORMATION

Name of Provider:
Physical Address:

24-Hour Customer Service: (toll free)
24-Hour Power Outages: Contact your local electricity delivery company
Internet web-site:
Fax: (toll free)

You may contact POLR Provider if you have a dispute concerning your bill or your service from POLR Provider. You must provide, in writing, within ten business days of the invoice date, your reasons for disputing the invoice. You will be obligated to pay the undisputed portion of the bill and the POLR may pursue disconnection of service for nonpayment of the undisputed portion after appropriate notice. In the event that you give timely notice of a dispute, you and the POLR Provider shall, for a period of 30 calendar days following POLR Provider's receipt of the notice, pursue diligent, good faith efforts to resolve the dispute. Following resolution of the dispute, any amount found payable by either party shall be paid within ten business days.

Complaints regarding your service may also be directed to the Public Utility Commission of Texas, 1-888-782-8477 (toll free).

9. LOW INCOME PAYMENT ASSISTANCE INFORMATION

Rate discounts are available for qualified low-income customers. For more information, contact POLR Provider Customer Service or either of the following state agencies:

Texas Department of Housing and Consumer Affairs:	1-512-475-3800
Public Utility Commission of Texas:	1-888-782-8477 (toll free)

10. BILL PAYMENT METHODS

You may pay for your electric service by personal or cashier's check, money order, debit or credit card, electronic funds transfer, [*Insert if offered by POLR Provider (optional):* in cash through an agent authorized by the POLR Provider], or automatic draft from your financial institution. If you choose to make payment via electronic funds transfer or automatic draft, you must contact POLR Provider's Customer Service number to begin those options for bill payment at no cost.

If you have had two or more personal checks returned for insufficient funds within the last 12 months, POLR Provider will require all further payments for electric service to be by cash, cashier's check, money order or debit/credit card. If you pay by debit/credit card and it has been declined two or more times within the last 12 months, POLR Provider will require all further payments to be by cash, cashier's check or money order.

11. FORCE MAJEURE

POLR Provider shall not be liable in damages for any act or event that is beyond its control including but not limited to, an act of God, act of the public enemy, war, insurrection, riot, fire, explosion, labor disturbance or strike, terrorism, wildlife, accident, breakdown or accident to machinery or equipment, or a valid curtailment order, regulation, or restriction imposed by governmental, military, or lawfully established civilian authorities, including any directive of the independent organization, and performance or nonperformance by the TDSP.

12. LIMITATION OF LIABILITY

POLR PROVIDER DOES NOT GENERATE YOUR ELECTRICITY, NOR DOES POLR PROVIDER TRANSMIT OR DISTRIBUTE ELECTRICITY TO YOU. POLR PROVIDER WILL NOT BE LIABLE FOR FLUCTUATIONS, INTERRUPTIONS OR IRREGULARITIES IN BASIC FIRM SERVICE. LIABILITIES NOT EXCUSED BY REASON OF FORCE MAJEURE OR OTHERWISE SHALL BE LIMITED TO DIRECT, ACTUAL DAMAGES. NEITHER YOU NOR THE POLR PROVIDER SHALL BE LIABLE TO THE OTHER FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY, OR INDIRECT DAMAGES. THESE LIMITATIONS APPLY WITHOUT REGARD TO THE CAUSE OF ANY LIABILITY OR DAMAGE.

13. REPRESENTATIONS AND WARRANTIES

POLR PROVIDER WARRANTS THAT THE ELECTRICITY SOLD UNDER THIS AGREEMENT WILL BE "BASIC FIRM SERVICE" AS THAT TERM IS DEFINED IN PUCT SUBSTANTIVE RULE 25.43(c)(3), TO WIT "ELECTRIC SERVICE NOT SUBJECT TO INTERRUPTION FOR ECONOMIC REASONS AND THAT DOES NOT INCLUDE VALUE ADDED OPTIONS OFFERED IN THE COMPETITIVE MARKET. BASIC FIRM SERVICE EXCLUDES, AMONG OTHER COMPETITIVELY OFFERED OPTIONS, EMERGENCY OR BACK-UP SERVICE, AND STAND-BY SERVICE."

POLR PROVIDER MAKES NO OTHER WARRANTIES WHATSOEVER WITH REGARD TO THE PROVISION OF ELECTRIC SERVICE AND DISCLAIMS ANY AND ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

14. DISCRIMINATION

POLR Provider will not refuse to provide electric service or otherwise discriminate in the provision of electric service to any customer based on race, creed, color, national origin, ancestry, sex, marital status, lawful source of income, disability, familial status, level of income, location of customer in an economically distressed geographic area, or qualification for low-income or energy efficiency services.

You have the right to cancel this agreement (Terms of Service Agreement) for electric service without penalty or fee of any kind for a period of three federal business days after you have received the Terms of Service. You may cancel your service and this agreement by calling the toll free 24-hour Customer Service number contained in this Terms of Service Agreement or by contacting us via fax or e-mail. ***Cancellation of this agreement will result in disconnection of your service as provided in this agreement.***

Terms of Service Agreement

[*Insert POLR Provider Name*] (Certificate No._____)
Provider of Last Resort (POLR) Small Non-Residential Service

This Terms of Service Agreement (TOSA) applies to small non-residential customers (i.e., one megawatt and below) receiving Provider of Last Resort (POLR) service from POLR Provider under Public Utility Commission of Texas (PUCT) Retail Electric Provider (REP) Certificate No. ___. These terms of service are subject to current and future customer protection laws or rules as prescribed by local, state or federal authorities and to changes in applicable charges or transmission and distribution service provider (TDSP) rates. Customers will be notified of material changes in these Terms of Service resulting from changes in local, state, or federal legislation or rules, applicable charges, or TDSP rates, [*insert if option A below applies:* except for changes in the energy-charge component of the price for basic firm service as described below, at least 45 days before such changes take effect, unless otherwise directed by law. Each TOSA will be given a unique version number for quick reference.

SPANISH LANGUAGE (IDIOMA ESPANOL) Si usted *quiere obtener el mismo documento impreso detallando los Términos de Servicio en español comunicandose con nosotros al* [insert toll-free number].

1. PRICE FOR BASIC FIRM SERVICE.

POLR Provider will provide basic firm service, defined as electric service not subject to interruption for economic reasons and that does not include value-added options offered in the competitive market. The rate for your electric service from POLR Provider will be based on the following [*INSERT IF OPTION A APPLIES TO POLR PROVIDER*: plus any applicable recurring monthly charges.] [*PAY-IN-ADVANCE LANGUAGE TO BE INCLUDED IN TERMS OF SERVICE AT THE OPTION OF POLR PROVIDER:* These charges may be applied in a pay-in-advance manner as described in section 2 **SECURITY AND BILLING**.] Non-recurring charges will be billed as they are incurred and are set out in section 3 **SERVICE CHARGES AND FEES** below.

A. Your rate for POLR service will consist of an energy charge, [*INSERT IF APPLICABLE*: demand charge], [*INSERT IF APPLICABLE*: monthly customer charge], and non-bypassable charges as described below.

Energy charge: The energy charge shall be recalculated at the beginning of each month in accordance with the formula provided below. If the recalculated energy charge varies by more than 5% from the existing energy charge, then the energy charge component of your rate for that billing month shall be the recalculated charge (see note below).* If the recalculated energy charge does not vary by more than 5% from the existing energy charge, then the energy charge component of your rate shall remain unchanged. The applicable energy charge will be stated on your monthly bill from POLR Provider. For additional information on the current energy charge, refer to [*INSERT POLR PROVIDER WEBSITE ADDRESS*] or contact POLR Provider at [*INSERT PHONE NUMBER*].

$$\text{Energy Charge}_N = \text{Energy Charge}_E * \text{Gas Price}_N / \text{Gas Price}_E$$

Where:

Energy Charge_N= recalculated energy charge

Energy Charge_E = existing energy charge

Gas Price_N = the average of the closing one-month forward New York Mercantile Exchange (NYMEX) Henry Hub natural gas prices as reported in the *Wall Street Journal* for the last five trading days of the month ended 30 days prior to the effective date of the recalculated energy charge.

Gas Price $_E$ = the average of the closing one-month forward NYMEX Henry Hub natural gas prices as reported in the *Wall Street Journal* for the last five business days preceding the bid due date for the first gas price adjustment of the POLR term. For subsequent calculations, Gas Price $_E$ = the average of the closing one-month forward NYMEX Henry Hub natural gas prices as reported in the *Wall Street Journal*, at the time the existing energy charge was last adjusted.

[*IF APPLICABLE*] Demand charge: [*Insert $/kW amount*]
The demand charge is calculated based on the customer's highest billing demand in any interval within the current billing period. Non-demand metered customers will be billed based on ten kilowatts (kW) monthly.

[*IF APPLICABLE*] Monthly customer charge: [*Insert $ amount*]

Nonbypassable charges: These charges are billed to POLR Provider and include, but are not limited to: Transmission and Distribution Service Provider's (TDSP) wires usage and miscellaneous discretionary charges, transition to competition (CTC) charges, system benefit fund (SBF) payments, taxes or charges from various taxing or regulatory authorities, including POLR Provider's Gross Receipts tax, and other non-bypassable charges.

*NOTE: If the recalculated energy charge results in the overall POLR price being lower than the price-to-beat rate charged by [*specify affiliated REP*] under [*specify applicable tariff*], the POLR price will be set at the price-to-beat rate for the applicable billing month.

OR [INSERT IF APPLICABLE]

B. [Rate = 125% of the applicable PTB] This rate is 125% of the price to beat rate charged by [*SPECIFY AFFILIATED REP*] under [*SPECIFY APPLICABLE TARIFF*]. You will be notified of any change in the rate that may result from changes in the price to beat rate.

2. SECURITY AND BILLING

[PAY-IN-ADVANCE LANGUAGE TO BE INCLUDED IN TERMS OF SERVICE AT THE OPTION OF POLR PROVIDER
POLR Provider will offer the option to either pay a cash deposit to secure your service pursuant to subsection (a) CASH DEPOSIT or to choose **PAY-IN-ADVANCE BILLING OPTION IN LIEU OF CASH DEPOSIT** pursuant to subsection (b).]

POLR Provider has no obligation to serve you if you fail to pay the required cash deposit [or to accept pay-in-advance billing.]

a) CASH DEPOSIT

If service is initiated under option (a) CASH DEPOSIT you will be billed monthly for your electric service after the scheduled monthly meter read date. The monthly billing period will be approximately 30 days. Your bill will be due upon receipt and will be considered delinquent if it is not paid by the sixteenth (16^{th}) day after issuance of the bill. Disconnection of service may result upon non-payment of a bill pursuant to section 4 **DISCONNECTION OF SERVICE.**

1) If your service is initiated with POLR Provider by paying a cash deposit, you will be required to pay the initial cash deposit after POLR Provider receives confirmation from the Registration Agent of the effective date you are to become a customer of POLR Provider. Cash deposits required for POLR service shall be equivalent to the estimated billing for a two-month period, including, where applicable, customer and non-bypassable charges, and energy and demand charges determined based on your two highest months of usage and demand in the most recent 12-month period. If 12 months of data are not available, the required two months cash deposit shall be determined by the longest available period less than 12 months.

2) If historical usage is not available, POLR Provider in its sole judgment may develop reasonable good faith estimates to determine your cash deposit amount. Estimates will be based on key energy determinants and electric equipment, including, but not limited to: square footage, HVAC size and type, type of business, hours of operation, standard industry load factor assumptions, etc. Other non-discriminatory methods of determining creditworthiness may be used.
3) You may be required, in the future, to pay an initial or additional cash deposit or [to pay-in-advance pursuant to subsection (b)] if you have been issued a disconnection notice within the last 12 months or if you have been a customer for 12 months and you have used more than twice the amount estimated to determine your initial cash deposit.
4) You will accrue interest on your cash deposit with POLR Provider. Each year in December, the PUCT establishes the interest rate POLR Provider will apply to your cash deposit for the next calendar year.
5) You may satisfy security requirements by providing POLR Provider with an irrevocable letter of credit in the amount of the required cash deposit. The required security must be provided within ten days after a notice is issued to you requesting a cash deposit.
6) If not previously returned to you, your cash deposit and accrued interest, less any outstanding balance owed for electric service, will be refunded to you upon closing of your account with POLR Provider.
7) If your service is terminated prior to the regularly scheduled meter read date, the final bill for service may be calculated using the out of cycle meter readings. Final bills will not be prorated.
8) POLR Provider will require payment of the initial cash deposit within ten days of receiving confirmation from the Registration Agent of the effective date you become a customer of the POLR.
9) Your service may be disconnected if you fail to pay the required cash deposit (initial or additional) within ten days of issuance of a notice of disconnection of service.

b) ***[PAY-IN-ADVANCE LANGUAGE TO BE INCLUDED IN TERMS OF SERVICE AT THE OPTION OF POLR PROVIDER]*** **PAY-IN-ADVANCE BILLING OPTION IN LIEU OF CASH DEPOSIT**

1) If your POLR electric service is initiated by pay–in-advance, you will be billed in advance for your electric service after POLR Provider receives confirmation from the Registration Agent of the effective date you are to become a POLR customer of POLR Provider. All bills including the initial one requesting your payment in advance, will include the monthly customer charge, demand charge, energy charge, and an estimate of two months' non-bypassable charges, applicable taxes, service charges and other costs as permitted by governmental or regulatory authorities.
2) Your initial pay-in-advance billing will include charges for two months, based on historical demand (the highest demand recorded for your service in the prior 12 months) plus an energy charge (based on your kWh consumption for the highest two months during the prior 12 months) and will be due within ten days of issuance of the notice requiring a pay-in-advance billing.
3) Pay-in-advance billing requires that you maintain a balance of the two-months initial total estimated charges for the time that you are a POLR customer and will be billed monthly on approximately 30-day periods.
4) Your bill will be due upon receipt and will be considered delinquent if it is not paid by the 16th calendar day after issuance of the bill.
5) If your pay-in-advance billing exceeds the initial pay-in-advance amount then the pay-in-advance billing amount will be reset to that amount for the next billing cycle.
6) There is no interest accrued on pay-in-advance billing.
7) If historical usage is not available, POLR Provider in its sole judgment may develop reasonable good faith estimates to determine your billing and establish a pay-in-advance billing amount accordingly. Estimates will be based on key energy determinants and electric equipment including, but not limited to: square footage, HVAC type and size, type of business, hours of operation, standard industry load factor assumptions, etc. Once there is an established history of six months usage, POLR Provider will review the pay-in-advance amount and adjust it if necessary. If your monthly bill exceeds the pay-in-advance amount, the pay-in-advance amount will be adjusted accordingly.
8) Billing statements will reflect the total charges for POLR services provided by POLR Provider.
9) Your service may be disconnected if you fail to pay the required pay-in-advance bill within ten days of issuance of a notice of disconnection of service.

3. SERVICE CHARGES AND FEES

You will be subject to the following charges and fees in addition to the **PRICE FOR BASIC FIRM SERVICE** in section 1. These fees will be billed for each premise. "Premise" herein shall mean the designated property or facilities and associated metered account identified by an Electric Service Identifier Number (ESI ID), which is a unique and permanent identifier assigned to each Premise.

Service Charges and Fees	Amount
Account Reinstatement fee for handling accounts for reconnection after disconnection for non-payment. This is in addition to any applicable disconnect or reconnect charges.	$10.00
Account History charge if you request and are provided a premise usage history for more than the most recent 12 months or if a 12 month history is requested for more than once within a 12 month period.	$25.00
Collection Letter charge for processing a registered or certified letter demanding payment of past due accounts.	$15.00
Drawing on an irrevocable letter of credit. Includes all of the activities required to present a drawing letter to customer's bank.	$50.00 plus any fees imposed by financial institution
Disconnection charge for disconnection of service pursuant to TDSP's tariffs.	[Insert pass through charge from TDSP]
Equipment charge for providing testing, monitoring or other special equipment at the request of the customer.	[Insert pass through charge from TDSP]
Field Collection charge for each trip to customer's premise to collect an amount that is past due when the customer requests the trip.	$10.00/ESI ID
Field Service Calls for each trip to the customer's premise to provide non-competitive services such as billing and outage-related inquiries, as requested and approved by the customer after trip charges are disclosed. A two hour minimum will be billed for each customer requested Field Service Call and includes travel and incidental expenses with the Field Service Call as well as any TDSP discretionary charges.	$100.00/hour
Reconnection charge for reconnection of service pursuant to TDSP's tariffs.	[Insert pass through charge from TDSP]
Guardlight/Security lighting charge applies to existing guardlights or security lighting.	[Insert applicable $/kWh charge equivalent to 125% of applicable PTB]
Master Contracts • Set-up fee per new or transferred contract • Additional fee per each unit placed on a master contract, added to an existing contract or transferred	 $25.00 $ 5.00
Master Metered Facilities: **Master Metered Tenant charge** for small non-residential 50 kW and below facilities may be assessed to recover costs associated with installing, maintaining, testing, reading or other costs incurred by POLR Provider for rendering electric service to tenants of master metered facilities.	[Insert pass through charge from TDSP]

Service Charges and Fees	Amount
Tenant Notification charge for each apartment unit to recover expenses incurred each time a tenant in a master metered facility is notified of either impending disconnection for nonpayment of the electric service or of actual disconnection.	$25.00 to meet Subst. R. 25.483 minimum. $10.00 per addn'l 5 notices per 50 units over 100 units
Late fees will be assessed on the seventeenth (17^{th}) day after the bill issuance for all unpaid balances, including pay-in-advance billing. Payment arrangements are delinquent and will be assessed late fees if not paid by the date pursuant to a negotiated payment plan. ***Late fees may not be assessed against a customer with a peak demand of less than 50 kW.***	5% assessed on the late payment amount
Out-of-cycle meter reading charge may be charged if you request an out-of-cycle meter reading:	
During regular hours	[Insert pass through charge from TDSP]
Outside regular working hours – Non-holiday	[Insert pass through charge from TDSP]
Outside regular working hours – Holidays	[Insert pass through charge from TDSP]
Reread request charge for each request by a customer to obtain meter readings in addition to the normal cycle readings.	[Insert pass through charge from TDSP]
Processing fee for renegotiation of a payment plan. This fee applies if you request renegotiations more than once in any 30-day period. In addition, you may be required to pay the appropriate amount to the Company to reconcile your account balance.	$10.00
Return check charge for each check returned for insufficient funds. This charge will be imposed for each returned check (or for any bill payment method that results in a notice of insufficient funds from the customer's financial institution.)	$25.00
Tampering charge for unauthorized reconnection of service, tampering with the electric meter, theft of electric service by any person on customer's premise, or evidence thereof, at Customer's premise. Additional charges for repair, replacement, relocation of equipment and estimated amount of electric service not recorded may also be billed to you.	[Insert pass through charge from TDSP]
Disconnection Reminder Notification charge for notifying customers that disconnection of service may be in progress. This notification may be made by telephone, electronically or by any means of communication appropriate for the customer.	$5.00
POLR Provider reserves the right to charge for incurred court costs, legal fees and miscellaneous costs associated with legal action as a result of maintaining customer accounts.	
POLR Provider reserves the right to charge for services, requested by you, that are rendered on your behalf after your approval of disclosed charges for those services, as well as the right to pass through tariff charges for services rendered by the TDSP and billed to POLR Provider.	

