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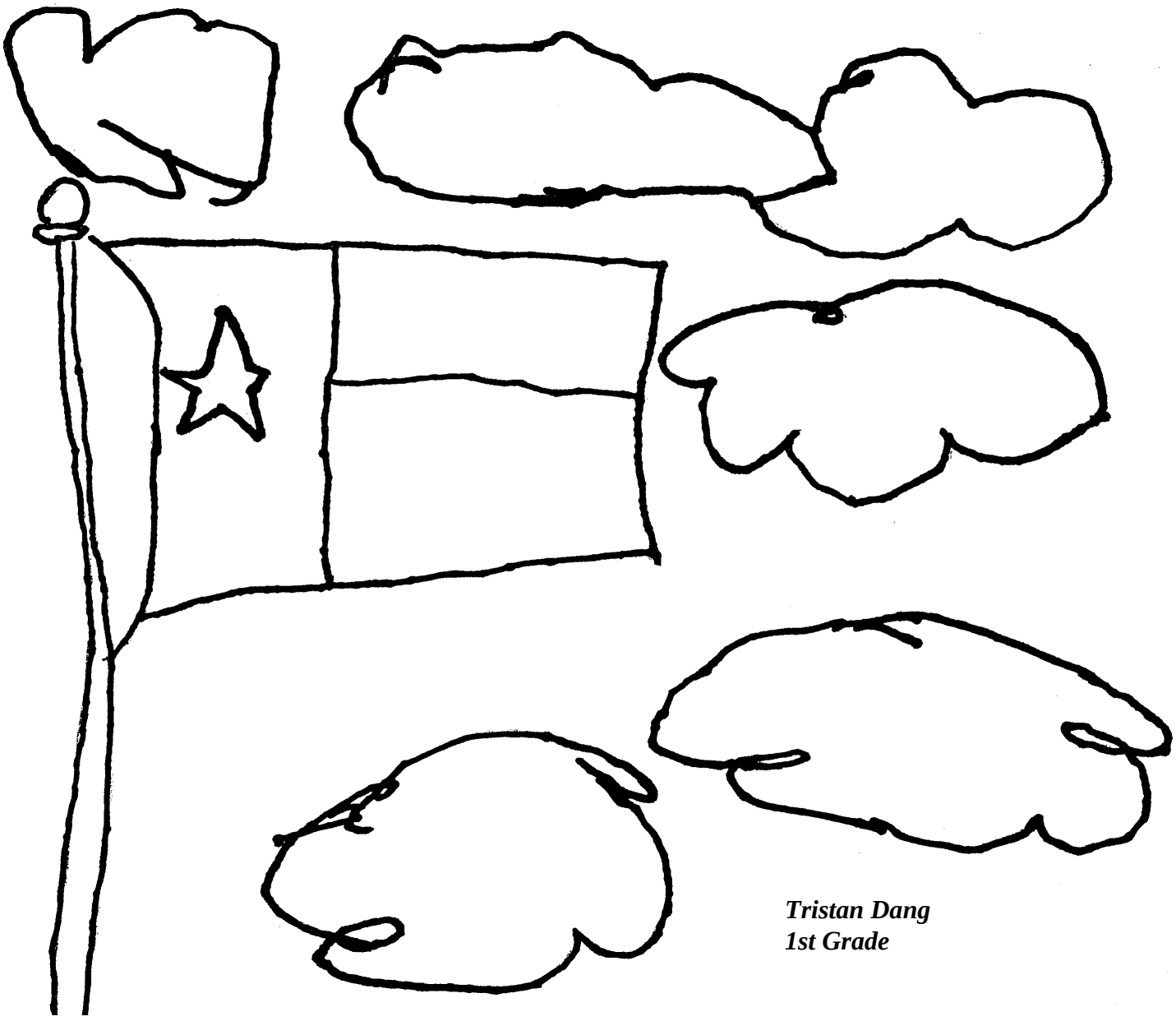

Tristan Dang
1st Grade

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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Open Meetings

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

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

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

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

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

THE GOVERNOR

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

Appointments

Appointments for September 11, 2002

Appointed to the State Securities Board for a term to expire January 20, 2007, James H. Simms of Amarillo (replacing Nicholas Taylor of Midland whose term expired).