4. DISCONNECTION OF SERVICE

Disconnection means a physical interruption of electric service. Disconnection is subject to the rules of the PUCT.

a) Your account will be considered delinquent if your monthly bill or pay-in-advance bill is not paid on or before the 16^{th} day after issuance of the bill. If your account becomes delinquent, your service may be disconnected 10 days after notice is issued.

b) Your service may be disconnected after you are notified of your failure to comply with the terms of this TOSA or any payment plan.
c) Service may not be reconnected until all delinquent amounts and charges owned to POLR Provider have been paid.
d) Your service may be disconnected without notice if a dangerous or hazardous condition exists, if the service has been connected without proper authority or for the reasons prescribed in the PUCT Substantive Rules. Service will not be reconnected until the dangerous or hazardous condition has been corrected.
e) If you choose to cancel service under this TOSA, your service will be disconnected unless you have made arrangements with another retail electric provider and a switch of provider has been successfully completed by the Registration Agent by the date you choose to cancel service. You will be responsible for any charges pursuant to section 1 **PRICE FOR BASIC FIRM SERVICE,** section 2 **SECURITY AND BILLING** and section 3 **SERVICE CHARGES AND FEES** of this agreement up to the date you choose to cancel service or the date you switch electric service to another REP, whichever is later.
f) A disconnection notice may be issued concurrently with the written requests for either the initial or additional cash deposit or with a pay-in-advance in lieu of cash deposit billing.
g) A disconnection notice may be issued concurrently with your pay-in-advance billing or cash deposit billing.
h) Your service may be disconnected for failure to pay an initial pay-in-advance bill, or monthly pay-in-advance bill, or cash deposit bill..

5. CUSTOMER INFORMATION

You will be required to provide a Federal tax identification (I.D) number, a social security number, a valid driver's license number or other verifiable means of personal identification in order to allow verification of changes you request in services from POLR Provider.

You authorize the TDSP, any previous retail electric provider, or the Independent Organization to provide information to POLR Provider including, but not limited to: previous billings and usage of electricity, meter readings and types of service received, credit history, any records of tampering, and other names in which service has been provided, social security number, contact telephone number(s), tax ID or driver's license number, etc.

You authorize POLR Provider to release your customer payment information to credit reporting agencies, regulatory agents, agents of POLR Provider, energy assistance agencies, law enforcement agencies or the TDSP.

You authorize POLR Provider to use credit-reporting agencies to evaluate your credit history.

6. LENGTH OF AGREEMENT

NOTICE: POLR PROVIDER CANNOT REQUIRE THAT YOU SIGN UP FOR A MINIMUM CONTRACT TERM AS A CONDITION OF PROVIDING SERVICE.

No term of service is required under this agreement unless by mutual agreement a term is agreed to in writing between you and POLR Provider or unless you enter an agreed payment plan requiring a minimum term.

7. END OF POLR TERM

POLR Provider's terms of service and obligations to offer the POLR rate specified under subsection 2, PRICE FOR BASIC FIRM SERVICE, will expire on [*insert last date of POLR term*]. At least 60 days before that date, POLR Provider will provide you notice of available options for securing electric service after POLR's existing term has expired. If you obtain electric service from a provider other than POLR Provider, your final bill from POLR Provider will be offset against your deposit and any remaining balance will be refunded to you within 20 days from the final meter read date.

8. CONTACT INFORMATION

Name of Provider:
Physical Address:

Certificate Number:
Customer Assistance:
Contact hours
24-Hour Power Outage:
Fax:
Internet web-site:

You may contact POLR Provider if you have a dispute concerning your bill or your service from POLR Provider. You must provide, in writing, within ten business days of the invoice date your reasons for disputing the invoice. You will be obligated to pay the undisputed portion of the bill and the POLR may pursue disconnection of service for nonpayment of the undisputed portion after appropriate notice. In the event that you give timely notice of a dispute, you and the POLR Provider shall, for a period of 30 calendar days following the POLR Provider's receipt of the notice, pursue diligent, good faith efforts to resolve the dispute. Following resolution of the dispute, any amount found payable by either party shall be paid within ten business days. Complaints regarding your service may also be directed to the Public Utility Commission, 1-888-782-8477 (toll free).

9. BILL PAYMENT METHODS

You may pay for your electric service by personal or cashier's check, money order, electronic funds transfer, [*Insert if offered by POLR Provider (optional):* in cash through an agent authorized by the POLR Provider], or automatic draft from your financial institution. If you choose to make payment via electronic funds transfer or automatic draft, you must contact POLR Provider's Customer Service number to begin those options for bill payment at no cost. Regardless of the payment method you select, all payments must be made within (16 calendar days of bill issuance. If payments are not received by POLR Provider by the end of the day on the due date, the bill will be considered delinquent and a late fee of 5% will be applied to all unpaid balances including pay-in-advance. Late fees may not be assessed against a customer with a peak demand of less than 50 kW.

If you have had two or more personal checks returned for insufficient funds within the last 12 months, POLR Provider will require all further payments for electric service to be by cash, cashier's check, or money order.

10. FORCE MAJEURE

POLR Provider shall not be liable in damages for any act or event that is beyond its control including but not limited to, an act of God, act of the public enemy, war, insurrection, riot, fire, explosion, labor disturbance or strike, terrorism, wildlife, accident, breakdown or accident to machinery or equipment, or a valid curtailment order, regulation, or restriction imposed by governmental, military, or lawfully established civilian authorities, including any directive of the independent organization, and performance or nonperformance by the TDSP.

11. LIMITATION OF LIABILITY AND INDEMNITY

POLR PROVIDER DOES NOT GENERATE YOUR ELECTRICITY, NOR DOES POLR PROVIDER TRANSMIT OR DISTRIBUTE ELECTRICITY TO YOU. POLR PROVIDER WILL NOT BE LIABLE FOR FLUCTUATIONS, INTERRUPTIONS OR IRREGULARITIES IN BASIC FIRM SERVICE. LIABILITIES NOT EXCUSED BY REASON OF FORCE MAJEURE OR OTHERWISE SHALL BE LIMITED TO DIRECT, ACTUAL DAMAGES. NEITHER YOU NOR THE POLR PROVIDER SHALL BE LIABLE TO THE OTHER FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY, OR INDIRECT DAMAGES. THESE LIMITATIONS APPLY WITHOUT REGARD TO THE CAUSE OF ANY LIABILITY OR DAMAGE.

12. REPRESENTATIONS AND WARRANTIES

POLR PROVIDER WARRANTS THAT THE ELECTRICITY SOLD UNDER THIS AGREEMENT WILL BE "BASIC FIRM SERVICE" AS THAT TERM IS DEFINED IN PUCT SUBSTANTIVE RULE 25.43(c)(3), TO WIT "ELECTRIC SERVICE NOT SUBJECT TO INTERRUPTION FOR ECONOMIC REASONS AND THAT DOES NOT INCLUDE VALUE ADDED OPTIONS OFFERED IN THE COMPETITIVE MARKET. BASIC FIRM SERVICE EXCLUDES, AMONG OTHER COMPETITIVELY OFFERED OPTIONS, EMERGENCY OR BACK-UP SERVICE, AND STAND-BY SERVICE."

POLR PROVIDER MAKES NO OTHER WARRANTIES WHATSOEVER WITH REGARD TO THE PROVISION OF ELECTRIC SERVICE AND DISCLAIMS ANY AND ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

13. DISCRIMINATION

POLR Provider will not refuse to provide electric service or otherwise discriminate in the provision of electric service to any customer based on race, creed, color, national origin, ancestry, sex, marital status, lawful source of income, disability, familial status, level of income, location of customer in an economically distressed geographic area, or qualification for low-income or energy efficiency services.

You have the right to cancel this agreement (Terms of Service Agreement) for electric service without penalty or fee of any kind for a period of three federal business days after you have received the Terms of Service. You may cancel your service and this agreement by calling the toll free Customer Service number during the hours stated in this Terms of Service Agreement. Service may also be cancelled by toll-free fax or e-mail. ***Canceling this service agreement will result in disconnection of service if you have not made arrangements for alternative supply***

Terms of Service Agreement

[*Insert POLR Provider Name*] (Certificate No.____)
Provider of Last Resort (POLR) Large Non-Residential Service (> one megawatt)

This Terms of Service Agreement (TOSA) applies to Large Non-Residential customers receiving Provider of Last Resort (POLR) service from pursuant to Public Utility Commission of Texas (PUCT) Retail Electric Provider (REP) Certificate No. ___. These terms of service are subject to certain current and future customer protection laws or rules as prescribed by local, state or federal authorities and to changes in applicable charges or transmission and distribution service provider (TDSP) rates. Customers will be notified of changes in applicable charges or TDSP rates, except for changes in the price for basic firm service as described below, at least 30 days before such changes take effect, unless otherwise directed by law. Each TOSA will be given a unique version number for quick reference.

1. PRICE FOR BASIC FIRM SERVICE.

POLR Provider will provide basic firm service, defined as electric service not subject to interruption for economic reasons and that does not include value-added options offered in the competitive market. [*INSERT EITHER OPTION A OR OPTION B BELOW*]

OPTION A. The price for your electric service from POLR Provider will consist of an energy charge, [*INSERT IF APPLICABLE*: demand charge], [*INSERT IF APPLICABLE*: monthly customer charge], and non-bypassable charges as described below. [*PAY-IN-ADVANCE LANGUAGE TO BE INCLUDED IN TERMS OF SERVICE AT THE OPTION OF POLR PROVIDER:* These charges may be applied in a pay-in-advance manner as described in section 2 **SECURITY AND BILLING.**]

Energy charge = [*INSERT EITHER:* "[*INSERT APPLICABLE FIGURE*] % of market clearing price of energy (MCPE) for each 15-minute settlement interval for customers in ERCOT" *OR* "[*INSERT APPLICABLE FIGURE*] % of market-based reference price as specified by the PUCT."]

[*INSERT IF APPLICABLE:* **Demand charge =**_____]

The demand charge is calculated based on the customer's highest billing demand in any interval within the current billing period.

[*INSERT IF APPLICABLE:* **Monthly customer charge =** _____]

OPTION B. Rate = 150% of the greater of $7.25 per megawatt-hour or the MCPE or the market-based price as specified by the PUCT and a monthly customer charge of $2897.00.

Non-bypassable charges billed to POLR Provider that will be added to the prices above include: Transmission and Distribution Service Provider's (TDSP) wires usage and miscellaneous discretionary charges, transition to competition charges (CTC), system benefit fund (SBF) payments, taxes or charges from various taxing or regulatory authorities including POLR Provider's Gross Receipts tax, and other non by-passable charges.

Non-recurring charges will be billed as they are incurred and are set out in section 3 **SERVICE CHARGES AND FEES** below.

2. SECURITY AND BILLING

[PAY-IN-ADVANCE LANGUAGE TO BE INCLUDED IN TERMS OF SERVICE AT THE OPTION OF POLR PROVIDER] POLR Provider will offer the option to either pay a cash deposit to secure your service pursuant to subsection (a) CASH DEPOSIT or to choose **PAY-IN-ADVANCE BILLING OPTION IN LIEU OF CASH DEPOSIT** pursuant to subsection (b). You will either be required to pay a cash deposit or be subject to pay-in-advance billing.]

POLR Provider has no obligation to serve you if you fail to pay the required cash deposit [or to accept pay-in-advance billing.]

a) CASH DEPOSIT

If service is initiated under option (a) **CASH DEPOSIT** you will be billed monthly for your electric service after the scheduled monthly meter read date. The monthly billing period will be approximately 30 days. Your bill will be due upon receipt and will be considered delinquent if it is not paid by the sixteenth (16^{th}) day after issuance of the bill. The late payment fee (5%) will be **assessed on the seventeenth (17^{th}) day after the bill issuance for all unpaid balances.** Disconnection of service may result upon non-payment of a bill pursuant to section 4 **DISCONNECTION OF SERVICE.**

1) If your service is initiated with POLR Provider by paying a cash deposit, you will be required to pay the initial cash deposit or letter of credit after POLR Provider receives confirmation from the Registration Agent of the effective date you are to become a customer of POLR Provider. Cash deposits required for POLR service shall be equivalent to the estimated billing for a three-month period, including, where applicable, customer and non-bypassable charges, and energy and demand charges determined based on your three highest months of usage and demand during the most recent 12-month period.
2) If historical usage is not available, POLR Provider in its sole judgment may develop reasonable good faith estimates to determine your cash deposit amount. Estimates will be based on key energy determinants and electric equipment, including, but not limited to: square footage, HVAC type and size, type of business, hours of operation, standard industry load factor assumptions, etc. Other non-discriminatory methods of determining creditworthiness may be used.
3) You may also be required, in the future, to pay an additional cash deposit if you have been issued a disconnection notice or if you have been a customer for three months and you have used more than the amount estimated to determine your initial cash deposit.
4) You will accrue interest on your deposit with POLR Provider. Each year in December, the PUCT establishes the interest rate the POLR Provider will apply to your cash deposit for the next calendar year.
5) You may satisfy security requirements by providing POLR Provider with a surety bond or an irrevocable letter of credit in the amount of the required cash deposit. The surety bond must be approved by the POLR provider. The required security must be provided within ten days after a notice is issued to you requesting a cash deposit.
6) If not previously returned to you, your cash deposit and accrued interest, less any outstanding balance owed for electric service, will be refunded to you upon closing of your account with POLR Provider.
7) If your service is terminated prior to the regularly scheduled meter read date, the energy usage for the final bills may be calculated using the out of cycle meter readings and will include all charges defined in section 1. Price for Basic Firm Service.
8) POLR Provider will require payment of the initial cash deposit within ten days of receiving confirmation from the Registration Agent of the effective date you become a customer of the POLR.
9) Your service may be disconnected if you fail to pay the required cash deposit (initial or additional) within ten days of issuance of a notice of disconnection of service.

b) *[PAY-IN-ADVANCE LANGUAGE TO BE INCLUDED IN TERMS OF SERVICE AT THE OPTION OF POLR PROVIDER]* PAY-IN-ADVANCE BILLING OPTION IN LIEU OF CASH DEPOSIT

1) If your POLR electric service is initiated by pay-in-advance, you will be billed in advance for your electric service after POLR Provider receives confirmation from the Registration Agent of the effective date you are to become a POLR customer of POLR Provider. All bills will include the monthly customer charge, demand charge, energy

charge, and an estimate of two months' non-bypassable charges, applicable fees, taxes, service charges and other costs as permitted by governmental or regulatory authorities.

2) Your initial pay-in-advance billing will include, where applicable, charges for two months, based on historical demand (the highest demand recorded for your service in the prior 12 months) plus an energy charge (based on your kWh consumption for the highest two months during the prior year) and will be due within ten days of issuance of the notice requiring a pay-in-advance billing
3) Pay-in-advance billing requires that you maintain a balance of the two-month initial total estimated charges for the time that you are a POLR customer and will be billed monthly on approximately 30-day periods.
4) Your bill will be due upon receipt and will be considered delinquent if it is not paid by the 16th calendar day after issuance of the bill.
5) If your pay-in-advance billing exceeds the initial pay-in-advance amount, then the pay-in-advance billing amount will be reset to that amount for the next billing cycle.
6) There is no interest accrued on pay-in-advance billing.
7) If historical usage is not available, POLR Provider in its sole judgment may develop reasonable good faith estimates to determine your billing and establish a pay-in-advance billing amount accordingly. Estimates will be based on key energy determinants and electric equipment including, but not limited to: square footage, HVAC type and size, type of business, hours of operation, standard industry load factor assumptions, etc. Once there is an established history of three months usage, POLR Provider will review the pay-in-advance amount and adjust it if necessary. If at any time the sum of your two highest monthly bills exceeds the pay-in-advance amount, the pay-in-advance amount may be adjusted accordingly.
8) Billing statements will reflect the total charges for POLR services provided by POLR Provider.
9) Your service may be disconnected if you fail to pay the required pay-in-advance bill within ten days of issuance of a notice of disconnection of service.

3. SERVICE CHARGES AND FEES

You will be subject to the following charges and fees in addition to the rates for service prescribed in section 1 **PRICE FOR BASIC FIRM SERVICE**. These fees will be billed for each premise. "Premise" herein shall mean the designated property or facilities and associated metered account identified by an Electric Service Identifier Number (ESI ID), which is a unique and permanent identifier assigned to each service point.

Service Charges and Fees	Charge or Fee
Account Reinstatement fee for handling accounts for reconnection after disconnection for non-payment. This is in addition to any applicable disconnect or reconnect charges.	$ 50.00
Account History charge if you request and are provided a service point usage history for more than the most recent 12 months or if a 12-month history is requested more than once within a 12-month period.	$ 25.00
Collection Letter charge for processing a registered or certified letter demanding payment of past due accounts or drawing on your letter of credit.	$15.00
Drawing on irrevocable letter of credit includes all of the activities required to present a drawing letter to your bank.	$150.00 plus any fees imposed by financial institution
Disconnection charge for disconnection of service pursuant to Transmission and Distribution Service Provider's (TDSP) tariffs, including charges that may be assessed by the TDSP for scheduling a disconnection that is canceled.	[Insert pass through charge from TDSP]
Equipment charge for providing testing, monitoring or other special equipment at the request of the customer.	[Insert pass through charge from TDSP]
Field Collection charge for each trip to a customer's premise to collect an amount that is past due when the customer requests the trip.	$10.00 / ESI ID
Field Service Calls for each trip to the customer's premise to provide non-competitive services such as billing and outage-related inquiries, as requested and approved by the customer after trip charges are disclosed. A four hour minimum will be billed for each customer requested Field Service Call and includes travel and incidental expenses with the field service call.	$200.00/hour
Late fees will be assessed on the seventeenth (17th) day after the bill issuance for all unpaid balances, including pay-in-advance billing. Payment arrangements are delinquent and will be assessed a late fee if not paid by the date pursuant to a negotiated payment plan.	5% assessed on the late payment amounts
Master Contracts ▪ Set-up fee per new or transferred contract ▪ Additional fee per each unit placed on a master contract, added to an existing contract or transferred	$25.00 $ 5.00
Master Metered Facilities: **Master Metered Tenant charge** for facilities may be assessed to recover costs associated with installing, maintaining, testing, reading or other costs incurred by POLR Provider for rendering electric service to tenants of master metered facilities. **Tenant Notification charge** for each apartment unit to recover expenses incurred each time a tenant in a master meter facility is notified of either impending disconnection for nonpayment of the electric service or of actual disconnection.	[Insert pass through charge from TDSP] $25.00 to meet Subst. R. 25.483 minimum. $10.00 per addn'l 5 notices per 50 units over 100 units
Out-of-cycle meter reading charge may be charged if you request an out-of-cycle meter reading.	
During regular hours	[Insert pass through charge from TDSP]

Service Charges and Fees	Charge or Fee
Outside regular working hours – Non-holiday	[Insert pass through charge from TDSP]
Outside regular working hours – Holidays	[Insert pass through charge from TDSP]
Reread request charge for each request by a customer to obtain meter readings in addition to the normal cycle readings.	[Insert pass through charge from TDSP]
Return check charge for each check returned for insufficient funds. This charge will be imposed for each returned check (or for any bill payment method that results in a notice of insufficient funds from the customer's financial institution.)	$ 25.00
Unmetered Guardlight/Security lighting charge applies to existing guardlights or security lighting.	[Insert applicable $/kWh charge equivalent to 125% of applicable PTB tariff for unmetered guardlight/security lighting]
Tampering charge for unauthorized reconnection of service, tampering with the electric meter, theft of electric service by any person on customer's premise, or evidence thereof, at customer's premise. Additional charges for repair, replacement, relocation of equipment and estimated amount of electric service not recorded may also be billed.	[Insert pass through charge from TDSP]
Disconnection Reminder Notification charge for notifying customers that disconnection of service may be in progress. This notification may be made by telephone, electronically or by any other means of communication appropriate for the customer.	$5.00
POLR Provider reserves the right to charge for court costs, legal fees and other costs associated with collection of delinquent amounts and miscellaneous legal costs associated with maintaining the account.	
POLR Provider reserves the right to charge for services, requested by you, that are rendered on your behalf after your approval of disclosed charges for those services, as well as the right to pass through tariff charges for services rendered by the TDSP and billed to POLR Provider.	