Appointments for September 12, 2002

Appointed to the Texas Council on Offenders with Mental Impairments for a term to expire February 1, 2003, Robert C. Strayhan, M.D. of San Antonio, (replacing Susan Stone of Rosanky who is no longer eligible).

Appointed to the Texas Board of Pardons and Paroles for a term to expire February 1, 2007, Charles C. Speier of San Antonio (replacing Wayne Scott of Huntsville who resigned).

Rick Perry, Governor

TRD-200206105

♦ ♦ ♦

Proclamation

BY THE GOVERNOR OF THE STATE OF TEXAS (41-2902)

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, RICK PERRY, Governor of Texas, do hereby certify that severe flooding due to Tropical Storm Fay, which began on September 6, 2002 and is continuing, has caused a disaster in Brazoria, Frio, Galveston, La Salle, Matagorda, and Wharton Counties in the State of Texas.

THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I do hereby proclaim the existence of such disaster and direct that all necessary measures, both public and private as authorized under Section 418.015 of the code, be implemented to meet that disaster.

In accordance with the Statutory requirements, copies of this proclamation shall be filed with the applicable authorities.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 16th day of September, 2002.

Rick Perry, Governor

TRD-200206106

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THE ATTORNEY GENERAL

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

Request for Opinions

RQ-0597

The Honorable Bob Turner, Chair, Committee on Public Safety, Texas House of Representatives, P.O. Box 2910, Austin, Texas 78768-2910

Re: Whether the Health Maintenance Organization Act, chapter 20A of the Texas Insurance Code, authorizes the Texas Department of Insurance to enforce its provisions against physicians that are not under contract with an HMO (Request No. 0597-JC)

Briefs requested by October 13, 2002

RQ-0598

The Honorable Randal Lee, Cass County Criminal District Attorney, P.O. Box 839, Linden, Texas 75536

Re: Allocation of "actual costs" by an appraisal district between its appraisal and collection functions (Request No. 0598-JC)

Briefs requested by October 10, 2002

RQ-0599

The Honorable Debra Danburg, Chair, Elections Committee, Texas House of Representatives, P.O. Box 2910, Austin, Texas 78768-2910

Re: Whether the Ethics Commission is authorized to interview third party witnesses in the process of investigating a sworn complaint (Request No. 0599-JC)

Briefs requested by October 10, 2002

RQ-0600

The Honorable Jeri Yenne, Brazoria County Criminal District Attorney, 111 Locust, Suite 408A, Angleton, Texas 77515

Re: Whether a school district employee who is also a city council member may participate in matters regarding the school district that come before the council (Request No. 0600-JC)

Briefs requested by October 12, 2002

RQ-0601

Mr. Tom Harrison, Executive Director, Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070

Re: Whether the Texas Ethics Commission, in a commission-initiated complaint, may disclose to the respondent information obtained in connection with other sworn complaints (Request No. 0601-JC)

Briefs requested by October 16, 2002

RQ-0602

Mr. Don A. Gilbert, Commissioner, Texas Health and Human Services Commission, P.O. Box 13247, Austin, Texas 78711-3247

Re: Constitutionality of chapter 136, Human Resources Code, which establishes the Texas Community Health Center Revolving Loan Fund, and related questions (Request No. 0602-JC)

Briefs requested by October 16, 2002

RQ-0603

The Honorable Tom Maness, Jefferson County Criminal District Attorney, 1001 Pearl Street, Third Floor, Beaumont, Texas 77701-3545

Re: Whether a commissioners court may impose a hiring freeze on budgeted positions under the control of an elected official, and related questions (Request No. 0603-JC)

Briefs requested by October 18, 2002

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

TRD-200206092
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: September 18, 2002