4. DISCONNECTION OF SERVICE

Disconnection means a physical interruption of electric service. Disconnection is subject to the rules of the PUCT.

a) Your account will be considered delinquent if payment for your monthly bill or pay-in-advance billing is not paid on or before the 16th day after issuance of the bill. If your account becomes delinquent, your service may be disconnected ten days after notice is issued.

b) Your service may be disconnected for failure to pay cash deposit as well as pay in advance. Your service may be disconnected after you are notified of your failure to comply with the terms of this TOSA or any payment plan.

c) Service may not be reconnected until all delinquent amounts and charges owed to POLR Provider have been paid. Upon receipt of all amounts and charges owed service may not be reconnected immediately and is dependent upon TDSP scheduling.

d) Your service may be disconnected without notice if a dangerous or hazardous condition exists, if the service has been connected without proper authority or for the reasons prescribed in the PUCT Substantive Rules. Service will not be reconnected until the dangerous or hazardous condition has been corrected.

e) If you choose to cancel service under this TOSA, your service will be disconnected unless you have made arrangements with another retail electric provider and a switch to the new provider has been successfully completed by the Registration Agent by the date you choose to cancel service. You will be responsible for any charges pursuant to section 1 **PRICE FOR BASIC SERVICE,** section 2 **SECURITY AND BILLING** and section 3 **SERVICE CHARGES AND FEES** of this agreement up to the date you choose to cancel service or the date you switch electric service to another REP, whichever is later.

f) A disconnection notice may be issued concurrently with the written requests for either the initial or additional cash deposit or with a pay-in-advance in lieu of cash deposit billing.

g) A disconnection notice may be issued concurrently with your pay-in-advance or cash deposit billing.

h) Your service may be disconnected for failure to pay an initial pay-in-advance bill or monthly pay-in-advance bill.

5. CUSTOMER INFORMATION

You will be required to provide a legal name, Federal tax identification (I.D.) number, a social security number, a valid driver's license number or other verifiable means of identification in order to allow verification of changes you request in services from POLR Provider.

You authorize the TDSP, any previous retail electric provider, or the Independent Organization to provide information to POLR Provider including but not limited to previous billings and usage of electricity, meter readings and types of service received, credit history, any records of tampering, other names in which service has been provided, social security number, contact telephone number(s), tax ID or driver's license number, etc.

You authorize POLR Provider at POLR Providers discretion to release your customer payment information to credit reporting agencies, regulatory agents, agents of POLR Provider, energy assistance agencies, law enforcement agencies or the TDSP.

You authorize POLR Provider to use credit-reporting agencies to evaluate your credit history.

6. LENGTH OF AGREEMENT

NOTICE: POLR PROVIDER CANNOT REQUIRE THAT YOU SIGN UP FOR A MINIMUM CONTRACT TERM AS A CONDITION OF PROVIDING SERVICE.

Subject to the advance payment provisions described in section 2, no term of service is required under this TOSA unless by mutual agreement a term is agreed to in writing between you and POLR Provider or if you enter an agreed payment plan requiring a minimum term.

7. END OF POLR TERM

POLR Provider's terms of service and obligations to offer the POLR rate specified under section 1, PRICE FOR BASIC FIRM SERVICE, will expire on [*insert last date of POLR term*]. At least 60 days before that date, POLR Provider will provide you notice of available options for securing electric service after POLR's existing term has expired. If you obtain electric service from a provider other than POLR Provider, your final bill from POLR Provider will be offset against your deposit and any remaining balance will be refunded to you within 20 days from the final meter read date.

8. CONTACT INFORMATION

Name of Provider:
Physical Address:

Certificate Number:
Customer Assistance:
Contact hours:
24-Hour Power Outage:
Fax:
Internet web-site:

You may contact POLR Provider if you have a dispute concerning your bill or your service from POLR Provider. You must provide, in writing, within ten business days of the invoice date your reasons for disputing the invoice. You will be obligated to pay the undisputed portion of the bill and the POLR may pursue disconnection of service for nonpayment of the undisputed portion after appropriate notice. In the event that you give timely notice of a dispute, you and the POLR Provider shall, for a period of 30 calendar days following the POLR Provider's receipt of the notice, pursue diligent, good faith efforts to resolve the dispute. Following resolution of the dispute, any amount found payable by either party shall be paid within ten business days.

Complaints regarding your service may also be directed to the Public Utility Commission, 1-888-782-8477 (toll free). Complaints directed to the Public Utility Commission do not relieve customer's obligation to pay in full within 16 days .

9. BILL PAYMENT METHODS

You may pay for your electric service by personal or cashier's check, money order, electronic funds transfer, automatic draft from your financial institution or in cash through a company authorized agent. If you choose to make payment via electronic funds transfer or automatic draft, you must contact POLR Provider' Customer Service number above to begin those options for bill payment at no cost. Regardless of the payment method you select, all payments must be made within 16 calendar days of bill issuance. If POLR Provider does not receive payments by the end of the day on the due date, the bill will be considered delinquent and a late fee of 5% will be applied to all unpaid balances including pay-in-advance.

If you have had two or more personal checks returned for insufficient funds within the past 12 months, POLR Provider will require all further payments for electric service to be by cash, cashier's check or money order.

10. FORCE MAJEURE

POLR Provider shall not be liable in damages for any act or event that is beyond its control including but not limited to, an act of God, act of the public enemy, war, insurrection, riot, fire, explosion, labor disturbance or strike, terrorism, wildlife, accident, breakdown or accident to machinery or equipment, or a valid curtailment order, regulation, or restriction imposed by governmental, military, or lawfully established civilian authorities, including any directive of the independent organization, and performance or nonperformance by the TDSP.

11. LIMITATION OF LIABILITY AND INDEMNITY

POLR PROVIDER DOES NOT GENERATE YOUR ELECTRICITY, NOR DOES POLR PROVIDER TRANSMIT OR DISTRIBUTE ELECTRICITY TO YOU. POLR PROVIDER WILL NOT BE LIABLE FOR CONSEQUENTIAL,

FLUCTUATIONS, INTERRUPTIONS OR IRREGULARITIES IN BASIC FIRM SERVICE. LIABILITIES NOT EXCUSED BY REASON OF FORCE MAJEURE OR OTHERWISE SHALL BE LIMITED TO DIRECT, ACTUAL DAMAGES. NEITHER YOU NOR THE POLR PROVIDER SHALL BE LIABLE TO THE OTHER FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY, OR INDIRECT DAMAGES. THESE LIMITATIONS APPLY WITHOUT REGARD TO THE CAUSE OF ANY LIABILITY OR DAMAGE.

12. REPRESENTATIONS AND WARRANTIES

POLR PROVIDER WARRANTS THAT THE ELECTRICITY SOLD UNDER THIS AGREEMENT WILL BE "BASIC FIRM SERVICE" AS THAT TERM IS DEFINED IN PUCT SUBST.R. 25.43(c)(3), TO WIT "ELECTRIC SERVICE NOT SUBJECT TO INTERRUPTION FOR ECONOMIC REASONS AND THAT DOES NOT INCLUDE VALUE ADDED OPTIONS OFFERED IN THE COMPETITIVE MARKET. BASIC FIRM SERVICE EXCLUDES, AMONG OTHER COMPETITIVELY OFFERED OPTIONS, EMERGENCY OR BACK-UP SERVICE, AND STAND-BY SERVICE."

POLR PROVIDER MAKES NO OTHER WARRANTIES WHATSOEVER WITH REGARD TO THE PROVISION OF ELECTRIC SERVICE AND DISCLAIMS ANY AND ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

13. DISCRIMINATION

POLR Provider will not refuse to provide electric service or otherwise discriminate in the provision of electric service to any customer based on race, creed, color, national origin, ancestry, sex, marital status, lawful source of income, disability, familial status, level of income, location of customer in an economically distressed geographic area, or qualification for low-income or energy efficiency services.

You have the right to cancel this agreement (Terms of Service Agreement) for electric service without penalty or fee of any kind for a period of three federal business days after you have received the Terms of Service. You may cancel your service and this agreement by calling the toll free Customer Service number during the hours stated in this Terms of Service Agreement. Service may also be cancelled by toll-free fax or e-mail. ***Canceling this service agreement will result in disconnection of service if you have not made arrangements for alternative supply.***

Figure: 16 TAC §25.43(k)(3)(A)

Service Area	Affiliated REP	Tariff
Oncor	TXU Energy Services	Rate R--Residential Service
Centerpoint	Reliant Energy Services	Rate PTB-RS--Residential Service
AEP/CPL	Mutual Energy CPL	Rate SRS--Standard Residential Service
AEP/WTU	Mutual Energy WTU	Rate RS--Residential Service
TNMP	First Choice Power	Residential Service

Figure: 16 TAC §25.43(k)(3)(B)

Service Area	Affiliated REP	Tariff
Oncor	TXU Energy Services	Rate GS--General Service Secondary
Centerpoint	Reliant Energy Services	Rate PTB-MGS--Misc. General Service
AEP/CPL	Mutual Energy CPL	Rate LPS--Lighting and Power Service
AEP/WTU	Mutual Energy WTU	Rate GS--General Service
TNMP	First Choice Power	General Service

Figure: 16 TAC §25.43(l)(2)

$E_N = E_E * G_N / G_E$	
Where:	
E_N =	recalculated energy charge
E_E =	existing energy charge
G_N =	the average of the closing one-month forward New York Mercantile Exchange (NYMEX) Henry Hub natural gas prices as reported in the *Wall Street Journal* for the last five trading days of the month ended 30 days prior to the effective date of the recalculated energy charge.
G_E =	the average of the closing one-month forward NYMEX Henry Hub natural gas prices as reported in the *Wall Street Journal* for the last five business days preceding the bid due date for the first gas price adjustment of the POLR term. For subsequent adjustments, G_E = the average of the closing one-month forward NYMEX Henry Hub natural gas prices as reported in the *Wall Street Journal*, at the time the existing energy charge was last adjusted.

Figure: 22 TAC §577.15

(a) EXAMINATIONS	FEE		
Texas State Board Licensing Exam (SBE)	$150		
Special License	$150		
(b) APPLICATION PROCESSING (except for Provisional License)	$50		
(c) RENEWALS	BOARD FEE	PROF. FEE	TOTAL FEE
License Renewal (current)	$133 [~~$124~~]	$200	$333 [~~$324~~]
Delinquent Renewals (90 days or less)	$208 [~~$199~~]	$200	$408 [~~$399~~]
Delinquent Renewals (over 90 days but less than one year)	$283 [~~$274~~]	$200	$483 [~~$474~~]
Inactive Renewals	$133 [~~$124~~]	$0	$133 [~~$124~~]
Delinquent Inactive Renewal (90 days or less)	$208 [~~$199~~]	$0	$208 [~~$199~~]
Delinquent Inactive Renewals (over 90 days but less than one year)	$283 [~~$274~~]	$0	$283 [~~$274~~]
Special License	$128 [~~$124~~]	$200	$328 [~~$324~~]
Delinquent Special License Renewals (90 days or less)	$203 [~~$199~~]	$200	$403 [~~$399~~]
Delinquent Special License Renewals (over 90 days but less than one year)	$278 [~~$274~~]	$200	$478 [~~$474~~]
(d) PROVISIONAL LICENSE	$250	$0	$250
(e) OPEN RECORDS Charges for all open records and other goods/services such as tapes, disks, will be in accordance with General Services Commission §§111.61 - 111.71--"Charges for Public Records"			
(f) RETURNED CHECK FEE	$25		

Figure: 30 TAC §101.1(22)

AIR CONTAMINANT	ANNUAL	24-HOUR	8-HOUR	3-HOUR	1-HOUR
Inhalable Particulate Matter (PM_{10})	1.0 $\mu g/m^3$	5 $\mu g/m^3$			
Sulfur Dioxide	1.0 $\mu g/m^3$	5 $\mu g/m^3$		25 $\mu g/m^3$	
Nitrogen Dioxide	1.0 $\mu g/m^3$				
Carbon Monoxide			0.5 mg/m^3		2 mg/m^3

Figure: 37 TAC §23.15(d)

Category	Type	1st Offense	2nd Offense	3rd Offense	4th and Subsequent Offense
A	Minor violation	Re-education	Warning	3 months	6 months
B	Intermediate violation	6 months	12 months	Revocation	Lifetime Revocation
C	Serious violations	12 months	Revocation	Lifetime Revocation	N/A
D	Eligibility violations	Suspension until bar removed			
E	Emissions violations Except those classed as Category C	6 months	12 months	Revocation	Lifetime Revocation

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

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 deemed administratively complete for the following projects(s) during the period of August 16, 2002, through August 22, 2002. The public comment period for these projects will close at 5:00 p.m. on September 27, 2002.

FEDERAL AGENCY ACTIONS:

Applicant: Ridgewood Baptist Church; Location: The project is located at 6920 Memorial Boulevard in Port Arthur in Jefferson County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled Port Arthur North, Texas. Approximate UTM Coordinates: Zone 15; Easting: 406000; Northing: 3311800. Project Description: The applicant proposes to retain fill that was placed into 0.936 acres of jurisdictional wetlands without a Department of the Army Permit, and also to fill an additional 0.200 acres of jurisdictional wetlands. A total of 1.136 acres of jurisdictional wetlands would be impacted. The purpose of the proposed fill is to prepare the site for the construction of a church, school, day care, senior adult complex, recreational areas, and associated parking areas. To compensate for the wetland impacts, the applicant proposes to purchase three credits from the Neches river cypress Swamp Preserve Mitigation Bank. CCC Project No.: 02-0256-F1; Type of Application: U.S.A.C.E. permit application #22742 is being evaluated under §404 of the Clean Water Act (33 U.S.C.A. §§125-1387). NOTE: The CMP consistency review for this project may be conducted by the Texas Natural Resource Conservation Commission as part of its certification under §401 of the Clean Water Act.

Applicant: Atofina Chemicals, Inc.; Location: The project is located in wetlands adjacent to the Neches River, adjacent to Atofina's existing facility, approximately 2.5 miles east of the intersection of US Highway 90 and State Highway 380 in Beaumont, Jefferson County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled Beaumont East, Texas. Approximate UTM Coordinates: Zone 15; Easting: 398246; Northing: 3325465. Project Description: The applicant proposes to fill 9.27 acres of freshwater wetlands to construct a new chemical manufacturing plant. The wetland proposed to be filled is largely dominated by California bulrush (Scirpus californicus). Higher elevations within the wetland are forest dominated by red maple (Acer rubrum), Chinese tallow (Sapium sebiferum), and wax myrtle (Myrica cerifera). An approximate 0.5-acre portion of the wetland is forested and was planted with bald cypress (Taxodium distichum), tupelo gum (Nyssa aquatica), and red maple as mitigation for Permit 18871. As mitigation for unavoidable impacts, the applicant proposes to purchase credits at the Neches River Cypress Swamp Mitigation Bank at a ratio of 7:1. CCC Project No.: 02-0257-F1; Type of Application: U.S.A.C.E. permit application #22602 is being evaluated under §404 of the Clean Water Act (33 U.S.C.A. §§125-1387). NOTE: The CMP consistency review for this project may be conducted by the Texas Natural Resource Conservation Commission as part of its certification under §401 of the Clean Water Act.

Applicant: Davis Petroleum Corporation; Location: The project is located in Galveston Bay in State Tract 223, offshore, Chambers County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled Smith Point, Texas. Approximate UTM Coordinates: Zone 15; Easting: 318430; Northing: 3269203. Project Description: This notice reflects a modification to a proposed well platform location originally coordinated via public notice dated July 26, 2002. The well platform has been relocated to avoid impacts to artificial oyster reefs associated with mitigation for the Federal project for the Houston-Galveston Ship Channel. The proposed activity involves the installation, operation, and maintenance of a well platform and a production platform, along with an associated flowline for oil and gas drilling, production, and transportation activities. The proposed well platform will be 30-foot-long by 7-foot-wide and will be constructed on top of a 240-foot-long by 100-foot-long by 3-foot high shell pad. The applicant also requests authorization to install and maintain an 8-inch flowline to connect the well platform to the production platform No wetlands or vegetated shallows will be impacted by the proposed activity. There are no known oyster reefs located within the permit area. CCC Project No.: 02-0258-F1;Type of Application: U.S.A.C.E. permit application #22764 (Revised) 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). NOTE: The CMP consistency review for this project may be conducted by the Railroad Commission of Texas as part of its certification under §401 of the Clean Water Act.

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-200205670
Larry R. Soward
Chief Clerk, General Land Office
Coastal Coordination Council
Filed: August 28, 2002

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Comptroller of Public Accounts

Notice of Contract Award

Pursuant to Chapter 2254, Chapter B, and Sections 403.011 and 403.020 Texas Government Code, the Comptroller of Public Accounts (Comptroller) announces this notice of consulting contract award.

The notice of request for proposals (RFP #141a) was published in the June 21, 2002, issue of the *Texas Register* at (27 TexReg 5598).

The consultant will assist Comptroller in conducting a management and performance review of the Brownsville Independent School District.

The contract was awarded to Gibson Consulting Group, Inc., 901 South Mopac Expressway, Suite 540, Austin, Texas 78746. The total amount of this contract is not to exceed $262,500.00.

The term of the contract is August 20, 2002 through March 1, 2003. The final report is due on or before December 9, 2002.

TRD-200205667
Pamela Ponder
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: August 28, 2002

♦ ♦ ♦

Notice of Contract Award

Notice of Award: Pursuant to Chapter 2254, Chapter B, and Sections 403.011 and 403.020 Texas Government Code, the Comptroller of Public Accounts (Comptroller) announces this notice of consulting contract award.

The notice of request for proposals (RFP #143a) was published in the June 28, 2002, issue of the *Texas Register* at (27 TexReg 5845).

The consultant will assist Comptroller in conducting a management and performance review of the Clear Creek Independent School District.

The contract was awarded to McConnell Jones Lanier & Murphy, LLP, 11 Greenway Plaza, Suite 2902, Houston, Texas 77046. The total amount of this contract is not to exceed $209,965.00.

The term of the contract is August 20, 2002 through March 31, 2003. The final report is due on or before January 6, 2003.

TRD-200205668
Pamela Ponder
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: August 28, 2002

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Notice of Contract Award

Notice of Award: Pursuant to Chapter 2254, Chapter B, and Sections 403.011 and 403.020 Texas Government Code, the Comptroller of Public Accounts (Comptroller) announces this notice of consulting contract award.

The notice of request for proposals (RFP #142a) was published in the June 21, 2002, issue of the *Texas Register* at (27 TexReg 5597).

The consultant will assist Comptroller in conducting a management and performance review of the Galena Park Independent School District.

The contract was awarded to SDSM, Inc., P. O. Box 27619, Austin, Texas 78755. The total amount of this contract is not to exceed $185,000.00.

The term of the contract is August 20, 2002 through March 31, 2003. The final report is due on or before December 23, 2002.

TRD-200205669
Pamela Ponder
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: August 28, 2002

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Notice of Request for Proposals

Pursuant to Chapter 2254, Subchapter B, and Sections 403.011 and 403.020, Texas Government Code, the Comptroller of Public Accounts (Comptroller) announces the issuance of a Request for Proposals (RFP #146a) from qualified, independent firms to provide consulting services to Comptroller. The successful respondent will assist Comptroller in conducting a management and performance review of the Rockwall Independent School District (Rockwall ISD). Comptroller reserves the right, in its sole discretion, to award one or more contracts for a review of the Rockwall ISD included in this RFP. The successful respondent(s) will be expected to begin performance of the contract or contracts, if any, on or about October 15, 2002.

Contact: Parties interested in submitting a proposal should contact Clay Harris, Assistant General Counsel, Contracts, Comptroller of Public Accounts, 111 E. 17th St., ROOM G-24, Austin, Texas, 78774, telephone number: (512) 305-8673, to obtain a copy of the RFP. Comptroller will mail copies of the RFP only to those specifically requesting a copy. The RFP was made available for pick-up at the above-referenced address on Friday, September 6, 2002, between 2 p.m. and 5 p.m., Central Zone Time (CZT), and during normal business hours thereafter. Comptroller also made the complete RFP available electronically on the Texas Marketplace at: http://esbd.tbpc.state.tx.us after 2 p.m. (CZT) on Friday, September 6, 2002.

Mandatory Letters of Intent and Questions: All Mandatory Letters of Intent and questions regarding the RFP must be sent via facsimile to Mr. Harris at: (512) 475-0973, not later than 2:00 p.m. (CZT), on September 20, 2002. Official responses to questions received by the foregoing deadline will be posted electronically on the Texas Marketplace no later than September 24, 2002, or as soon thereafter as practical. Mandatory Letters of Intent received after the 2:00 p.m., September 20th deadline will not be considered. Respondents shall be solely responsible for confirming the timely receipt of Mandatory Letters of Intent to propose.