♦ ♦ ♦

Opinions

Opinion No. JC-0553

The Honorable Warren Chisum, Chairman, Committee on Environmental Regulation, Texas House of Representatives, P.O. Box 2910, Austin, Texas 78768-2910, regarding whether a creating unit must review a development corporation's dissolution plan when the corporation is dissolving under article 5190.6, §4A(k) of the Revised Civil Statutes, and related question. (RQ-0527-JC)

SUMMARY

An industrial development corporation that is dissolving under article 5190.6, §4A(k) of the Revised Civil Statutes must submit its dissolution plan to the corporation's creating unit for its review and approval. See

Texas Revised Civil Statutes Annotated article 5190.6, §4A(k) (Vernon Supp. 2002). But the creating unit may not use its approval power to prevent the development corporation from performing its statutory duty to, "to the extent practicable, . . . dispose of its assets and apply the proceeds to satisfy" the corporation's obligations. Id. Neither article 5190.6 nor the Non-Profit Corporation Act preclude an industrial development corporation from establishing an escrow account to meet calculable future financial commitments.

Opinion No. JC-0554

The Honorable Clyde Alexander, Chairman, House Committee on Transportation, Texas House of Representatives, P.O. Box 2910, Austin, Texas 78768-2910, regarding whether a towing company may provide certain services for the owner of a parking facility, and related questions. (RQ-0528-JC)

SUMMARY

Section 684.082(a) of the Transportation Code prohibits a towing company from providing free of charge to the owner of a parking facility services such as roadside assistance or lot maintenance, including parking space striping and fire lane markings in connection with the removal of vehicles from a parking facility. The penalty attached to violations of chapter 684 is applicable to both parking facility owners and towing companies. Various local prosecutors are responsible for the enforcement of this statute in municipal and justice courts.

Opinion No. JC-0555

Ms. Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, 333 Guadalupe, Suite 2-350, Austin, Texas 78701-3942, regarding confidentiality of disability information collected by the Texas Board of Architectural Examiners, and related questions. (RQ-0529-JC)

SUMMARY

Pursuant to the federal Americans with Disabilities Act, the Texas Board of Architectural Examiners considers prospective examinees' requests for special accommodations in the exams the Board requires for licensure as an architect, landscape architect, or interior designer. The Board uses a disability assessment form to determine whether an examinee who requests accommodations has a disability and the nature of accommodations needed as a result of disability.

Information about "the identity, diagnosis, evaluation, or treatment" of an applicant placed on a disability assessment form by his or her physician is confidential under chapter 159 of the Occupations Code and subject to release only under its provisions. See Texas Occupations Code Annotated §159.002 (Vernon 2002). Such information is excepted from disclosure to the public under the Public Information Act, chapter 552 of the Government Code.

A disability assessment form may also include an examinee's or a non-physician's answer to an optional question, and such information, provided directly to the Board by the examinee, may be excepted from public disclosure under the Public Information Act if it is within an exception to that Act.

The privacy provisions in title I of the ADA do not apply to medical information obtained by the Board under title II and title III of the ADA. The Board must rely on state law to protect applicants' medical information from disclosure to the public pursuant to a request under the Public Information Act.

Opinion No. JC-0556

The Honorable Ron Lewis, Chair, Energy Resources Committee, Texas House of Representatives, P.O. Box 2910, Austin, Texas 78768-2910, regarding whether a particular special district must notify or obtain various political subdivisions' consent before laying new or repairing existing water or sewer facilities located in county or municipal right-of-way, and related questions. (RQ-0530-JC)

SUMMARY

A district created under article XVI, section 59 of the Texas Constitution has the right to use public right-of-way under §49.220 of the Water Code, but the district, as a water corporation, is subject to the requirements of chapter 402 of the Local Government Code when it wishes to lay water system facilities. For those activities to which chapter 402 applies, a water corporation must obtain the consent of a municipality or notify a county that has the primary right-of-way. With respect to the laying of fixtures within the county's right-of-way, the district may not "inconvenience the public using the road [or] street." Texas Local Government Code Annotated §402.104(a) (Vernon 1999).