Closing Date: Proposals must be received in Assistant General Counsel's Office at the address specified above (ROOM G-24) no later than 2 p.m. (CZT), on Tuesday, October 1, 2002. Proposals received after this time and date will not be considered. Proposals will not be accepted from respondents that do not submit mandatory letters of intent by the September 20, 2002, deadline. Respondents shall be solely responsible for confirming the timely receipt of proposals.

Evaluation and Award Procedure: All proposals will be subject to evaluation by a committee based on the evaluation criteria and procedures set forth in the RFP. Comptroller will make the final decision regarding the award of a contract or contracts. Comptroller reserves the right to award one or more contracts under this RFP.

Comptroller reserves the right to accept or reject any or all proposals submitted. Comptroller is under no legal or other obligation to execute any contracts on the basis of this notice or the distribution of any RFP. Comptroller shall not pay for any costs incurred by any entity in responding to this Notice or the RFP.

The anticipated schedule of events is as follows: Issuance of RFP - September 6, 2002, 2 p.m. CZT; All Mandatory Letters of Intent and

Questions Due - September 20, 2002, 2 p.m. CZT; Official Responses to Questions Posted - September 24, 2002, or as soon thereafter as practical; Proposals Due - October 1, 2002, 2 p.m. CZT; Contract Execution - October 15, 2002, or as soon thereafter as practical; Commencement of Project Activities - October 15, 2002.

TRD-200205564
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: August 23, 2002

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Office of Consumer Credit Commissioner

Interpretations

Under provisions of Texas Finance Code §1.14.108, the consumer credit commissioner may issue interpretations of Subtitle A or B, Title 4, after approval of the interpretation by the finance commission. The provisions of Chapter 2001, Government Code, that relate to the adoption of an administrative rule do not apply to the issuance of an interpretation under this section. This interpretation was approved by the Finance Commission of Texas on August 16, 2002.

Request Number 2002-01. A request from John E. Wacholtz, of Irving, Texas regarding whether the sale of GAP insurance by a surplus lines carrier is permissible under the terms of Chapter 348.

In summary, the interpretation request was: Is the sale of GAP insurance on a motor vehicle retail installment sales finance contract permissible by a surplus lines carrier?

The response concludes that GAP insurance by a surplus lines carrier may not be charged as a separate charge on a motor vehicle installment sales contract because it does not meet the requirements of §348.209 of the Texas Finance Code. That provision requires the insurance to be written at lawful rates, in accordance with the Insurance Code and by a company authorized to do business in this state. The Texas Department of Insurance requires prior approval of GAP forms and rates under §5.15 of the Insurance Code. This request contemplates writing insurance that would not meet those requirements and thus is not authorized.

TRD-200205637
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: August 26, 2002

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Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in Sections 303.003, 303.005, 303.008, 303.009, 304.003, and 346.101. Tex. Fin. Code.

The weekly ceiling as prescribed by Sec. 303.003 and 303.009 for the period of 09/02/02 - 09/10/02 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit thru $250,000.

The weekly ceiling as prescribed by Sec. 303.003 and 303.009 for the period of 09/02/02 - 09/10/02 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by Sec. 303.005 and 303.009[3] for the period of 09/01/02 - 09/30/02 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The monthly ceiling as prescribed by Sec. 303.005 and 303.009 for the period of 09/01/02 - 09/30/02 is 18% for Commercial over $250,000.

The standard quarterly rate as prescribed by Sec. 303.008 and 303.009 for the period of 10/01/02 - 12/31/02 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The standard quarterly rate as prescribed by Sec. 303.008 and 303.009 for the period of 10/01/02 - 12/31/02 is 18% for Commercial over $250,000.

The retail credit card quarterly rate as prescribed by Sec. 303.009 [1] for the period of 10/01/02 - 12/31/02 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The lender credit card quarterly rate as prescribed by Sec. 346.101 Tex. Fin. Code[1] for the period of 10/01/02 - 12/31/02 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The standard annual rate as prescribed by Sec. 303.008 and 303.009 [4]for the period of 10/01/02 - 12/31/02 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The standard annual rate as prescribed by Sec. 303.008 and 303.009 for the period of 10/01/02 - 12/31/02 is 18% for Commercial over $250,000.

The retail credit card annual rate as prescribed by Sec. 303.009[1]for the period of 10/01/02 - 12/31/02 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The judgment ceiling as prescribed by Sec. 304.003 for the period of 09/01/02 - 09/30/02 is 10% for Consumer/Agricultural/Commercial/credit thru $250,000.

The judgment ceiling as prescribed Sec. 304.003 for the period of 09/01/02 - 09/30/02 is 10% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

[3]For variable rate commercial transactions only.

[4]Only for open-end credit as defined in Sec. 301.002(14), Tex. Fin. Code.

TRD-200205639
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: August 27, 2002

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Court Reporters Certification Board

Certification of Court Reporters

Following the examination of applicants on July 26, 2002, the Texas Court Reporters Certification Board certified to the Supreme Court of Texas the following individuals who are qualified in the method indicated to practice shorthand reporting pursuant to Chapter 52 of the Texas Government Code, V.T.C.A.:

MACHINE SHORTHAND: JAMIL JACOBS- CARROLLTON, TX; RAQUEL ZAMORA- EL PASO, TX; SHELLEY JONES- ROUND ROCK, TX; ANNA COKER- AMARILLO, TX; CYNTHIA PETERSON- HOUSTON, TX.

Following the examination of applicants on July 26, 2002, the Texas Court Reporters Certification Board certified to the Supreme Court of

Texas the following individuals who are qualified in the method indicated to practice shorthand reporting pursuant to Chapter 52 of the Texas Government Code, V.T.C.A.:

ORAL STENOGRAPHY: BARBARA ELLISON- PEARLAND, TX; MENDY WILLIAMS- ROSENBERG, TX; TAMMY BATES- CLE ELUM, WA

TRD-200205619
Sheryl Jones
Director of Administration
Court Reporters Certification Board
Filed: August 26, 2002

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Texas Department of Criminal Justice

Award Notice

Contract Administrator: Paul Fitts, Texas Department of Criminal Justice, Two Financial Plaza Suite 525, Huntsville, TX 77340.

Solicitation No: 696-FD-2-B025. Solicitation Title: Road/Parking Lot Improvements - Hightower Unit. Contract Number: 696-FD-2-3-C0226. Award Date: 08/02/02. Amount Awarded to Vendor: $555,294.35.

Awarded Vendor's Name and Address: W.T. Byler Co., LP, 15203 Lillja Road, Houston, TX 77060.

Awarded Vendor is a Non-HUB.

TRD-200205561
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Filed: August 23, 2002

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Texas Commission for the Deaf and Hard of Hearing

Request for Proposals

The Texas Commission for the Deaf and Hard of Hearing announces a Request for Proposals (RFP) for services to eliminate communication barriers and to facilitate communication access for individuals who are deaf or hard of hearing. Funding is available for provision of Communication Access Services for Health and Human Services Region 2.

Note to Applicants: The estimated funding levels in the RFP does not bind TCDHH to make any awards or to any specific number of awards or funding levels.

Contact: Parties interested in submitting a proposal for any of the funding categories should contact the Texas Commission for the Deaf and Hard of Hearing, P.O. Box 12904, Austin, Texas 78711, 512-407-3250 (Voice) or 512-407-3251 (TTY), to obtain a complete copy of the. The RFP is also available for pick-up at 4800 North Lamar, Suite 310, Austin, Texas 78756 on and after Friday, September 6, 2002, during normal business hours. The RFP is not available through fax. The RFP will also be available on the agency website at www.tcdhh.state.tx.us.

Closing Date: Proposals must be received in the Texas Commission for the Deaf and Hard of Hearing Office, 4800 North Lamar, Suite 310, Austin, Texas 78756 no later than 5 p.m. (CDT), on Friday, September 20, 2002. Proposals received after this time and date will not be considered.

Award Procedure: All proposals will be subject to evaluation by a review team using a scoring method based on the evaluation criteria set forth in the RFP. The review team will determine which proposals best meet the established criteria and will make selection recommendations for each category to the Executive Director, who will then make recommendations to the Commission. The Commission will make the final decision. Any applicant may be asked to clarify any information in their proposal and which may involve either written or oral presentations of requested information. The initial contract awards could start as early as October 1, 2002.

The Commission reserves the right to accept or reject any or all proposals submitted. The Texas Commission for the Deaf and Hard of Hearing is under no legal or other obligation to execute a contract on the basis of this notice or the distribution of a RFP. Neither this notice nor the RFP commits the Commission to pay for any costs incurred prior to the award of a contract. The anticipated schedule of events is as follows:

Issuance of RFP - September 6, 2002

Proposals Due - September 20, 2002, 5 p.m. (CDT);

Maximum award amount per contract period and estimated number of awards

Communication Access Services $4,500 up to 2

TRD-200205630
David W. Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
Filed: August 26, 2002

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Texas Education Agency

Request for Applications Concerning Texas Head Start Educational Component Grant Program 2002-2004

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications under Request for Applications (RFA) #701-02-026 from public, private, nonprofit, and for-profit organizations or agencies in Texas currently operating federal Head Start Programs or similar government-funded early childhood care and education programs for a grant to provide supplementary educational services to participating children. Shared services arrangements (SSAs) of eligible applicants are also eligible to apply. A Head Start Program is defined as the federal program established under the Head Start Act (42 USCS, §9831, et seq.) and its subsequent amendments. Each applicant must clearly demonstrate that it is currently operating either a federally funded Head Start program or a similar government-funded early child care and education program. To be eligible for a grant, an applicant, including each member of an SSA, must serve at least 75% low-income students, as determined by the Commissioner of Education. The Texas Education Code, §5.001(4), defines "educationally disadvantaged" as eligible to participate in the national free or reduced-price lunch program established under 42 USCS, §1751, et seq.

Description. The purpose of this grant program is to provide scientific, research-based, pre-reading instruction to achieve the goal of directly improving the pre-reading skills of three- and four-year-old children. The program is also to identify cost-effective models for pre-reading interventions. This grant requires collaboration with either a four-year institution of higher education or a two-year community college. The institution of higher education or the community college must presently have a program to prepare graduates in the field of early childhood or offer an associate degree in early childhood. The grant addresses

the need for pre-school students to acquire the pre-reading foundation needed to be successful when entering school while increasing the quality of training for teachers and increasing the number of teachers being trained to provide service in this field.

Dates of Project. The Texas Head Start Educational Component Grant Program will be implemented during the 2002-2003 and 2003-2004 school years. Applicants should plan for a starting date of no earlier than December 1, 2002, and an ending date of no later than August 31, 2004.

Project Amount. Funding will be provided for approximately 20-25 projects. A total of approximately $8,600,000 is available for funding the Texas Head Start Educational Component Grant Program during the 2002-2003 and 2003-2004 school years. Allocations for the entire grant period would be in the following not-to-exceed ranges based on the number of identified classrooms in year one: (1) five or fewer classrooms implemented in the first year to receive not more than $100,000 for the total period of the grant program; (2) more than five classrooms but fewer than fifteen classrooms to be implemented in the first year to receive not more than $175,000 for the total period of the grant program; (3) fifteen classrooms to fewer than twenty-two classrooms to be implemented in the first year to receive not more than $250,000 for the total period of the grant program; or (4) twenty-two classrooms to thirty classrooms to be implemented in the first year to receive not more than $400,000 for the total period of the grant program.

Project funding in the second year will be based on satisfactory progress of the first-year objectives and activities and on general budget approval by the State Board of Education, the Commissioner of Education, and the state legislature.

Selection Criteria. Applications will be selected based on the ability of each applicant to carry out all requirements contained in the RFA. Special consideration (or priority) will be given to applicants whose program designs meet the requirements of the RFA. Applications must first receive a score of 70 or above in the review scoring of the application in order to receive the competitive priority points to be used in determining ranking. Competitive priorities are:

(a) The applications that describe and implement a plan to include pre-service and in-service training for students from the higher education partner (four-year higher education institution or two-year community college) as a part of the grant program will be given a competitive priority.

(b) Programs that have not been served through the previous Texas Ready to Read and Texas Head Start Education Component grant programs will be given priority for funding.

The TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TEA to pay any costs before an application is approved. The issuance of this RFA does not obligate TEA to award a grant or pay any costs incurred in preparing a response.

Requesting the Application. A complete copy of RFA #701-02-026 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 RFA number and title in your request. Provide your name, complete mailing address, and phone number including area code. The RFA will also be posted on the TEA website at http://www.tea.state.tx.us/grant/announcements/grants2.cgi for viewing and downloading.

Further Information. For clarifying information about the RFA, contact Geraldine Kidwell, Division of Curriculum and Professional Development, TEA, (512) 463-9581.

Deadline for Receipt of Applications. Applications must be received in the Document Control Center of the TEA by 5:00 p.m. (Central Time), Tuesday, November 5, 2002, to be considered for funding.

TRD-200205666
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Filed: August 28, 2002

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Texas Commission on Environmental Quality

Correction of Error

The Texas Commission on Environmental Quality (TCEQ), formerly Texas Natural Resource Conservation Commission, adopted amendments to 30 TAC Chapter 285.10, concerning on-site sewage facilities which appeared in the August 23, 2002, issue of the *Texas Register* (27 TexReg 7917). The following errors were noted in the submission by TCEQ.

On page 7917, second column, the beginning paragraph for Chapter 285, §285.10 states that it is adopted without change. Section 285.10 had a change at adoption and should have been adopted *with change*. In the proposed §285.10(d)(5), the last sentence read "A material change is a new requirement in this chapter that would make it impossible for the authorized agent to continue to comply with this chapter without obtaining significant additional financial or human resources." This sentence was deleted when the rule was adopted.

On page 7922, second column, fourth paragraph, sixth line, the sentence reads, "The commission included the definition 'Material change' in the rule to clarify what conditions constitute a material change." The correct sentence should read as follows: "The commission, however, removed the definition of "Material change" in response to comments, to continue to foster a cooperative relationship with AAs."

TRD-200205767

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Correction of Error

The Texas Commission on Environmental Quality (TCEQ, commission, formerly TNRCC) adopted 30 TAC Chapter 312, Sludge Use, Disposal, and Transportation, which appeared in the August 23, 2002, issue of the *Texas Register* (27 TexReg 7958). The Commission's submission contained the following errors.

In the preamble on page 7959, second column, third paragraph, concerning new §312.4(f), the first sentence should read: "New §3122.4(f) provides a new schedule for permit application fees to land apply Class B sewage sludge."

In the preamble on page 7960, first column, second paragraph, concerning new §312.11, add to the end of the second sentence: "..., and associated paragraphs (1) and (2) specify who can apply for land application permits, as required by statute."

In the preamble on page 7961, second column, third paragraph, concerning TAKINGS IMPACT ASSESSMENT, the second sentence read: "The specific purpose of the rulemaking is to ensure that the commission's regulations comply with new statutory Class B sewage sludge permitting requirements."

In the preamble on page 7962, first column, third paragraph, concerning RESPONSE TO COMMENTS, second to last and last sentences should read: "The commission intends to do a comprehensive review of this chapter in the future. The second rulemaking may include stakeholders in a group formed in accordance with current rules."

In the preamble on page 7962, 2nd column, first paragraph, second and third sentences should read: "The commission will consider addressing these types of issues in a future rulemaking for this chapter. In any rulemaking, solicited input from stakeholders on changes to rules must be from a balanced group, as required by 30 TAC Chapter 5."

Also on page 7962, second column, seventh paragraph, omit the second sentence: "The commission does not believe that other states' processes are comparable to the permitting process required by THSC, §361.121."

In the preamble on pages 7963, 2nd column, first paragraph; and 7964, first column, first and third paragraphs, concerning §312.11, Clean Water Action should be inserted as the commentor instead of as the "individual."

In the preamble on page 7963, second column, last paragraph (beginning with Chapter 312...), second to last sentence should read: "...for the control of runoff from such events; the use of sewage sludge is no more problematic than other agricultural operations."

On page 7966, concerning §312.4(f)(2), replace the word "obligation" with "liability." The last sentence in paragraph (2) should read: "...assessed, the executive director may for good cause waive the applicant's liability under this section for payment of delinquent annual fees or delinquent administrative penalties."

TRD-200205768

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Correction of Error

The Texas Commission on Environmental Quality (commission) adopted new 30 TAC §122.162, concerning Compliance History Requirements, which appeared in the August 23, 2002 issue of the *Texas Register* (27 TexReg 7913). The Commission's submission contained the following error.

On page 7915, second column, §122.162(8) reads "acid rain permit reopenings under §122.231(a) or (b) of this title; and". The word "and" should be deleted. Paragraph (8) should read "acid rain permit reopenings under §122.231(a) or (b) of this title;".

TRD-200205769

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Correction of Error

The Texas Commission on Environmental Quality (formerly TNRCC, commission) adopted new 30 TAC §60.2 and §60.3, concerning Compliance History, which appeared in the August 23, 2002 issue of the *Texas Register* (27 TexReg 7824). Due to an error by the *Texas Register*, the § symbol was printed in error in front of a site rating calculation.

On page 7904, second column, sixth paragraph, sixth sentence, there was a publication error of a site rating calculation. A section symbol "§"was inadvertently inserted before the calculation. The sentence should read as follows. "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."

TRD-200205770

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Enforcement Orders

An order was entered regarding Las Palmas Veterinary Hospital, Inc., Docket No. 1999-1563- AIR-E on August 27, 2002 assessing $9,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lisa Lemanczyk, Staff Attorney at (512) 239-5915, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200205646
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: August 27, 2002

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Enforcement Orders

An agreed order was entered regarding Jabe Energy Company dba Meyerland Shell, Docket No. 2000-0007-PST-E on August 21, 2002 assessing $4,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Elisa Roberts, Staff Attorney at (512)239-6939, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding James F. Lunsford dba Fairview Joint Venture, Docket No. 2000-0728-MWD-E on August 21, 2002 assessing $12,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Robin Chapman, Staff Attorney at (512)239-0497, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Jose G. Quintanilla dba San Perlita Food Store, Docket No. 2000-0821-PST-E on August 21, 2002 assessing $4,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Gitanjali Yadav, Staff Attorney at (512)239-2029, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding John Randall Hunt aka Randy Jo Hunt dba Hunt Utility Company, Docket No. 1999-1390-OSS-E on August 21, 2002 assessing $688 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Robin Chapman, Staff Attorney at (512)239-0497, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Dorothy Rolater and Athalea Lane, as Co-Trustees of Boyd Living Trust, dba Boyd Acres Water System, Docket No. 2001-0036-PWS-E on August 21, 2002 assessing $5,188 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Robin Chapman, Staff Attorney at (512)239-0497, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Touche International, Inc., Docket No. 2000-1311-MSW- E on August 21, 2002 assessing $11,600 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Darren Ream, Staff Attorney at (817)588-5878, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Julian Kubeczka dba Fairway Mobile Home Village, Docket No. 2001-1364-PWS-E on August 21, 2002 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Chris Friesenhahn, Enforcement Coordinator at (512)239-4471, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Steve Laughlin dba Floore's Country Store, Docket No. 2001-1493-PWS-E on August 21, 2002 assessing $1,125 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Chris Friesenhahn, Enforcement Coordinator at (512)239-4471, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding H & H Oil Co Inc., Docket No. 2002-0130-PST-E on August 21, 2002 assessing $500 in administrative penalties with $100 deferred.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817)588-5886, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Dar Anderson dba Anderson Dairy, Docket No. 2002- 0002-AGR-E on August 21, 2002 assessing $1,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Pamela Campbell, Enforcement Coordinator at (512)239-4493, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ayres Oil, Inc., Docket No. 2001-1423-PST-E on August 21, 2002 assessing $12,000 in administrative penalties with $2,400 deferred.

Information concerning any aspect of this order may be obtained by contacting Todd Huddleson, Enforcement Coordinator at (512)239-1105, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Brotherton Water Supply Corporation, Docket No. 2002- 0019-PWS-E on August 21, 2002 assessing $563 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Alayne Furgurson, Enforcement Coordinator at (817)588-5812, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding C & R Distributing, Inc., Docket No. 2001-1328-MLM-E on August 21, 2002 assessing $1,875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kevin Smith, Enforcement Coordinator at (915)834-4952, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Craft Oil Company, Docket No. 2001-1322-PST-E on August 21, 2002 assessing $6,000 in administrative penalties with $1,200 deferred.

Information concerning any aspect of this order may be obtained by contacting Susan Kelly, Enforcement Coordinator at (409)898-3838, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Chevron Phillips Chemical Company LP (formerly Phillips Petroleum Company), Docket No. 2000-0434-AIR-E on August 21, 2002 assessing $6,000 in administrative penalties with $1,200 deferred.

Information concerning any aspect of this order may be obtained by contacting Trina Greico, Enforcement Coordinator at (713)767-3607, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding EnerVest Operating, LLC, Docket No. 2002-0081-AIR-E on August 21, 2002 assessing $7,500 in administrative penalties with $1,500 deferred.

Information concerning any aspect of this order may be obtained by contacting J. Craig Fleming, Enforcement Coordinator at (512)239-5806, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Highland Village Car Care, Inc., Docket No. 2001-0855- PST-E on August 21, 2002 assessing $12,000 in administrative penalties with $11,400 deferred.

Information concerning any aspect of this order may be obtained by contacting Catherine Albrecht, Enforcement Coordinator at (713)767-3672, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ICA GP, LLC dba Airline Mobile Home Park, Docket No. 2002-0057-PWS-E on August 21, 2002 assessing $2,350 in administrative penalties with $470 deferred.

Information concerning any aspect of this order may be obtained by contacting Dan Landenberger, Enforcement Coordinator at (915)570-1359, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ideal Gas, Inc. and Ideal Gas, Inc. dba M & M Grocery, Docket No. 2001-0802-PST-E on August 21, 2002 assessing $14,000 in administrative penalties with $2,800 deferred.

Information concerning any aspect of this order may be obtained by contacting Elnora Moses, Enforcement Coordinator at (903)535-5136, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Wayne Chadick dba A & A Longhorn Trailer Park, Docket No. 2001-1283-PWS-E on August 21, 2002 assessing $1,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Subhash Jain, Enforcement Coordinator at (512)239-5867, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding General Cable Industries, Inc., Docket No. 2002-0004- IHW-E on August 21, 2002 assessing $1,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting J. Craig Fleming, Enforcement Coordinator at (512)239-5806, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Fort Worth Grain Company, Inc. dba Alliance Grain Cooperative, Inc., Docket No. 2002-0086-IHW-E

on August 21, 2002 assessing $5,000 in administrative penalties with $1,000 deferred.

Information concerning any aspect of this order may be obtained by contacting James Jackson, Enforcement Coordinator at (254)751-0335, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jefferson Highway Investments, L.L.C., Docket No. 2001-1436-IHW-E on August 21, 2002 assessing $13,000 in administrative penalties with $2,600 deferred.

Information concerning any aspect of this order may be obtained by contacting Ronnie Kramer, Enforcement Coordinator at (806)468-0512, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Harbor Seafood, Inc., Docket No. 2001-1478-PWS-E on August 21, 2002 assessing $1,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting John Schildwachter, Enforcement Coordinator at (512)239-2355, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Sajjad Pasha dba King Food Citgo, Docket No. 2001- 1359-PST-E on August 21, 2002 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Catherine Sherman, Enforcement Coordinator at (713)767-3624, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Leggett & Platt, Incorporated, Docket No. 2002-0249- AIR-E on August 21, 2002 assessing $1,875 in administrative penalties with $375 deferred.

Information concerning any aspect of this order may be obtained by contacting James Jackson, Enforcement Coordinator at (254)751-0335, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Molded Fiber Glass Companies Texas LP, Docket No. 2001-1510-AIR-E on August 21, 2002 assessing $3,750 in administrative penalties with $750 deferred.

Information concerning any aspect of this order may be obtained by contacting Suzanne Walrath, Enforcement Coordinator at (512)239-2134, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Alvin Oien, Jr., Docket No. 2001-1342-MSW-E on August 21, 2002 assessing $2,000 in administrative penalties with $400 deferred.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817)588-5886, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Holcim (Texas) Limited Partnership, Docket No. 2001- 0337-AIR-E on August 21, 2002 assessing $223,125 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Katharine Hodgins, SEP Coordinator at (512)239-5731, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Mike Barnett dba Mike's Lawn Care, Docket No. 2001- 1330-AIR-E on August 21, 2002 assessing $1,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lisa Lemanczyk, Staff Attorney at (512)239-5915, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Patriot Petroleum, Inc., Docket No. 2001-1258-PST-E on August 21, 2002 assessing $500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Alfred Okpohworho, Staff Attorney at (713)422-8918, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Nyta Enterprises Inc., Docket No. 2001-0311-MWD-E on August 21, 2002 assessing $18,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laurencia Fasoyiro, Staff Attorney at (713)422-8914, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Chad Houck dba Rafter H Cattle Company, Docket No. 2001-0454-MWD-E on August 21, 2002 assessing $7,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Robert Hernandez, Staff Attorney at (210)403-4016, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Katy Family YMCA, Docket No. 2001-1472-PWS-E on August 21, 2002 assessing $1,875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Alfred Okpohworho, Staff Attorney at (713)422-8918, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Arsalita Investment, Inc. dba San Pedro Grocery, Docket No. 2001-0131-PST-E on August 21, 2002 assessing $9,375 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting James Biggins, Staff Attorney at (210)403-4017, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Zana Realty Investments, Inc. dba C & B One Stops, dba Cantu's Texaco, dba Courtesy Mart, and dba J & C Mobil, Docket No. 2001-0945-PST-E on August 21, 2002 assessing $66,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Alfred Okpohworho, Staff Attorney at (713)422-8918, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding The Lubrizol Corporation, Docket No. 2001-1104-AIR-E on August 21, 2002 assessing $2,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator at (713)767-3607, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Varco, L.P. dba Tuboscope Vetco International, Inc., Docket No. 2001-0916-IHW-E on August 21, 2002 assessing $15,000 in administrative penalties with $3,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Katharine Hodgins, SEP Coordinator at (512)239-5731, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Olmos Construction, Inc., Docket No. 2001-1404-PST-E on August 21, 2002 assessing $10,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rebecca Clausewitz, Enforcement Coordinator at (210)403-4012, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Santa Rosa, Docket No. 2001-1316-PWS-E on August 21, 2002 assessing $2,188 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Katharine Hodgins, SEP Coordinator at (512)239-5731, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texaco Inc., Docket No. 2001-1350-PST-E on August 21, 2002 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Kevin Keyser, Enforcement Coordinator at (713)422-8938, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Mahmood Jaffer Ali dba JR's Grocery, Docket No. 2001- 0954-PST-E on August 21, 2002 assessing $14,375 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Robin Chapman, Staff Attorney at (512)239-0497, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Stafaz Corporation dba Gonzales Diamond Shamrock, Docket No. 2001-0944-PST-E on August 21, 2002 assessing $33,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Robin Chapman, Staff Attorney at (512)239-0497, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Troy Valderrama dba Done Right Landscaping, Docket No. 2001-0673-IRR-E on August 21, 2002 assessing $1,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shannon Strong, Staff Attorney at (512)239-6201, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Raul Dominguez dba Rado Import/Export Company, Docket No. 2000-1262-AIR-E on August 21, 2002 assessing $2,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Robert Hernandez, Staff Attorney at (210)403-4016, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Lockwood Enterprises, Inc. dba Lockwood Fuel Stop, Docket No. 2001-1064-PST-E on August 21, 2002 assessing $1,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Alfred Okpohworho, Staff Attorney at (713)422-8918, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Trelson Corporation, Docket No. 2001-0572-IHW-E on August 21, 2002 assessing $9,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Robin Chapman, Staff Attorney at (512)239-0497, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Four G Asphalt, Inc. dba Big Buck Asphalt, Inc., Docket No. 2001-0724-AIR-E on August 21, 2002 assessing $12,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Robin Chapman, Staff Attorney at (512)239-0497, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200205651
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: August 27, 2002

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Notice of Application and Preliminary Decision for a Municipal Solid Waste Permit

For the Period of August 20, 2002

APPLICATION EnviroClean Management Services, Inc., 12750 Merit Drive, Park Central VII, Suite 770, Dallas, Texas 75251, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a permit to amend an existing municipal solid waste permit (No. MSW-2245) to authorize a Type V municipal solid waste facility with the addition of autoclave and/or chemical disinfection units to the facility. The facility will be authorized to accept municipal solid waste in the form of medical waste, off-specification pharmaceuticals, confidential documents for destruction, and "regulated garbage" defined in 7 CFR 330.400 and 9 CFR 94.5. The facility is located on a 3.0 acre site located at 2821 Industrial Lane, in Garland, Dallas County, Texas. This permit amendment application was submitted to the TNRCC on March 12, 2002.

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 City of Garland Central Branch Library, 625 Austin Street, Garland, Texas 75040. The telephone number of the library is (972) 205-2503.

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 Mr. Mathew Fleeger, Chief Executive Officer, 12750 Merit Drive, Central Park VII, Suite 770, Dallas, Texas 75251, or by calling Mr. Fleeger at (972) 931-2374.

TRD-200205647
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: August 27, 2002

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Notice of Comment and Hearing Period on Draft Oil and Gas General Operating Permits and Draft Bulk Fuel Terminal General Operating Permit

The Texas Commission on Environmental Quality (TCEQ) is providing an opportunity for public comment and a notice and comment hearing (hearing) on the following draft General Operating Permits (GOPs): Oil and Gas GOP for Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Hardin, Harris, Jefferson, Liberty, Montgomery, Orange, Tarrant, and Waller Counties (GOP #511); Oil and Gas GOP for Gregg, Nueces, and Victoria Counties (GOP #512); Oil and Gas GOP for Aransas, Bexar, Calhoun, Matagorda, San Patricio, and Travis Counties (GOP #513); Oil and Gas GOP for all Texas counties except for Aransas, Bexar, Brazoria, Calhoun, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Gregg, Hardin, Harris, Jefferson, Liberty, Matagorda, Montgomery, San Patricio, Tarrant, Travis, Victoria, and Waller Counties (GOP #514); and Bulk Fuel Terminal GOP (GOP #515). The draft GOPs contain revisions to codified applicable requirements as a result of amended regulations or the adoption of new regulations and the addition of Compliance Assurance Monitoring (CAM) and Periodic Monitoring.

The draft GOPs are subject to a 30-day comment period. During the comment period, any person who may be affected by the emission of air pollutants from emission units that may be authorized to operate under the GOP is entitled to request, in writing, a hearing on the draft GOPs. If requested, a hearing will be held in Austin on October 8, at 10:00 a.m. in Room 131E of TCEQ, Building C, located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TCEQ staff member will be available to discuss the draft GOPs 30 minutes prior to the hearing and will also be available to answer questions after the hearing.

Copies of the draft GOPs may be obtained from the TCEQ website at *http://www.tceq.state.tx.us/permitting/airperm/opd/permtabl.htm* or by contacting the TCEQ Office of Permitting, Remediation and Registration, Air Permits Division at (512) 239-1334. Written comments may be mailed to Eduardo Acosta, TCEQ Office of Permitting, Remediation and Registration, Air Permits Division, MC 163, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-1070. All comments should reference the draft GOPs. Comments must be received by 5:00 p.m., October 7, 2002. For further information, contact Mr. Acosta at (512) 239-0450.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

TRD-200205642
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: August 27, 2002

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Notice of Costs to Administer the Voluntary Cleanup Program

In accordance with Solid Waste Disposal Act, §361.613, Subchapter S, the executive director of the Texas Commission on Environmental Quality (TCEQ or commission) shall calculate and publish annually the commission's costs to administer the Voluntary Cleanup Program. The Innocent Owner/Operator Program, based on authority from Solid Waste Disposal Act, §361.752(b) shall also calculate and publish annually a rate established for the purposes of identifying the costs recoverable by the commission. The TCEQ is publishing the hourly billing rate of $104 for both the Voluntary Cleanup Program and the Innocent Owner/Operator Program for Fiscal Year 2003.

The Voluntary Cleanup Law was effective September 1, 1995, and as such, this will be the eighth year of operation for the program. The commission is able to use data from the previous seven years to calculate the rate for Fiscal Year 2003. The Innocent Owner/Operator Program Law was effective September 1, 1997. As such, this will be the sixth year of operation for the program. Therefore, the commission will be able to use data from the previous five years to calculate the rate for

Fiscal Year 2003. A single hourly billing rate for both programs was derived from current projections for salaries plus the fringe benefit rate and the indirect cost rate, less federal funding divided by the estimated billable salary hours. The hourly rate for the two programs was calculated, and then rounded to a whole dollar amount. Billable salary hours were derived by subtracting the release time hours from the total available hours and a further reduction of 40.8% to account for non-site specific hours. The release time includes sick leave, jury duty, holidays, etc., and is set at 17% (actual rate for Fiscal Year 2001). The current fringe benefit rate is 21.30%. Fringe benefits include retirement, social security, and insurance expenses and are calculated at a rate that applies to the agency as a whole. The proposed indirect cost rate is 28.91%. Indirect costs include allowable overhead expenses and are also calculated at a rate that applies to the whole agency. The billings processed for Fiscal Year 2003 will use the hourly billing rate of $104 for both the Voluntary Cleanup Program and the Innocent Owner/Operator Program and will not be adjusted. All travel-related expenses will be billed as a separate expense. After an applicant's initial $1,000 application fee has been expended by the Innocent Owner/Operator Program or the Voluntary Cleanup Program review and oversight, invoices will be sent to the applicant on a monthly basis for payment of additional program expenses.

The commission anticipates receiving federal funding during Fiscal Year 2003 for the continued development and enhancement of the Voluntary Cleanup Program and the Innocent Owner/Operator Program. If the federal funding anticipated for Fiscal Year 2003 does not become available, the commission may publish a new rate. Federal funding of the Voluntary Cleanup Program and the Innocent Owner/Operator Program should occur prior to October 1, 2002.

For more information, please contact Mr. Jay Carsten, Texas Commission on Environmental Quality, Voluntary Cleanup Section, Remediation Division, MC 221, 12100 Park 35 Circle, Austin, Texas 78753 or call (512) 239-5873.

TRD-200205655
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: August 28, 2002

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Notice of District Petition

Notice mailed on August 26, 2002.

TNRCC Internal Control No. 02212002-D06; I Blackhawk, LTD., (Petitioner) filed a petition for creation of Harris County Municipal Utility District Number 382 (District) with the Texas Natural Resource Conservation Commission (TNRCC). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TNRCC. The petition states that: (1) the petitioner is the owner of a majority in value of the land to be included in the proposed District; (2) that there are two lien holders on the property to be included in the proposed District; (3) the proposed District will contain approximately 124.9385 acres located within Harris County, Texas; and (4) the proposed District is within the corporate boundaries of the City of Houston, Texas, and is not within such jurisdiction of any other city. By City of Houston, Texas, Ordinance No. 2001-1175, the City of Houston, Texas, effective December 25, 2001, passed, approved and gave its consent to create District, and has given its authorization to initiate proceedings to create such political subdivision within its jurisdiction. According to the petition, a preliminary investigation has been made to determine the cost of the project, and it is estimated by the petitioners, from the information available at this time, that the cost of said project will be approximately $4,800,000.

The TNRCC may grant a contested case hearing on this petition if a written hearing request is filed within 30 days after the newspaper publication of the notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the petitioner and the TNRCC Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed district's boundaries. You may also submit your proposed adjustments to the petition 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.

The Executive Director may approve the petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of the notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition 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.

Written hearing requests 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 Public Interest Counsel, MC 103, the same address. For additional information, individual members of the general public may contact the Office of Public Assistance, at 1-800-687- 4040. General information regarding the TNRCC can be found at our web site at www.tnrcc.state.tx.us.

TRD-200205649
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: August 27, 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 **October 14, 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 October 14, 2002**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs should be submitted to the commission in **writing**.

(1) COMPANY: Ackerly Oil Company, Inc. dba Trio-Fuels; DOCKET NUMBER: 2002-0696- PST-E; IDENTIFIER: Enforcement Identification Number 17608; 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 of the regulated underground storage tank (UST) systems had a valid, current delivery certificate; PENALTY: $1,600; ENFORCEMENT COORDINATOR: Dan Landenberger, (915) 570-1359; REGIONAL OFFICE: 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5404, (915) 570-1359.

(2) COMPANY: Ali Al-Fattah Enterprises, LLC dba Baytown Quick Mart; DOCKET NUMBER: 2002-0056-PST-E; IDENTIFIER: Petroleum Storage Tank (PST) Facility Identification Number 0040551; LOCATION: Baytown, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.51(b)(2)(C) and the Code, §26.3475(c)(2), by failing to have overfill prevention; 30 TAC §37.815(a) and (b), by failing to demonstrate financial assurance; 30 TAC §334.48(c), by failing to conduct inventory control; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor the USTs for releases; 30 TAC §115.246(1), (5), and (7)(A), and THSC, §382.085(b), by failing to maintain a copy of the California Air Resources Board Executive Order, maintain a record of the results of Stage II testing, and maintain Stage II vapor recovery records on-site and make available for review; 30 TAC §115.244(1) and (3), and THSC, §382.085(b), by failing to conduct daily inspections of the Stage II vapor recovery equipment and conduct monthly inspections of the pressure/vacuum relief valves; 30 TAC §334.8(c)(4)(B) and (5)(C), by failing to submit an accurate UST registration and self-certification renewal and ensure that a legible tag, label, or marking with the tank number is permanently applied; 30 TAC §115.248(1) and THSC, §382.085(b), by failing to ensure that at least one station representative receive training and instruction in the operation and maintenance of the Stage II Vapor recovery system; PENALTY: $600; ENFORCEMENT COORDINATOR: Rebecca Johnson, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(3) COMPANY: Bargas, Inc.; DOCKET NUMBER: 2002-0648-MSW-E; IDENTIFIER: Enforcement Identification Number 17963; LOCATION: San Angelo, Tom Green County, Texas; TYPE OF FACILITY: transporter of used oil; RULE VIOLATED: 30 TAC §324.4(2)(C)(i), §324.11(2), and 40 Code of Federal Regulations §279.42(a), by failing to register as a used oil transporter; PENALTY: $200; ENFORCEMENT COORDINATOR: Gary Shipp, (806) 796-7092; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(4) COMPANY: Beck-Reit & Sons Construction Company, Ltd.; DOCKET NUMBER: 2002- 0215-EAQ-E; IDENTIFIER: Enforcement Identification Number 17488; LOCATION: San Antonio, Bexar County, Texas; TYPE OF FACILITY: above ground diesel fuel storage tank; RULE VIOLATED: 30 TAC §213.4(a), by failing to obtain approval prior to placing a 1,000 gallon above ground storage tank at the site; PENALTY: $600; ENFORCEMENT COORDINATOR: Malcolm Ferris, (210) 490-3096; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(5) COMPANY: CP Transport; DOCKET NUMBER: 2002-0533-PST-E; IDENTIFIER: Enforcement Identification Number 17541; LOCATION: near Temple, Bell County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to have a valid delivery certificate; PENALTY: $400; ENFORCEMENT COORDINATOR: Sarah Slocum, (512) 239-6589; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(6) COMPANY: Clements Oil Corporation; DOCKET NUMBER: 2002-0375-PST-E; IDENTIFIER: Enforcement Identification Number 17736; LOCATION: near Karnack, Harrison County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to have a valid, current delivery certificate; PENALTY: $5,600; ENFORCEMENT COORDINATOR: Carolyn Lind, (903) 535-5100; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(7) COMPANY: Debbie Block and Melvin Block dba Community Water Systems; DOCKET NUMBER: 2002-0636-PWS-E; IDENTIFIER: Public Water Supply (PWS) Numbers 1810083 and 1810018; Certificate of Convenience and Necessity (CCN) Number 11438; LOCATION: Bridge City, Orange County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.110(b)(4), by failing to maintain a minimum free chlorine residual of 0.2 milligrams per liter; 30 TAC §290.46(r), by failing to provide a minimum of 35 pounds per square inch (psi) throughout the distribution system; and 30 TAC §290.51, by failing to pay public health service fees; PENALTY: $1,145; ENFORCEMENT COORDINATOR: Kimberly McGuire, (512) 239-4761; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(8) COMPANY: DCTD, Inc.; DOCKET NUMBER: 2001-1570-PST-E; IDENTIFIER: PST Facility Identification Number 6933; LOCATION: San Angelo, Tom Green County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(A)(vi)(I) and (B), (5)(A)(i), and the Code, §26.346(a) and §26.3467(a), by failing to submit the UST registration and self-certification form and make available a valid, current delivery certificate; PENALTY: $2,300; ENFORCEMENT COORDINATOR: Mark Newman, (915) 655-9479; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 79603-7013, (915) 655-9479.