A county or municipality may require a district or water supply corporation with rights under §49.220 of the Water Code to remove or relocate the district's or corporation's facilities at the expense of the district or corporation.

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

TRD-200206071
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: September 17, 2002

♦ ♦ ♦

EMERGENCY RULES

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

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 20. COTTON PEST CONTROL

SUBCHAPTER C. STALK DESTRUCTION PROGRAM

4 TAC §20.22

The Department of Agriculture (the department) adopts on an emergency basis, an amendment to §20.22, concerning the authorized cotton destruction dates for a portion of Pest Management Zone 2 (Zone 2), Area 2 and Zone 2, Area 3. A prior emergency amendment filed by the department on August 28, 2002, divided Zone 2, Area 2 and Area 3 into two sections each, extended the destruction deadline for a portion of Jim Wells County found in Pest Management Zone 2 Area 2, to September 14, and also extended the destruction deadline for a portion of Zone 2, Area 3 to September 14. That emergency amendment is now being amended to extend the cotton destruction deadline for the areas covered by that amendment to September 28, 2002. In addition, the cotton destruction deadline of September 1 is extended to September 28 for that portion of Zone 2, Area 3 located in Aransas County, the portion of San Patricio County east of Highway 77 and the portion of Live Oak County south and east of U.S. Highway 59, and a September 28 deadline is established for all of Jim Wells County.

The department is acting on behalf of cotton farmers in Zone 2, Area 2, for Jim Wells County; and Zone 2, Area 3, which includes Aransas, San Patricio, and south and east of U.S. Highway 59 in Bee and Live Oak counties.

The current cotton destruction deadline is September 1 for Zone 2, Area 2; except for Jim Wells County, which will be extended through September 28. The current destruction deadline for cotton in Zone 2, Area 3 is September 1 for Aransas County, San Patricio County east of Highway 77 and Live Oak County south and east of Highway 59. The destruction deadline for the remainder of Zone 2, Area 3, which includes San Patricio County west of Highway 77 and Bee County south and east of Highway 59 is September 14. The destruction deadline will be extended through September 28, 2002 for all of Zone 2, Area 3. The department believes that changing the cotton destruction date is both necessary and appropriate. This extension is effective only for the 2002 crop year.

Excessive amounts of rainfall have occurred across the cotton growing area of these two zones, preventing cotton producers from completing harvest and destruction of hostable cotton in a timely manner. A failure to act to extend the cotton destruction deadline could create a significant economic loss to Texas cotton producers in the counties in these zones and the state's economy.

The emergency amendment to §20.22(a) changes the date for cotton stalk destruction for Jim Wells County, located in Zone 2, Area 2, and all of Zone 2, Area 3, extending the deadline through September 28, 2002.

The amendment is adopted on an emergency basis under the Texas Agriculture Code, §74.006, which provides the Texas Department of Agriculture with the authority to adopt rules as necessary for the effective enforcement and administration of Chapter 74, Subchapter A; §74.004, which provides the department with the authority to establish regulated areas, dates and appropriate methods of destruction of stalks, other parts, and products of host plants for cotton pests and provides the department with the authority to consider a request for a cotton destruction extension due to adverse weather conditions; and the Government Code, §2001.34, which provides for the adoption of administrative rules on an emergency basis, without notice and comment.

§20.22. Stalk Destruction Requirements.

(a) Deadlines and methods. All cotton plants in pest management zones 1-8 shall be rendered non-hostable by the stalk destruction dates indicated for the zone. Destruction shall periodically be performed to prevent the presence of fruiting structures. Destruction of all cotton plants in Zones 9 and 10 shall be accomplished by shredding and plowing and completely burying the stalk. Soil should be tilled to a depth of 2 or more inches in Zone 9 and to a depth of 6 or more inches in Zone 10.

Figure: 4 TAC §20.22 (a)

(b)-(d) (No Change.)