(9) COMPANY: Darnell & Dickson Construction, Inc.; DOCKET NUMBER: 2002-0339-PST- E; IDENTIFIER: PST Facility Identification Number 21397; LOCATION: San Angelo, Tom Green County, Texas; TYPE OF FACILITY: construction company with fleet 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 make available a valid, current delivery certificate; and 30 TAC §334.49(c)(2)(C) and the Code, §26.3475(d), by failing to check the corrosion protection rectifier; PENALTY: $14,800; ENFORCEMENT COORDINATOR: Gary Shipp, (806) 796-7092; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 79603-7013, (915) 655-9479.

(10) COMPANY: HMA Mesquite Hospital, Inc. dba The Medical Center of Mesquite; DOCKET NUMBER: 2002-0706-PST-E; IDENTIFIER: PST Facility Identification Number 0071243; LOCATION:

Mesquite, Dallas County, Texas; TYPE OF FACILITY: medical care; RULE VIOLATED: 30 TAC §334.8(c)(4)(B) and the Code, §26.346(a), by failing to ensure that the UST registration and self-certification form are accurately completed and submitted; and 30 TAC §334.7(d)(3), by failing to submit an amended UST registration and self-certification form; PENALTY: $1,440; ENFORCEMENT COORDINATOR: Wendy Cooper, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(11) COMPANY: Heritage Financial Group, Inc. dba Big Oak Limited; DOCKET NUMBER: 2002-0021-PWS-E; IDENTIFIER: PWS Number 1020061; LOCATION: near Longview, Harrison County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(f)(3)(A)(ii), (m), and (r), and THSC, §341.0315(c), by failing to maintain records of the total volume of water treated daily, maintain and ensure the reliability of the equipment, and operate a public water system at a minimum of 35 psi; 30 TAC §290.45 and THSC, §341.0315(c), by failing to meet the minimum water system capacity requirements; 30 TAC §290.43(c)(2), (d)(3) and (7), by failing to ensure a positive seal on the roof hatch opening, equip the air injection line to the pressure tank with a filtering device, and ensure that all associated appurtenances to the pressure tank are thoroughly tight against leakage; and 30 TAC §290.41(c)(1)(F) and THSC, §341.036, by failing to provide a sanitary control easement; PENALTY: $4,500; ENFORCEMENT COORDINATOR: Gilbert Angelle, (512) 239-4489; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(12) COMPANY: Jackie Duncan dba Jackie's Water Company; DOCKET NUMBER: 2002- 0262-PWS-E; IDENTIFIER: PWS Number 0640030; LOCATION: Carrizo Springs, Dimmit County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §291.101(a) and the Code, §13,242, by failing to obtain a CCN; 30 TAC §291.21(a) and the Code, §13.190, by failing to obtain an approved tariff; 30 TAC §288.20, by failing to provide a drought contingency plan; 30 TAC §290.39(c) and THSC, §341.035(a), by failing to submit a business plan, plans and specifications for the system, and executive director approval prior to construction and operation of the facility; 30 TAC §290.41(c)(1)(F) and (3)(A), (J), (K), (M), (N), and (O), and THSC, §341.035(a)(2) and (c), by failing to obtain a sanitary control easement, submit well completion data, provide the well with a concrete sealing block, provide the well with an elevated, downward-facing, 16-mesh screened casing vent, provide a suitable sampling tap on each well discharge, install a flow meter on the well pump discharge line, and provide the PWS well with an intruder-resistant fence; 30 TAC §290.43(c)(3), (d)(9), and (e), by failing to provide the overflow pipe with a gravity hinged and weighted cover, maintain three or less pressure tanks, and enclose the potable water storage tank with an intruder-resistant fence; 30 TAC §290.45(b)(1)(B)(vi) and THSC, §341.0315(c), by failing to provide a pressure tank capacity of 20 gallons per connection; 30 TAC §290.46(e)(1)(A), (h), and (m)(1), and THSC, §341.033(a), by failing to be at all times under the direct supervision of a competent water works operator and maintain on hand a supply of sodium hypochlorite disinfectant, and maintain records of annual inspections of the ground storage tank; 30 TAC §290.109(c) and (g)(4), and THSC, §341.033(d), by failing to collect monthly water samples for bacteriological analysis and provide public notice of the failure to collect water samples; 30 TAC §290.121(a), by failing to keep on file and make available for review a sample siting plan; 30 TAC §290.110(c)(5)(B), by failing to perform chlorine residual tests; 30 TAC §290.110(b)(4) and (d)(3)(C)(ii), by failing to maintain the residual disinfectant concentration in the far reaches of the distribution system at a minimum of 0.2 milligrams per liter (mg/L) and possess a chlorine test kit; PENALTY: $3,308; ENFORCEMENT COORDINATOR: Malcolm Ferris, (210) 490-3096; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(13) COMPANY: Las Palamas Del Sol Regional Healthcare Systems, Ltd.; DOCKET NUMBER: 2002-0480-PST-E; IDENTIFIER: PST Facility Identification Number 0003731; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: emergency generator tank for a hospital; RULE VIOLATED: 30 TAC §334.51(b)(2)(C) and the Code, §26.3475, by failing to install overfill prevention equipment; 30 TAC §37.835(b), by failing to provide a properly worded insurance policy endorsement or certificate of insurance to demonstrate financial responsibility; 30 TAC §334.50(b)(2)(A)(i), (d)(1)(B)(ii) and (iii)(I), and the Code, §26.3475, by failing to monitor piping for releases or perform tightness test, equip pressurized piping with an automatic line leak detector, conduct inventory volume measurements, and reconcile inventory control records on a monthly basis; 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 §334.7(d)(3), by failing to amend, update, or change registration information; PENALTY: $6,400; ENFORCEMENT COORDINATOR: Terry McMillan, (915) 834- 4949; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(14) COMPANY: Manchaca Volunteer Fire Department; DOCKET NUMBER: 2001-1520- PWS-E; IDENTIFIER: PWS Number 2270216; LOCATION: Austin, Travis County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.106(a) (now 30 TAC §290.109(c)(2)) and THSC, §341.033(d), by failing to collect and submit routine monthly water samples for bacteriological analysis; 30 TAC §290.109(c)(2)(F), by failing to collect and submit all required additional routine water samples for bacteriological analysis; 30 TAC §290.106(e) and §290.103(5) (now 30 TAC §290.109(g) and §290.122(c)), by failing to provide public notice of its failure to collect samples; 30 TAC §290.41(c)(1)(F), by failing to secure a sanitary control easement; 30 TAC §290.46(f), (n)(2), and (v), by failing to provide documentation of the water system's operating records, provide a map of the distribution system, and install all water system electrical wiring in a securely mounted conduit; and 30 TAC §290.51, by failing to pay public health service fees; PENALTY: $3,375; ENFORCEMENT COORDINATOR: Kimberly McGuire, (512) 239-4761; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(15) COMPANY: Office Creek Corporation dba Arctic Beer and Wine; DOCKET NUMBER: 2002-0301-PST-E; IDENTIFIER: PST Facility Identification Number 0070187; LOCATION: The Colony, Denton County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(B) and (5)(i), and the Code, §26.346(a) and §26.3467(a), by failing to make available to a common carrier a valid, current delivery certificate and submit a fully and accurately complete UST registration and self-certification form; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to ensure that all USTs are monitored for releases; and 30 TAC §334.48(c), by failing to record daily inventory volume measurements and conduct monthly reconciliation of detailed inventory control records; PENALTY: $16,800; ENFORCEMENT COORDINATOR: Todd Huddleson, (512) 239-1105; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(16) COMPANY: Oldmoc, Inc. (Formerly Moffitt Oil Company); DOCKET NUMBER: 2002- 0461-PST-E; IDENTIFIER: Enforcement Identification Number 17492; LOCATION: Pasadena, Harris

County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to ensure that an owner or operator of a UST system has a valid, current delivery certificate; PENALTY: $3,200; ENFORCEMENT COORDINATOR: Trina Grieco, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(17) COMPANY: RME Petroleum Company; DOCKET NUMBER: 2002-0792-AIR-E; IDENTIFIER: Air Account Number PB-0003-L; LOCATION: Carthage, Panola County, Texas; TYPE OF FACILITY: natural gas compressor station; RULE VIOLATED: 30 TAC §122.146(2) and THSC, §382.085(b), by failing to submit the annual compliance certification; and 30 TAC §122.145(2) and THSC, §382.085(b), by failing to submit a deviation report; PENALTY: $3,600; ENFORCEMENT COORDINATOR: Carolyn Lind, (903) 535-5100; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(18) COMPANY: Ted Booher dba Rapid Environmental Services; DOCKET NUMBER: 2002- 0528-MSW-E; IDENTIFIER: Used Oil Handler Registration Number A85374; LOCATION: Laporte, Harris County, Texas; TYPE OF FACILITY: used oil transport, treatment and storage; RULE VIOLATED: 30 TAC §37.2015 and §324.22(c), by failing to provide an original financial assurance mechanism; PENALTY: $200; ENFORCEMENT COORDINATOR: Steven Lopez, (512) 239-1896; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767- 3500.

(19) COMPANY: Renfaire Water Supply, Inc.; DOCKET NUMBER: 2001-1475-PWS-E; IDENTIFIER: PWS Number 0930057; LOCATION: Todd Mission, Grimes County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.39(h)(1) and §290.46(a), and THSC, §341.035(a), by failing to obtain written approval of plans and specifications; 30 TAC §290.41(c)(1)(F) and (3)(K), (M),and (O), by failing to secure a sanitary control easement, properly seal the well head with suitable gaskets or pliable crack resistant sealing compound, provide a suitable sampling cock on the well pump discharge, and protect the well unit with an intruder-resistant fence; 30 TAC §290.45(b)(1)(A)(i) and (ii), and THSC, §341.0315(c), by failing to meet the minimum well capacity requirement of 1.5 gallons per minute (gpm) per connection, meet the required minimum water system capacity requirement of 50 gpm per connection; 30 TAC §291.93 and THSC, §341.0315(c), by failing to furnish, operate, and maintain production and storage facilities; 30 TAC §290.42(e)(7), by failing to seal the open space between the chemical feed pump access hole and the feed pump suction line; 30 TAC §290.43(d)(2) and (9), by failing to provide the pressure tanks with a pressure release device and obtain agency approval for the installation of more than three pressure tanks; 30 TAC §290.46(v), by failing to install all electrical wiring in a securely mounted conduit; and 30 TAC §288.30(3), by failing to provide a copy of an adopted drought contingency plan; PENALTY: $600; ENFORCEMENT COORDINATOR: Michael Meyer, (512) 239-4492; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(20) COMPANY: Southwest Canners of Texas, Inc. and Ryder Truck Rental, Inc.; DOCKET NUMBER: 2002-0602-PST-E; IDENTIFIER: PST Facility Identification Number 0010079; LOCATION: Nacogdoches, Nacogdoches County, Texas; TYPE OF FACILITY: truck rental 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 provide proper release detection; 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 self- certification registration form is fully and accurately completed and submitted and make available to a common carrier a valid, current delivery certificate; PENALTY: $10,800; ENFORCEMENT COORDINATOR: John Barry, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(21) COMPANY: Sterling Stiles; DOCKET NUMBER: 2002-0663-LII-E; IDENTIFIER: Enforcement Identification Number 17459; LOCATION: San Antonio, Bexar County, Texas; TYPE OF FACILITY: landscape irrigation system; RULE VIOLATED: 30 TAC §34.007(a), by allegedly having acted as a licensed installer without a valid certificate of registration; PENALTY: $200; ENFORCEMENT COORDINATOR: Erika Fair, (512) 238-6673; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(22) COMPANY: Texas Municipal Power Agency; DOCKET NUMBER: 2002-0775-AIR-E; IDENTIFIER: Air Account Number GK-0012-K; LOCATION: near Carlos, Grimes County, Texas; TYPE OF FACILITY: electric power generation plant; RULE VIOLATED: 30 TAC §122.145(2) and §122.146(1), and THSC, §382.085(b), by failing to submit annual Title V compliance certifications and deviation reports; PENALTY: $3,000; ENFORCEMENT COORDINATOR: James Jackson, (254) 751-0335; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(23) COMPANY: United Services Automobile Association; DOCKET NUMBER: 2002-0321- AIR-E; DENTIFIER: Air Account Number BG-1306-P; LOCATION: San Antonio, Bexar County, Texas; TYPE OF FACILITY: power generating and boiler plants; RULE VIOLATED: 30 TAC §122.121 and THSC, §382.054, by failing to obtain a federal operating permit prior to operating emissions units; PENALTY: $1,800; ENFORCEMENT COORDINATOR: Rebecca Clausewitz, (210) 490-3096; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233- 4480, (210) 490-3096.

(24) COMPANY: Universal Transport, Inc.; DOCKET NUMBER: 2002-0710-PST-E; IDENTIFIER: Enforcement Identification Number 17854; LOCATION: Coppell, Dallas 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 has a valid, current delivery certificate; PENALTY: $1,600; ENFORCEMENT COORDINATOR: Wendy Cooper, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-200205654
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: August 28, 2002

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Notice of Water Quality Applications

The following notices were issued during the period of August 20, 2002 through August 26, 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 DECATUR has applied for a major amendment to TNRCC Permit No. 10009-001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 800,000 gallons per day to an annual average flow not to exceed 1,200,000 gallons per day. The facility is located approximately 1,300 feet east of Farm-to-Market Road 51, approximately one mile south of the intersection of Farm-to-Market Road 51 and U.S. Highway 81 in Wise County, Texas. The treated effluent is discharged to Center

Creek; thence to Martin Branch; thence to the West Fork Trinity River Below Bridgeport Reservoir in Segment No. 0810 of the Trinity River Basin.

ERGON ASPHALT & EMULSIONS, INC. which operates an asphalt emulsions blending facility, has applied for a renewal of TPDES Permit No. 03877, which authorizes the discharge of storm water on an intermittent and flow variable basis via Outfall 001. The facility is located 209 Airport Road, approximately 1/4 mile west of the intersection of Airport Road and Jefferson Avenue, south of the city of Mount Pleasant, in Titus County, Texas. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing TPDES Permit No. 03877, issued on December 27, 1999.

CITY OF HENDERSON has applied for a renewal of TNRCC Permit No. 10187-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 2,000,000 gallons per day. The draft permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,000,000 gallons per day. The plant site is located approximately 1.5 miles southwest of the intersection of State Highway 79 and Farm-to-Market Road 225, in Rusk County, Texas.

CITY OF HIDALGO has applied for a major amendment to TNRCC Permit No. 11080-001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 407,000 gallons per day to an annual average flow not to exceed 1,200,000 gallons per day and to move the discharge point approximately 300 feet south of the existing outfall. The facility is located east of the City of Hidalgo, approximately 0.5 mile north of U.S. Highway 281 and 0.5 mile east of Farm-to-Market Road 336 in Hidalgo County, Texas. The treated effluent is discharged to an unnamed drainage ditch; thence to the Arroyo Colorado Above Tidal in Segment No. 2202 of the Nueces-Rio Grande Coastal Basin.

CITY OF HUNTSVILLE has applied for a renewal of TPDES Permit No. 10781-003, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 4,150,000 gallons per day. This application was submitted to the TNRCC on January 31, 2002. The facility is located 0.8 miles north of the intersection of State Highway 19 and Ellisor Road and 3.5 miles northeast of the intersection of U.S. Highway 30 and U.S. Highway 190, at the north end of Ellisor Road near the City of Huntsville in Walker County, Texas. The treated effluent is discharged to Parker Creek; thence to Harmon Creek; thence to Lake Livingston in Segment No. 0803 of the Trinity River Basin.

NORTH STAR STEEL TEXAS, INC. has applied for a renewal of an existing wastewater permit. The applicant has an existing National Pollutant Discharge Elimination System (NPDES) Permit No. TX0067695 and an existing Texas Natural Resource Conservation Commission (TNRCC) Permit No. 01971. The draft permit authorizes the discharge of treated process wastewater and storm water runoff at a daily average flow not to exceed 1,640,000 gallons per day via Outfall 001; storm water on an intermittent and flow variable basis via Outfalls 002, 003, 004, and 007; and treated domestic wastewater at a daily average flow not to exceed 40,000 gallons per day via Outfall 005. The plant site is located north of the Neches River, south of the Kansas City Railroad and east of the City of Beaumont, Orange County, Texas.

TOWN OF REFUGIO has applied for a renewal of TPDES Permit No. 10255-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 576,000 gallons per day. The facility is located 1.0 mile east of U.S. Highway 77 and 0.75 mile south of Farm-to-Market Road 774 in Refugio County, Texas. The treated effluent is discharged to Dry Creek; thence to the Mission River Above Tidal in Segment No. 2002 of the San Antonio- Nueces Coastal Basin

SAFETY-KLEEN SYSTEMS, INC. which operates an industrial and hazardous waste treatment and storage facility, has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 04336, to authorize the discharge of storm water on an intermittent and flow variable basis via Outfall 001. The facility is located at 1722 Cooper Creek Road, Denton, Texas, 0.5 miles north of State Highway 380 on Cooper Creek Road.

TRD-200205648
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: August 27, 2002

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Notice of Water Rights Application

Notices mailed during the period August 16, 2002 through August 26, 2002.