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

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

TRD-200205972
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective Date: September 12, 2002
Expiration Date: October 12, 2002
For further information, please call: (512) 463-4075

♦ ♦ ♦

PROPOSED RULES

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

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

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION

SUBCHAPTER B. UNDERWRITING, MARKET ANALYSIS, APPRAISAL, AND ENVIRONMENTAL SITE ASSESSMENT RULES AND GUIDELINES

10 TAC §§1.31 - 1.35

The Texas Department of Housing and Community Affairs ("the Department" or "TDHCA") proposes new Subchapter B, Underwriting, Market Analysis, Appraisal, and Environmental Site Assessment Rules and Guidelines, §§1.31, 1.32, 1.33, 1.34, and 1.35. This subchapter is proposed in order to establish stand alone guidelines for underwriting, market analysis, appraisal, and environmental site assessment performed for requests submitted to the Department for review.

Edwina P Carrington, Executive Director, has determined that for the first five-year period the rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Carrington has also determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be to standardize underwriting, market analysis, appraisal, and environmental site assessment guidelines utilized by the Department. There will be no effect on small businesses. There is no anticipated economic cost to persons or businesses that are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Lisa Vecchietti, Credit Underwriting, Texas Department of Housing and Community Affairs, PO Box 13941, Austin, Texas 78711-3941 or email: lvecchie@tdhca.state.tx.us, beginning September 27, 2002 through 5:00 p.m., October 25, 2002.

The subchapter is proposed under Texas Government Code, §§2306.6710 and 2306.148, which authorize the evaluation of multifamily developments with regard to: certain low income housing tax credits authorized by applicable federal income tax laws, certain HOME Investment Partnership Program funds authorized by the United States Congress, certain Multifamily Bonds authorized by the State of Texas, and certain Housing Trust Funds authorized by the State of Texas.

No other code, articles, or statutes are affected by this proposed subchapter.

§1.31. General Provisions.

(a) Purpose. The Rules in this subchapter apply to the underwriting, market analysis, appraisal, and environmental site assessment standards employed by the Texas Department of Housing and Community Affairs (the "Department" or "TDHCA"). This chapter provides rules for the underwriting review of an affordable housing development's financial feasibility and economic viability. In addition, this chapter guides the underwriting staff in making recommendations to the Executive Award and Review Advisory Committee ("the Committee"), Executive Director, and TDHCA Governing Board ("the Board") to help ensure procedural consistency in the award determination process. Due to the unique characteristics of each development the interpretation of the rules and guidelines described in subchapter B of this chapter is subject to the discretion of the Department and final determination by the Board.

(b) Definitions. Many of the terms used in this subchapter are defined in 10TAC §§49 and 50 of this title (the Department's Low Income Housing Tax Credit Program Qualified Allocation Plan and Rules, known as the "QAP"). Those terms that are not defined in the QAP or which may have another meaning when used in subchapter B of this title, shall have the meanings set forth in this subsection unless the context clearly indicates otherwise.

(1) Affordable Housing--Housing that has been funded through one or more of the Department's programs or other local, state or federal programs or has at least one unit that is restricted in the rent that can be charged either by a Land Use Restriction Agreement or other form of Deed Restriction or by natural market forces at the equivalent of 30% of 100% of an area's median income as determined by the United States Department of Housing and Urban Development ("HUD").

(2) Affordability Analysis--An analysis of the ability of a prospective buyer or renter at a specified income level to buy or rent a housing unit at specified price or rent.

(3) Cash Flow--The funds available from operations after all expenses and debt service required to be paid has been considered.

(4) Credit Underwriting Analysis Report--Sometimes referred to as the "Report." A decision making tool used by the Department and Board, described more fully in §1.32(a) and (b) of this subchapter.

(5) Comparable Unit--A unit of housing that is of similar type, age, size, location and other discernable characteristics that can be used to compare and contrast from a proposed or existing unit.

(6) DCR--Debt Coverage Ratio. Sometimes referred to as the "Debt Coverage" or "Debt Service Coverage." A measure of the number of times loan principal and interest are covered by net after tax income.

(7) Development--Proposed multi-unit residential housing that meets the affordability requirements for and requests funds from one or more of the Department's sources of funds.

(8) EGI--Effective Gross Income. The sum total of all sources of anticipated or actual income for a rental Development less vacancy and collection loss, leasing concessions, and rental income from employee-occupied units that is not anticipated to be charged or collected.

(9) Gross Program Rent--Sometimes called the "Program Rents." Maximum Rent Limits based upon the tables promulgated by the Department's division responsible for compliance by program and by county or Metropolitan Statiostical Area ("MSA") or Primary Metropolitan Statistical Area ("PMSA").

(10) HUD--The United States Department of Housing and Urban Development. The department of the US Government responsible for major housing and urban development programs, including programs that are redistributed through the State such as HOME and CDBG.

(11) Local Amenities--Include, but are not limited to police and fire protection, transportation, healthcare, retail, grocers, educational institutions, employment centers, parks, public libraries, entertainment centers, etc.

(12) Low Income Housing Tax Credit(s)--Sometimes referred to as "LIHTC" or "Tax Credit(s)." A financing source allocated by the Department as determined by the QAP. The Tax Credits are typically sold through syndicators to raise equity for the Development.

(13) Market Analysis--Sometimes referred to as a Market Study. An evaluation of the economic conditions of supply, demand and pricing conducted in accordance with the Department's Market Analysis Rules and Guidelines in §1.33 of this subchapter as it relates to a specific Development

(14) Market Analyst--An individual or firm providing market information for use by the Department.

(15) Market Rent--The unrestricted rent concluded by the Market Analyst for a particular unit type and size after adjustments are made to Comparable Units.

(16) NOI--Net Operating Income. The income remaining after all operating expenses, including replacement reserves and taxes have been paid.

(17) Primary Market--Sometimes referred to as "Primary Market Area" or "Submarket." The area defined from which political/geographical boundaries that a proposed or existing Development is most likely to draw the bulk of its prospective tenants or homebuyers.

(18) Rent Over-Burdened Households-- Non-elderly households paying more than 35% of gross income towards total housing expenses (unit rent plus utilities) and elderly households paying more than 40% of gross income towards total housing expenses.

(19) Sustaining Occupancy--The occupancy level at which rental income plus secondary income is equal to all operating expenses and mandatory debt service requirements for a Development.

(20) TDHCA Operating Expense Database--Sometimes called the TDHCA Database. This is a consolidation of recent actual operating expense information collected through the Department's Annual Owner Financial Certification process and published on the Department's web site.

(21) Third Party--A Third Party is a Person which is not an Affiliate, Related Party, or Beneficial Owner of the Applicant, General Partner(s), Developer, or Person receiving any portion of the developer fee or contractor fee.

(22) Underwriter--the author(s), as evidenced by signature, of the Credit Underwriting Analysis Report.

(23) Unstabilized Development-- A Development that has not maintained a 90% occupancy level for at least 12 consecutive months.

(24) Utility Allowance(s)--The estimate of tenant-paid utilities, based either on the most current HUD Form 52667, "Section 8, Existing Housing Allowance for Tenant-Furnished Utilities and Other Services", provided by the local Public Housing Authority with most direct jurisdiction over the majority of the buildings existing or a documented estimate from the utility provider proposed in the Application. Documentation from the local utility provider to support an alternative calculation can be used to justify alternative Utility Allowance conclusions but must be specific to the subject Development and consistent with the building plans provided.

§1.32. Underwriting Rules and Guidelines.

(a) General Provisions. The Department, through the division responsible for underwriting, produces or causes to be produced a Credit Underwriting Analysis Report (the "Report") for every Development recommended for funding through the Department. The primary function of the Report is to provide the Committee, Executive Director, the Board, applicants, and the public a comprehensive analytical report and recommendations necessary to make well informed decisions in the allocation or award of the State's limited resources. The Report in no way guarantees or purports to warrant the actual performance, feasibility, or viability of the Development by the Department.