Application No. 08-2462G; City of Dallas, 1500 Marilla, Room 4A North, Dallas Texas 75201, seeks to amend Certificates of Adjudication No. 08-2462, as amended, pursuant to Texas Water Code sections 11.042, 11.046, and 11.122, and Texas Natural Resource Conservation Commission Rules 30 TAC 295.1, et seq. Published notice of the application is being given Pursuant to 30 TAC 295.152(a) allowing for a thirty (30) day comment period. Notice is being mailed to all water right owners of record in the Trinity River Basin pursuant to 30 TAC 295.153(b). This application is being submitted contemporaneously with an application to amend the Applicant's Certificate of Adjudication No.08-2456, as amended, which will seek to re-use return flows in combination with this application to amend Certificate of Adjudication No. 08-2462. Certificate of Adjudication No. 08-2462, as amended, authorizes the City of Dallas (Owner) to maintain an existing dam and reservoir (Lake Ray Hubbard) on the East Fork Trinity River, tributary of the Trinity River, Trinity River Basin, in Dallas, Rockwall, and Kaufman County, and to impound therein 490,000 acre-feet of water. Owner is also authorized to store up to 179,000 acre-feet of water conveyed by pipeline from Lake Tawakoni on the Sabine River, Sabine River Basin in Lake Ray Hubbard. Owner is authorized to divert and use from the reservoir, and other points authorized for diversion, up to 89,700 acre-feet of water per annum for municipal, domestic, agriculture (irrigation), industrial and recreational purposes, at a maximum combined diversion rate of 619.00 cfs (277,807 gpm). Applicant seeks to amend Certificate of Adjudication No. 08-2462 by adding authorizations to convey, store, divert, and re-use a portion of the treated effluent return flow from the Central and Southside WWTPs. This amendment, if granted, would authorize the applicant to reuse a portion of the historic and future return flows which originate from existing surface water rights held by the Applicant in the Trinity, Sabine, and Neches River Basins. The Trinity River Basin water rights held by the Applicant include Certificates of Adjudication Nos. 08-2456, 08-2455, 08-2458, 08-2457, 08- 2462, and Permit No. 5414, all as amended. The water transferred into the Trinity River Basin from the Sabine River Basin for use by the applicant is authorized by Certificate of Adjudication No. 05- 4669, and from the Neches River Basin by Certificate of Adjudication No. 06-3254, as amended. The Central WWTP is located on the west bank of the Trinity River at 1020 Sargent Road in the City of Dallas. The Southside WWTP is located on the east bank of the Trinity River at 10011 Log Cabin Road in the City of Dallas. The return flows stored in Lake Ray Hubbard will be available for diversion at the Applicant's diversion points authorized in Certificate of Adjudication No. 08-2462, as amended. Applicant seeks authorization to use the bed and banks of Lake Ray Hubbard to convey a portion of the historic and future return flows from the Central and

Southside WWTPs to the diversion points authorized under Certificate of Adjudication 08-2462. A portion of the return flows of municipal wastewater from the Central and Southside WWTPs will be conveyed directly by pipeline to Lake Ray Hubbard. Applicant also seeks authorization to divert and use up to an additional 150,000 acre-feet per year from Lake Ray Hubbard based on the return flows delivered from the two WWTPs by pipeline. The application states that the maximum annual wastewater permit discharges, and the current five-year average annual wastewater effluent discharges, respectively, from the WWTPs associated with this application are as follows: Dallas Central WWTP - 224,029 acre-feet / 157,030 acre-feet; Dallas Southside WWTP - 123,216 acre-feet / 85,800 acre-feet. Applicant has also filed application No. 08-2456E to amend Certificate of Adjudication No. 08-2456, as amended. That application and this application to amend Certificate of Adjudication No. 08-2462, as amended, will leave at least 114,000 acre-feet of water per year discharged from the two WWTPs in the river for instream flows (composed of 190,000 acre-feet of water per annum discharged from the two WWTP's less the 40 percent of that amount attributable to Sabine River water). The amendment application was received on May 1, 2000, and additional information was received on March 23, 2001. The application was determined to be administratively complete on December 5, 2001 and accepted by the Chief Clerk's Office for filing on July 25, 2002. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

Application No. 08-2462G; City of Dallas, 1500 Marilla, Room 4A North, Dallas Texas 75201, seeks to amend Certificates of Adjudication No. 08-2462, as amended, pursuant to Texas Water Code sections 11.042, 11.046, and 11.122, and Texas Natural Resource Conservation Commission Rules 30 TAC 295.1, et seq. Published notice of the application is being given Pursuant to 30 TAC 295.152(a) allowing for a thirty (30) day comment period. Notice is being mailed to all water right owners of record in the Trinity River Basin pursuant to 30 TAC 295.153(b). This application is being submitted contemporaneously with an application to amend the Applicant's Certificate of Adjudication No. 08-2456, as amended, which will seek to re-use return flows in combination with this application to amend Certificate of Adjudication No. 08-2462. Certificate of Adjudication No. 08-2462, as amended, authorizes the City of Dallas (Owner) to maintain an existing dam and reservoir (Lake Ray Hubbard) on the East Fork Trinity River, tributary of the Trinity River, Trinity River Basin, in Dallas, Rockwall, and Kaufman County, and to impound therein 490,000 acre-feet of water. Owner is also authorized to store up to 179,000 acre-feet of water conveyed by pipeline from Lake Tawakoni on the Sabine River, Sabine River Basin in Lake Ray Hubbard. Owner is authorized to divert and use from the reservoir, and other points authorized for diversion, up to 89,700 acre-feet of water per annum for municipal, domestic, agriculture (irrigation), industrial and recreational purposes, at a maximum combined diversion rate of 619.00 cfs (277,807 gpm). Applicant seeks to amend Certificate of Adjudication No. 08-2462 by adding authorizations to convey, store, divert, and re-use a portion of the treated effluent return flow from the Central and Southside WWTPs. This amendment, if granted, would authorize the applicant to reuse a portion of the historic and future return flows which originate from existing surface water rights held by the Applicant in the Trinity, Sabine, and Neches River Basins. The Trinity River Basin water rights held by the Applicant include Certificates of Adjudication Nos. 08-2456, 08-2455, 08-2458, 08-2457, 08- 2462, and Permit No. 5414, all as amended. The water transferred into the Trinity River Basin from the Sabine River Basin for use by the applicant is authorized by Certificate of Adjudication No. 05- 4669, and from the Neches River Basin by Certificate of Adjudication No. 06-3254, as amended. The Central WWTP is located on the west bank of the Trinity River at 1020 Sargent Road in the City of Dallas. The Southside WWTP is located on the east bank of the Trinity River at 10011 Log Cabin Road in the City of Dallas. The return flows stored in Lake Ray Hubbard will be available for diversion at the Applicant's diversion points authorized in Certificate of Adjudication No. 08-2462, as amended. Applicant seeks authorization to use the bed and banks of Lake Ray Hubbard to convey a portion of the historic and future return flows from the Central and Southside WWTPs to the diversion points authorized under Certificate of Adjudication 08-2462. A portion of the return flows of municipal wastewater from the Central and Southside WWTPs will be conveyed directly by pipeline to Lake Ray Hubbard. Applicant also seeks authorization to divert and use up to an additional 150,000 acre-feet per year from Lake Ray Hubbard based on the return flows delivered from the two WWTPs by pipeline. The application states that the maximum annual wastewater permit discharges, and the current five-year average annual wastewater effluent discharges, respectively, from the WWTPs associated with this application are as follows: Dallas Central WWTP - 224,029 acre-feet / 157,030 acre-feet; Dallas Southside WWTP - 123,216 acre-feet / 85,800 acre-feet. Applicant has also filed application No. 08-2456E to amend Certificate of Adjudication No. 08-2456, as amended. That application and this application to amend Certificate of Adjudication No. 08-2462, as amended, will leave at least 114,000 acre-feet of water per year discharged from the two WWTPs in the river for instream flows (composed of 190,000 acre-feet of water per annum discharged from the two WWTP's less the 40% of that amount attributable to Sabine River water). The amendment application was received on May 1, 2000, and additional information was received on March 23, 2001. The application was determined to be administratively complete on December 5, 2001 and accepted by the Chief Clerk's Office for filing on July 25, 2002. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

APPLICATION NO. 12-3578C; Oro Pecanlands, Inc., Carlos Orozco Armendariz, and Candlearia Vallas De Orozco, c/o Robert Merworth, 1503 East Central, Commanche, Texas 76442, applicant, seeks to amend Certificate of Adjudication No. 12-3578, as amended, pursuant to Texas Water Code 11.122 and Texas Natural Resource Conservation Commission Rules 30 TAC 295.1, et seq. Published and mailed notice of the application is being given pursuant to 30 TAC 295.152 & 295.158 (b) (8) to the water right holders of record in the Brazos River Basin. Certificate of Adjudication No. 12-3578, as amended, authorizes the owners to maintain an existing dam and reservoir on an unnamed tributary of Copperas (Rush) Creek, a tributary of the Leon River, a tributary of the Little River, a tributary of the Brazos River, in the Brazos River Basin with a capacity of 800 acre-feet of water and two existing off-channel reservoirs. Owners are also authorized to divert and use not to exceed 700 acre-feet of water per annum from two diversion points on Copperas (Rush) Creek and from the low-flow outlet of the 800 acre-foot reservoir. The diversion rate from the upstream diversion point is 11.14 cfs (5,000 gpm), from the downstream diversion point is 2.94 cfs (1,320 cfs), and from the low flow outlet is 3.00 cfs (1,350 gpm). Owners can use the bed and banks of copperas creek and it's tributaries below the aforesaid dam to convey and deliver water to the downstream diversion point. Diversion point 1 is located on Copperas (Rush) Creek at approximately 32.072 N Latitude, 98.678 W Longitude. Diversion point 2 is located on Copperas (Rush) Creek at approximately 32.064 N Latitude, 98.666 W Longitude. Diversion point 3 is located at the low flow outlet at approximately 32.075 N Latitude, 98.677 W Longitude. The Certificate contains a special condition whereby the right to divert from the reservoir expired December 31, 2000. The time priority for this application is November 11, 1974. Applicant seeks to amend Certificate of Adjudication No. 12-3578, as amended, by

extending or deleting the expiration date of December 31, 2000. The application was received on January 20, 2001. Additional information was received March 12, 2002. The application was determined to be administratively complete on May 22, 2002. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

APPLICATION NO. 5782; The City of Carrollton, 1945 East Jackson Road, Carrollton, Texas 75011-0535, applicant, seeks a Water Use Permit pursuant to Texas Water Code 11.143 and Texas Natural Resource Conservation Commission Rules 30 TAC 295.1, et seq. Published and mailed notice of the application are given pursuant to 30 TAC 295.152 and 295.153(c)(1) to the downstream water right holders in the Trinity River Basin. Applicant seeks authorization to maintain two exempt on-channel reservoirs, pursuant to TWC 11.143, for recreational purposes on an unnamed tributary of Hutton Branch, tributary of the Elm Fork Trinity River, tributary of the Trinity River, Trinity River Basin, Dallas County, Texas. Both reservoirs are located 13 miles in a northwest direction from the City of Dallas. Reservoir No. 1 has a capacity of 47 acre-feet of water with a surface area of 9.88 acres. The centerline of the dam is located N 62 degrees E, 10' W, 950 feet from the southeast corner of the William H, Pulliam Survey, Abstract No. 1172, also being at latitude 32.970 degrees N and Longitude 96.892 degrees W. Reservoir No. 2 has a capacity of 13 acre-feet of water with a surface area of 2.66 acres. The centerline of the dam is located N 81 degrees E, 10' W, 1090 feet from the aforesaid survey, also being at Latitude 32.969 degrees N and Longitude 96.894 degrees W. Ownership of the land appurtenant to the reservoirs is evidenced by Special Warranty Deed Vol. 84138, Pages 3294-3295 in the official records of Dallas County. Applicant plans to supplement evaporative losses through the use of groundwater and/or potable water from the City's distribution system. The applicant is not requesting a new appropriation of surface water. The application was received on April 29, 2002 and additional information was received on June 1, 2002. The application was determined to be administratively complete and was filed on July 8, 2002. 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 30 days of the date of newspaper publication of the notice.

APPLICATION NO. 5783; Jimme A. Mumme, P.O. Box 238, Hondo, Texas 78861 seeks a Water Use Permit pursuant to Texas Water Code 11.121 and Texas Natural Resource Conservation Commission Rules 30 TAC 295.1, et seq. Published and mailed notice of the application is being given pursuant to 30 TAC 295.152 & 295.153 to all of the water right holders in the Nueces River Basin. Applicant seeks authorization to divert and use not to exceed 35 acre-feet of water per annum from Hondo Creek, tributary of the Nueces River, Nueces River Basin, in Medina County, Texas to an off-channel settling reservoir for subsequent mining purposes (sand and gravel washing) at a maximum diversion rate of 1.34 cfs (600 gpm). Applicant also seeks the right to divert and use surplus flows (floodflows) when available. The off-channel reservoir is located adjacent to Hondo Creek, 3.2 miles in a northerly direction from Hondo, Texas and has a capacity of 2 acre-feet with a surface area of 0.2 acres. The aforesaid reservoir is located in the Galan Hodges Original Survey No. 422, Abstract No. 523 in Medina County, Texas, at a point S 16 degrees W, 4,100 feet from the northeast corner of the aforesaid survey, also being at Latitude 29.060 degrees N and Longitude 99.158 degrees W. The diversion point is located on the north, left bank of Hondo Creek at Latitude 29.392 degrees N, Longitude 99.157 degrees W, also, bearing S 12 degrees W, 4,600 feet from the northeast corner of the aforesaid survey in Medina, County, Texas. Ownership of the land is evidenced by Warranty Deed No. 48651, Volume 144, Pages 242-246 in the official records of Medina County, Texas. Applicant has a permit to withdraw 9.0 acre-feet of groundwater per annum from the Edwards Aquifer via the Edwards Aquifer Authority for irrigation purposes and applicant proposes to use to the groundwater to supplement the consumptive amount of water proposed to be used for mining purposes. Water diverted, but not consumed as a result of mining purposes, will be returned to Hondo Creek, tributary of the Nueces River, Nueces River Basin at Latitude 29.395 degrees N, Longitude 99.157 degrees W, also bearing S 16 degrees W, 4,000 feet from the northeast corner of the aforesaid survey. The estimated annual amount of return flow will be approximately 26 acre-feet. The application was received on June 18, 2002 and the additional information was received on August 2, 2002. The application was filed and declared to be administratively complete on August 6, 2002. 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 30 days of the date of newspaper publication of the notice.

Information Section

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 an application.

The Executive Director can consider approval of an 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;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TNRCC Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TNRCC Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TNRCC can be found at our web site at www.tnrcc.state.tx.us.

TRD-200205650
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: August 27, 2002

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Texas Department of Health

Notice of Default Order on Cyvon Imaging, Inc. dba Community Diagnostics

A default order was entered regarding Cyvon Imaging, Inc., doing business as Community Diagnostics, of Dallas; Texas Department of Health (department) Certificate of Registration Number M00702;

Compliance Number M021547 on August 7, 2002, assessing $4,000 in administrative penalties.

Information concerning this order is available for public inspection Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays). Contact Chrissie Toungate, Custodian of Records, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189, by calling (512) 834-6688, or by visiting the Exchange Building at 8407 Wall Street, Austin, Texas.

TRD-200205628
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: August 26, 2002

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Texas Health and Human Services Commission

Notice of Contract Award

Notice of Award: Pursuant to Chapter 2254, Subchapter B, Texas Government Code, the Health and Human Services Commission (HHSC) announces this notice of contract award.

The original notice of request for proposals (RFP #02-184) was published in the February 22, 2002 issue of the *Texas Register*. The contract is awarded to Public Consulting Group, Inc., 148 State Street, Boston, Massachusetts, 02109.

The contractor will assist HHSC, the Comptroller of Public Accounts (Comptroller), and other participating state agencies by reviewing programs administered by various state agencies and recommending specific ways the agencies can maximize federal revenue from appropriate funding sources.

The total amount of the contract is contingent upon the receipt of increased federal funds by participating agencies; the estimated amount of the contract is $3.4 million. The contract was executed on July 22, 2002. The term of the contract is July 22, 2002 through August 31, 2004.

The Consultant will provide monthly reports to HHSC and the Comptroller.

TRD-200205656
Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Filed: August 28, 2002

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Public Notice - Amendment Number 621

The Health and Human Services Commission State Medicaid Office has received approval from the Centers for Medicare and Medicaid Services to amend the Title XIX Medical Assistance Plan by Transmittal Number 02-02, Amendment Number 621.

The amendment creates a new rate for case management provided to individuals through the Texas Department of Mental Health and Mental Retardation MRLA waiver program. The amendment is effective July 1, 2002.

If additional information is needed, please contact Deborah Hankey, Texas Department of Mental Health and Mental Retardation, at (512) 206-5743.

TRD-200205658
Marina S. Henderson
Executive Deputy Director
Texas Health and Human Services Commission
Filed: August 28, 2002

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Public Notice Statement - Amendment Number 630

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 02-11, Amendment Number 630, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. Amendment Number 630 clarifies that the payments for home health professional services will be made based on a fee schedule developed by HHSC, the single state agency for the administration of the Texas Medicaid program.

The proposed amendment is to be effective September 1, 2002. The fiscal impact is zero, because the change was implemented in a budget neutral manner, based on actual payment amounts.

For further information or copies of the proposed reimbursement methodology, contact Janet Kres, at the Texas Health and Human Services Commission, MC Y-975, 1100 West 49th Street, Austin, Texas 78756, of at (512) 794-5166.

TRD-200205657
Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Filed: August 28, 2002

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Texas Department of Insurance

Company Licensing

Application to change the name of FIRST AMERICAN INSURANCE COMPANY, to ARCH INSURANCE COMPANY a foreign fire and/or casualty company. The home office is in Kansas City, Missouri.

Application to change the name of ANTHEM ALLIANCE HEALTH INSURANCE COMPANY to ONENATION INSURANCE COMPANY, a domestic fire and/or casualty company. The home office is in Dallas, Texas.

Application for incorporation to the State of Texas by AMERICA FIRST LLOYD'S INSURANCE COMPANY, a domestic Lloyds/Reciprocal company. The home office is in Dallas, Texas.

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-200205661
Gene C. Jarmon
Acting General Counsel and Chief Clerk
Texas Department of Insurance
Filed: August 28, 2002

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Manufactured Housing Division

Notice of Administrative Hearing

Wednesday, September 18, 2002, 1:00 p.m.

State Office of Administrative Hearings, Stephen F. Austin Building, 1700 N Congress, 11th Floor, Suite 1100

Austin, Texas

AGENDA

Administrative Hearing before an administrative law judge of the State Office of Administrative Hearings in the matter of the complaint of the Texas Department of Housing and Texan Manufactured Homes, Inc. to hear alleged violations of Sections 6(m), 6(m)(1), 6(m)(3), 7(b), 7(j)(3), 7(j)(5), 8(b), 8(d), 13(e), 14(m), 18(b), and 20(a) of the Act and Sections 80.121(a), 80.123(b), and 80.180(b)(1) of the Rules by not refunding deposits, not being licensed or bonded to sell homes, failing to deliver proper title in a timely manner, failing to give proper warranties and notices, and not responding with corrective action in a timely manner. SOAH 332-02-2989 and 332-02-3841. Department MHD2002000835-DT and MHD2002001218-RD.

Contact: Jim R. Hicks, P.O. Box 12489, Austin, Texas 78711-2489, (512) 475-3589, jhicks@tdhca.state.tx.us

TRD-200205563
Tim Irvine
Attorney
Manufactured Housing Division
Filed: August 23, 2002

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Notice of Administrative Hearing

Wednesday, September 18, 2002, 1:00 p.m.

State Office of Administrative Hearings, William P. Clements Building, 300 West 15th Street, 4th Floor

Austin, Texas

AGENDA

Administrative Hearing before an administrative law judge of the State Office of Administrative Hearings in the matter of the complaint of the Texas Department of Housing and Community Affairs and Texan Manufactured Homes, Inc. to hear alleged violations of Sections 6(m), 6(m)(1), 6(m)(3), 7(b), 7(j)(3), 7(j)(5), 8(b), 8(d), 13(e), 14(m), 18(b), and 20(a) of the Act and Sections 80.121(a), 80.123(b), and 80.180(b) of the Rules by not refunding deposits, not being licensed or bonded to sell homes, failing to deliver proper title in a timely manner, failing to give proper warranties and notices, and not responding with corrective action in a timely manner. SOAH 332-02-2989 and 332-02-3841. Department MHD2002000835-DT and MHD2002001218-RD.

Contact: Jim R. Hicks, P.O. Box 12489, Austin, Texas 78711-2489, (512) 475-3589, jhicks@tdhca.state.tx.us

TRD-200205582
Tim Irvine
Attorney
Manufactured Housing Division
Filed: August 23, 2002

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Notice of Administrative Hearing

Tuesday, September 24, 2002, 1:00 p.m.

State Office of Administrative Hearings, William P. Clements Building, 300 West 15th Street, 4th Floor

Austin, Texas

AGENDA

Administrative Hearing before an administrative law judge of the State Office of Administrative Hearings in the matter of the complaint of the Texas Department of Housing and Community Affairs and Jesus Garza dba Garza Mobile Home Transport to hear alleged violations of Sections 4(d) and 7(d) of the Act and Sections 80.54 and 80.123(e) of the Rules by not properly installing a manufactured home, not obtaining, maintaining, or possessing a valid license, and not responding with corrective action in a timely manner. SOAH 332-02-3958. Department MHD2002000824-UI, MHD2001000863-UI, and MHD2001000952-IV.

Contact: Jim R. Hicks, P.O. Box 12489, Austin, Texas 78711-2489, (512) 475-3589, jhicks@tdhca.state.tx.us

TRD-200205583
Tim Irvine
Attorney
Manufactured Housing Division
Filed: August 23, 2002

♦ ♦ ♦

Notice of Administrative Hearing

Wednesday, September 25, 2002, 1:00 P.M.

State Office Of Administrative Hearings, William P. Clements Building, 300 West 15Th Street, 4Th Floor

Austin, Texas

Agenda

Administrative Hearing Before An Administrative Law Judge Of The State Office Of Administrative Hearings In The Matter Of The Complaint Of The Texas Department Of Housing And Dr. Bacon's Custom Homes Inc. Dba Dr. Bacon's Affordable Housing To Hear Alleged Violations Of Sections 4(D), 14(F) And 14(J) Of The Act And Sections 80.131(B) And 80.132(3) Of The Rules By Not Complying With The Warranty Order, Not Responding With Corrective Action In A Timely Manner, And Not Properly Installing A Manufactured Home. Soah 332-02-3943. Department Mhd2001001904-W, Mhd2002001323-Iv, And Mhd2002000595-W.

Contact: Jim R. Hicks, P.O. Box 12489, Austin, Texas 78711-2489, (512) 475-3589, Jhicks@Tdhca.State.Tx.Us

Trd-200205584
Tim Irvine
Attorney
Manufactured Housing Division
Filed: August 23, 2002

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Notice of Administrative Hearing

Tuesday, October 1, 2002, 1:00 p.m.

State Office of Administrative Hearings, William P. Clements Building, 300 West 15th Street, 4th Floor

Austin, Texas

AGENDA

Administrative Hearing before an administrative law judge of the State Office of Administrative Hearings in the matter of the complaint of the Texas Department of Housing and Community Affairs and Fitzbert LC dba I-35 Homes & Land Depot to hear alleged violations of Sections 6(m), 6(m)(1), 6(m)(3), and 6(m)(3)(d) of the Act by not refunding

deposits, failing to give proper notice, and not responding with corrective action in a timely manner. SOAH 332-02-3959. Department MHD2002001315-RD.

Contact: Jim R. Hicks, P.O. Box 12489, Austin, Texas 78711-2489, (512) 475-3589, jhicks@tdhca.state.tx.us

TRD-200205585
Tim Irvine
Attorney
Manufactured Housing Division
Filed: August 23, 2002

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Notice of Administrative Hearing

Wednesday, October 2, 2002, 1:00 p.m.

State Office of Administrative Hearings, William P. Clements Building, 300 West 15th Street, 4th Floor

Austin, Texas

AGENDA

Administrative Hearing before an administrative law judge of the State Office of Administrative Hearings in the matter of the complaint of the Texas Department of Housing and Community Affairs and Betty Havard to hear alleged violations of Section 7(m) of the Act and Section 80.123(g)(3) of the Rules by not obtaining, maintaining, or possessing a valid salesperson's license and not responding with corrective action in a timely manner. SOAH 332-02-3960. Department MHD2002000050-US.

Contact: Jim R. Hicks, P.O. Box 12489, Austin, Texas 78711-2489, (512) 475-3589, jhicks@tdhca.state.tx.us

TRD-200205586
Tim Irvine
Attorney
Manufactured Housing Division
Filed: August 23, 2002

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North Central Texas Council of Governments

Request for Proposals to Prepare a Comprehensive Transportation Plan for the Dallas Central Business District

CONSULTANT PROPOSAL REQUEST

This request by the North Central Texas Council of Governments (NCTCOG) for consultant services is filed under the provisions of Government Code, Chapter 2254.

The North Central Texas Council of Governments and the City of Dallas are requesting written proposals from consultants to undertake the development of a transportation study for the Central Business District (CBD) area of the City of Dallas. The effort will be a cooperative one, funded and managed jointly by four funding agencies: NCTCOG, the City of Dallas, Dallas County, and Dallas Area Rapid Transit. The consultant effort will include a review of the land uses in the Dallas CBD, a review of peripheral highway systems that have the potential to influence traffic patterns into and out of the CBD, the review of a future second light rail transit corridor, and the review of the operation of the street system and its possible conversion of existing one-way streets to two-way. A multi-modal plan to guide the development and operation of the transportation system to promote mixed use in the Central Business District is the expected outcome.

Due Date

Proposals must be submitted no later than 5 p.m. Central Daylight Time on Friday, September 27, 2002, to Lynn Hayes, Principal Transportation Planner, North Central Texas Council of Governments, 616 Six Flags Drive, Arlington, Texas 76011 or P.O. Box 5888, Arlington, Texas 76005-5888. For copies of the Request for Proposals, contact Lynn Hayes, (817) 695-9281.

Contract Award Procedures

The firm or individual selected to perform this study will be recommended by a Project Review Committee. The PRC will use evaluation criteria and methodology consistent with the scope of services contained in the Request for Proposals. The NCTCOG Executive Board will review the PRC's recommendations and, if found acceptable, will issue a contract award.

Regulations

NCTCOG, in accordance with Title VI of the Civil Rights Act of 1964, 78 Statute 252, 41 United States Code 2000d to 2000d-4; and Title 49, Code of Federal Regulations, Department of Transportation, Subtitle A, Office of the Secretary, Part 1, Nondiscrimination in Federally Assisted Programs of the Department of Transportation issued pursuant to such act, hereby notifies all proposers that it will affirmatively assure that in regard to any contract entered into pursuant to this advertisement, disadvantaged business enterprises will be afforded full opportunity to submit proposals in response to this invitation and will not be discriminated against on the grounds of race, color, sex, age, national origin, or disability in consideration of an award.

TRD-200205660
R. Michael Eastland
Executive Director
North Central Council of Governments
Filed: August 28, 2002

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Texas Department of Protective and Regulatory Services

Request for Proposal - Services to At-Risk Youth (STAR) Program - Dallas County

The Texas Department of Protective and Regulatory Services (PRS), Division of Prevention and Early Intervention, is soliciting proposals to provide preventive and short-term services to at-risk youth in Dallas county. PRS anticipates funding only one contract as a result of this solicitation. The Request for Proposal (RFP) will be released on or about September 6, 2002. The RFP will be posted on the State Internet Site at www.marketplace.state.tx.us on the date of its release.

Brief Description of Services: The goal of the Services To At-Risk Youth or *STAR* program is to reduce and prevent the problems of runaway, truancy, abandonment, family conflict, and delinquent behavior through the provision of timely and appropriate services to eligible youth and their families. The foundation of the *STAR* program is residential, non-residential and short-term crisis intervention services that are family-oriented, strengths-based, solution- focused and client-driven. Community-based programs with a family systems approach, which are affirmation focused, can offer youth and families the tools and knowledge needed to problem solve, master new skills, and relate more effectively. The *STAR* program envisions a community effort to provide the assistance and support high-risk youth and their families need to become redirected toward more positive pathways of functioning. Services must be as accessible to self- and family-referred youth as to youth referred by agencies or other sources. The program's

highest priority is to support youth remaining in their homes, and to quickly reunite out-of-home youth with their families.

PRS's intent, through its *STAR* program, is to procure residential, non-residential and short-term crisis intervention services that best meet the needs of the targeted population, or eligible youth and families who do not meet the requirements of other youth-serving agencies.

The contract will be funded and managed by PRS.

Eligible Applicants: Eligible offerors include private nonprofit and for-profit corporations, cities, counties, partnerships, and individuals. Historically Underutilized Businesses (HUBs), Minority Business and Women's Enterprises, and Small Businesses are encouraged to submit proposals.

Limitations: Total funding for this procurement is $900,000. It is anticipated that one contract will be funded as a result of this procurement. The funding allocated for the contract resulting from this RFP is dependent on Legislative appropriation. Funding is not guaranteed at the maximum level, or at any level. PRS reserves the right to reject any and all offers received in response to this RFP and to cancel this RFP if it is deemed in the best interest of PRS. PRS also reserves the right to re-procure this service.

If no acceptable responses are received, or no contract is entered into as a result of this procurement, PRS intends to procure by non-competitive means in accordance with the law but without further notice to potential vendors.

Deadline for Proposals, Term of Contract, and Amount of Award: Proposals will be due October 17, 2002, at 3:00 p.m. The effective dates of the contract awarded under this RFP will be November 15, 2002, through August 31, 2003.

Contact Person: Potential offerors may obtain a copy of the RFP on or about September 6, 2002. It is preferred that requests for the RFP be submitted in writing (by mail or fax) to: Vicki Logan, Mail Code Y-956; Texas Department of Protective and Regulatory Services; P.O. Box 149030; Austin, Texas 78714-9030; Fax: 512-821-4767.

TRD-200205641
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Filed: August 27, 2002

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Public Utility Commission of Texas

Notice of Amendment to Interconnection Agreement

On August 20, 2002, Southwestern Bell Telephone, LP doing business as Southwestern Bell Telephone Company and XO Texas, Inc. formerly known as Nextlink 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 26509. 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 26509. 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 20, 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 26498.

TRD-200205502
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 21, 2002

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Notice of Amendment to Interconnection Agreement

On August 21, 2002, Verizon Select Services, Inc. and Verizon Southwest, 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 26514. 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 26514. 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 23, 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 26514.

TRD-200205518
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 22, 2002

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Notice of Amendment to Interconnection Agreement

On August 21, 2002, Southwestern Bell Telephone, LP doing business as Southwestern Bell Telephone Company and Bestline Communications, LP, 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 26515. 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 26515. 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 23, 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 26498.

TRD-200205519
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 22, 2002

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Notice of Application for a Certificate to Provide Retail Electric Service

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on August 23, 2002, for retail electric provider (REP) certification, pursuant to §§39.101- 39.109 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of ExxonMobil Power and Gas Services, Inc. for Retail Electric Provider (REP) certification, Docket Number 26519 before the Public Utility Commission of Texas.

Applicant's requested service area is defined by customers: ExxonMobil Oil Corporation's Beaumont refinery, and ExxonMobil Corporation's Baytown Complex and Mont Belvieu Plastics Plant.

Persons wishing to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 13, 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 26519.

TRD-200205644
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 27, 2002

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on August 23, 2002, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of Florida Telephone Service, LLC for a Service Provider Certificate of Operating Authority, Docket Number 26518 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service.

Applicant's requested SPCOA geographic area includes the entire State of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-800-782-8477 no later than September 11, 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 26518.

TRD-200205643
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 27, 2002

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Notice of Application for Withdrawal of Service Pursuant to the Public Utility Commission of Texas (Commission) Substantive Rule §26.208

Notice is given to the public of an application filed with the Public Utility Commission of Texas on July 26, 2002, for withdrawal of service offering pursuant to the commission's Substantive Rule §26.208(h).

Docket Title and Number: Application of Central Telephone Company of Texas, Inc. dba Sprint (Sprint) Pursuant to the commission's Substantive Rule §26.208. Docket Number 26351.

The Application: Sprint seeks to delete references to Program Audio and Video Services located in its Access Service Tariff pursuant to the commission's substantive Rule §26.208(h). Sprint stated that there has been no customer demand for the past three years and there is no anticipated customer demand for the services. In addition, Sprint certified by affidavit that there are no current subscribers.

On or before September 16, 2002, persons wishing to comment on this application 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. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll-free 1-800-735-298. All correspondence should refer to Docket Number 26351.

TRD-200205558
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 22, 2002

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Notice of Application for Withdrawal of Service Pursuant to Public Utility Commission of Texas (Commission) Substantive Rule §26.208

Notice is given to the public of an application filed with the Public Utility Commission of Texas on July 26, 2002, for withdrawal of service offering pursuant to the commission's Substantive Rule §26.208(h).

Docket Title and Number: Application of United Telephone Company of Texas, Inc. dba Sprint (Sprint) Pursuant to the commission's Substantive Rule §26.208. Docket Number 26350.

The Application: Sprint seeks to delete references to Program Audio and Video Services located in its Access Service Tariff pursuant to the commission's SUBSTANTIVE RULE §26.208(h). Sprint stated that there has been no customer demand for the past three years and there is no anticipated customer demand for the services. In addition, Sprint certified by affidavit that there are no current subscribers.

On or before September 16, 2002, persons wishing to comment on this application 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. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll-free 1-800-735-298. All correspondence should refer to Docket Number 26350.

TRD-200205559
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 22, 2002

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Notice of Interconnection Agreement

On August 21, 2002, Ionex Communications South, Inc. and Verizon Southwest, collectively referred to as applicants, filed a joint application for adoption of 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 26513. The joint application

and the underlying interconnection agreement are available for public inspection at the (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 10 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 26513. 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 23, 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 26513.

TRD-200205517
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 22, 2002

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Notice of Proceeding for State Certification for Designation of Common Carriers as Eligible Telecommunications Carriers to Receive Federal Universal Funds

Notice is given to the public of the 2002 annual certification proceeding initiated by the Public Utility Commission of Texas for state certification of common carriers as eligible telecommunications carriers (ETC) to receive federal universal service funds.

Docket Title and Number: Designation of Common Carriers as Eligible Telecommunications Carriers (ETC) to Receive Federal Universal Funds Pursuant to the Federal Communications Commission's Fourteenth Report and Order Adopting a State Certification Process. Docket Number 24481.

The Public Utility Commission of Texas (commission) initiated this proceeding in response to the Federal Communications Commission's (FCC) Fourteenth Report and Order adopting a state certification process. Under §254(e) of the Federal Telecommunications Act (FTA) carriers must use federal universal service support "only for the provision, maintenance, and upgrading of facilities and services for which the support was intended." The FCC concluded that it is appropriate for the state to certify that all federal high-cost funds flowing to rural carriers within the state of Texas are being used in a manner consistent with FTA §254(e). The commission is required to file such annual certification with the FCC and the Universal Service Administrative Company (USAC) on or before October 1 of each year. Absent such certification, carriers will not receive federal universal service support.

The certification requirement is applicable to all rural carriers and competitive eligible telecommunications carriers seeking high-cost support in the service area of a rural local exchange carrier that the state commission certifies as eligible to receive federal high-cost during that annual period. Carriers shall certify directly to the commission in the form of a sworn affidavit executed by a corporate officer attesting to the use of the support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended pursuant to FTA §254(e) of the 1996 Act.

On or before September 13, 2002, carriers seeking to be certified 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. 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. Persons contacting the commission regarding this certification proceeding should refer to Docket Number 24481.

TRD-200205645
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 27, 2002

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Public Notice of Workshop on Competitive Energy Services and Request for Comments

The Public Utility Commission of Texas (commission) will hold a workshop regarding a competitive energy services rulemaking, on Wednesday, October 30, 2002, at 10:00 a.m. in the Commissioners' Hearing Room, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 26418, *Rulemaking to Address Competitive Energy Services* has been established for this proceeding. Prior to the workshop, the commission requests interested persons file comments regarding the following questions:

1. How should the scope of the competitive energy services rulemaking project be defined? What issues should or should not be addressed in this rulemaking project?

2. Are there services that are currently classified in §25.341(6) of the commission's substantive rules as competitive energy services for which there are not competitive suppliers?

3. Should the petition process in §25.343 of the commission's substantive rules for classifying services as competitive or not competitive be changed? If so, how?

Responses may be filed by submitting 16 copies to the commission's Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326 within 15 days of the date of publication of this notice. Reply comments may be filed within 30 days of the date of publication of this notice. All responses should reference Project Number 26418.

Ten days prior to the workshop the commission shall make available in Central Records under Project Number 26418 an agenda for the format of the workshop. Copies of the agenda will also be available on the Commission's website at www.puc.state.tx.us. The format will allow for panel discussions and/or presentations by interested persons. The commission requests that persons interested in making a presentation at the workshop register by phone with Melissa Silguero, Policy Development Division, at (512) 936-7213, no later than October 16, 2002.

Questions concerning the workshop or this notice should be referred to Sally Talberg, Chief Policy Analyst, Policy Development Division, at (512) 936-7206. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200205640
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 27, 2002

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Texas Savings and Loan Department

Notice of Application for Change of Control of a Savings Bank

Notice is hereby given that on July 31, 2002, application was filed with the Savings and Loan Commissioner of Texas by: Mr. Harold Courson, Perryton, Texas, for change of control of Interstate Bank, ssb, Perryton.

This application is filed pursuant to 7 TAC §§75.121-75.127 of the Rules and Regulations Applicable to Texas Savings Banks. These rules are on file with the Secretary of State, Texas Register Division, or may be seen at the Department's offices in the Finance Commission Building, 2601 North Lamar, Suite 201, Austin, Texas 78705.

TRD-200205631
James L. Pledger
Commissioner
Texas Savings and Loan Department
Filed: August 26, 2002

♦ ♦ ♦

Stephen F. Austin State University

Notice of Consultant Contract Award

In compliance with the provisions of Chapter 2254, Subchapter B, Texas Government Code, Stephen F. Austin State University furnishes this notice of consultant contract award. The consultant will provide assistance to the University in conducting a comprehensive search for an individual to fill the position of Vice President of Academic Affairs and an individual to fill the position of Dean of the College of Education. The Request for Proposals was filed in the June 14, 2002 issue of the *Texas Register*, Volume 27 Number 24 TexReg Pages 5025-5314.

The contract was awarded to EFL Associates, 7101 College Blvd., Ste. 550, Overland Park, KS 66210, for $65,000.00 plus expenses.

The beginning date of the contract is August 13, 2002 and the contract will end upon the appointment of individuals in both positions.

No reports will be provided by the consultant.

For further information, please call (936)468-4305.

TRD-200205652
R. Yvette Clark
General Counsel
Stephen F. Austin State University
Filed: August 27, 2002

♦ ♦ ♦

Notice of Consultant Contract Renewal

In compliance with the provisions of Chapter 2254, Subchapter B, Texas Government Code, Stephen F. Austin State University furnishes this notice of renewal to the University's contract with LCS Development Group, 115 N. University Dr., Suite F, Nacogdoches, TX 75964. The original contract was in the sum of $35,000, with a subsequent renewal in the amount of $10,000. The original contract award was published in the July 30, 1999, issue of the *Texas Register* (24 TexReg 5947). The subsequent renewal was published in the October 5, 2001, issue of the *Texas Register*, Volume 26, Number 40, Pages 7663-7948. The contract will be renewed in an additional sum not to exceed $10,000.

No documents, films, recording, or reports of intangible results will be required to be presented by the outside consultant. Services are provided on an as-needed basis.

For further information, please call (936)468-2906.

TRD-200205653
R. Yvette Clark
General Counsel
Stephen F. Austin State University
Filed: August 27, 2002

♦ ♦ ♦

Texas Department of Transportation

Public Notice - Aviation

Pursuant to Transportation Code, §21.111, and Title 43, Texas Administrative Code, §30.209, the Texas Department of Transportation conducts public hearings to receive comments from interested parties concerning proposed approval of various aviation projects.

For information regarding actions and times for aviation public hearings, please go to the following web site:

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

Click on Aviation, click on Aviation Public Hearing. Or, contact Karon Wiedemann, Aviation Division, 150 East Riverside, Austin, Texas 78704, (512) 416-4520 or 800 68 PILOT.

TRD-200205508
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: August 22, 2002

♦ ♦ ♦

Texas Water Development Board

Notice of Public Hearing

An attorney with the Texas Water Development Board will conduct a public hearing beginning at: 1:30 p.m., September 30, 2002, Room 118, Stephen F. Austin Building, 1700 North Congress Avenue, Austin, Texas 78701, to receive public comment on proposed new sections in 31 TAC Chapter 356, concerning the designation of groundwater management areas. Chapter 35, §35.004 of the Texas Water Code requires the Texas Water Development Board, with assistance from the Texas Natural Resources Conservation Commission, to designate GMA's covering all major and minor aquifers in the state.

Interested persons are encouraged to attend the hearing and to present relevant and material comments concerning the proposed new sections. In addition, persons may participate in the hearing by mailing written comments before the above date to Jorge Arroyo, Director of Special Projects, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231, by e-mail to jarroyo@twdb.state.tx.us or by fax @ 512/463-5580. The proposed rules may be accessed on the Board's website @ http://www.twdb.state.tx.us under Publications, Administrative Rules.

TRD-200205557
Suzanne Schwartz
General Counsel
Texas Water Development Board
Filed: August 22, 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).

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The *Texas Register* offers the following services. Please check the appropriate box (or boxes).

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