(b) Report Contents. The Report provides an organized and consistent synopsis and reconciliation of the application information submitted by the Applicant. At a minimum, the Report includes:

(1) Identification of the Applicant and any principals of the Applicant;

(2) Identification of the funding type and amount requested by the Applicant;

(3) The Underwriter's funding recommendations and any conditions of such recommendations;

(4) Evaluation of the affordability of the proposed housing units to prospective residents;

(5) Review and analysis of the Applicant's operating pro-forma as compared to industry information, similar Developments previously funded by the Department, and the Department guidelines described in this section;

(6) Analysis of the Development's debt service capacity;

(7) Review and analysis of the Applicant's Development budget as compared to the estimate prepared by the Underwriter under the guidelines in this section;

(8) Evaluation of the commitment for additional sources of financing for the Development;

(9) Review of the experience of the development team members;

(10) Identification of related interests among the members of the development team, Third Party service providers and/or the seller of the property;

(11) Analysis of the Applicant's and principals' financial statements and creditworthiness including a review of the credit report for each of the principals in for-profit Developments subject to the Texas Public Information Act;

(12) Review of the proposed development plan and evaluation of the proposed improvements and architectural design;

(13) Review of the Applicant's evidence of site control and any potential title issues that may affect site control;

(14) Identification and analysis of the site which includes review of the independent site inspection report prepared by a TDHCA staff member;

(15) Review of the Phase I Environmental Site Assessment in conformance with the Department's Environmental Site Assessment Rules and Guidelines in §1.35 of this subchapter or soils and hazardous material reports as required; and,

(16) Review of market data and market study information and any valuation information available for the property in conformance with the Department's Market Analysis Rules and Guidelines in §1.33 of this subchapter.

(c) Recommendations in the Report. The conclusion of the Report includes a recommended award of funds or allocation of Tax Credits based on the lesser amount calculated by the eligible basis method (if applicable), equity gap method, or the amount requested by the Applicant as further described in paragraphs (1) through (3) of this subsection.

(1) Eligible Basis Method. This method is only used for Developments requesting Low Income Housing Tax Credits. This method is based upon calculation of eligible basis after applying all cost verification measures and limits on profit, overhead, general requirements, and developer fees as described in this section. The Applicable Percentage used in the Eligible Basis Method is as defined in the QAP.

(2) Equity Gap Method. This method evaluates the amount of funds needed to fill the gap created by total Development cost less total non-Department-sourced funds. In making this determination, the Underwriter resizes any anticipated deferred developer fee down to zero before reducing the amount of Department funds. In the case of Low Income Housing Tax Credits, the syndication proceeds are divided by the syndication rate to determine the amount of Tax Credits. In making this determination, the Department adjusts the permanent loan amount and/or any Department-sourced loans, as necessary, such that it conforms to the NOI and DCR standards described in this section.

(3) The Amount Requested. This is the amount of funds that is requested by the Applicant as reflected in the application documentation.

(d) Operating Feasibility. The operating financial feasibility of every Development funded by the Department is tested by adding total income sources and subtracting vacancy and collection losses and operating expenses to determine net operating income. This net operating income is divided by the annual debt service to determine the debt coverage ratio. The Underwriter characterizes a Development as infeasible from an operational standpoint when the debt coverage ratio does not meet the minimum standard set forth in paragraph (6) of this subsection. The Underwriter may choose to make adjustments to the financing structure, such as lowering the debt and increasing the deferred developer fee that could result in a re-characterization of the Development as feasible based upon specific conditions set forth in the Report.

(1) Rental Income. The Program Rent less Utility Allowances and/or Market Rent (if the project is not 100% affordable) is utilized by the Underwriter in calculating the rental income for comparison to the Applicant's estimate in the application. Where multiple programs are funding the same units, the lowest Program Rents for those units is used. If the Market Rents, as determined by the Market Analysis, are lower than the net program rents, then the Market Rents for those units are utilized.

(A) Market Rents. The Underwriter reviews the Attribute Adjustment Matrix of Market Rent comparables by unit size provided by the Market Analyst and determines if the adjustments and conclusions made are reasoned and well documented. The Underwriter uses the Market Analyst's conclusion of adjusted Market Rent by unit, as long as the proposed Market Rent is reasonably justified and does not exceed the highest existing unadjusted market comparable rent. Random checks of the validity of the Market Rents may include direct contact with the comparable properties. The Market Analyst's Attribute Adjustment Matrix should include, at a minimum, adjustments for location, size, amenities, and concessions as more fully described in §1.33 of this subchapter, the Department's Market Analysis Rules and Guidelines.

(B) Program Rents. The Underwriter reviews the Applicant's proposed rent schedule and determines if it is consistent with the representations made in the remainder of the application. The Underwriter uses the Program Rents as promulgated by the Department's Compliance Division for the year that is most current at the time the underwriting begins. When underwriting for a simultaneously funded competitive round, all of the applications are underwritten with the rents promulgated for the same year. Program Rents are reduced by the Utility Allowance. The Utility Allowance figures used are determined based upon what is identified in the application by the Applicant as being a utility cost paid by the tenant and upon other consistent documentation provided in the application. Water and sewer can only be a tenant-paid utility if the units will be individually metered for such services. Gas utilities are verified on the building plans and elsewhere in the application when applicable. Trash allowances paid by the tenant are rare and only considered when the building plans allow for individual exterior receptacles. Refrigerator and range allowances are not considered part of the tenant-paid utilities unless the tenant is expected to provide their own appliances, and no eligible appliance costs are included in the development cost breakdown.

(2) Miscellaneous Income. All ancillary fees and miscellaneous secondary income, including but not limited to late fees, storage fees, laundry income, interest on deposits, carport rent, washer and dryer rent, telecommunications fees, and other miscellaneous income, are anticipated to be included in a $5 to $15 per unit per month range. Any estimates for secondary income above or below this amount are only considered if they are well documented by the financial statements of comparable properties as being achievable in the proposed market area as determined by the Underwriter. Exceptions may be made for special uses, such as garages, congregate care/assisted living/elderly facilities, and child care facilities. Exceptions must be justified by operating history of existing comparable properties and should also be documented as being achievable in the submitted market study. The Applicant must show that the tenant will not be required to pay the additional fee or charge as a condition of renting an apartment unit and must show that the tenant has a reasonable alternative. Collection rates of these exceptional fee items will generally be heavily discounted. If the total secondary income is over the maximum per unit per month limit, any cost associated with the construction, acquisition, or development of the hard assets needed to produce an additional fee may also need to be reduced from eligible basis for Tax Credit Developments as they may, in that case, be considered to be a

commercial cost rather than an incidental to the housing cost of the Development. The use of any secondary income over the maximum per unit per month limit that is based on the factors described in this paragraph is subject to the determination by the Underwriter that the factors being used are well documented.

(3) Vacancy and Collection Loss. The Underwriter uses a vacancy rate of 7.5% (5% vacancy plus 2.5% for collection loss) unless the Market Analysis reflects a higher or lower established vacancy rate for the area. Elderly and 100% project-based rental subsidy Developments and other well documented cases may be underwritten at a combined 5% at the discretion of the Underwriter if the historical performance reflected in the Market Analysis is consistently higher than a 95% occupancy rate.

(4) Effective Gross Income ("EGI"). The Underwriter independently calculates EGI. If the EGI figure provided by the Applicant is within five percent of the EGI figure calculated by the Underwriter, the Applicant's figure is characterized as acceptable or reasonable in the Report, however, for purposes of calculating DCR the Underwriter will maintain and use its independent calculation of EGI regardless of the characterization of the Applicant's figure.

(5) Expenses. The Underwriter evaluates the reasonableness of the Applicant's expense estimate based upon line item comparisons with specific data sources available. Evaluating the relative weight or importance of the expense data points is one of the most subjective elements of underwriting. Historical stabilized certified or audited financial statements of the property will reflect the strongest data points to predict future performance. The Department also maintains a database of performance of other similar sized and type properties across the State. In the case of a new Development, the Department's database of property in the same location or region as the proposed Development provides the most heavily relied upon data points. The Department also uses data from the Institute of Real Estate Management's ("IREM") most recent Conventional Apartments-Income/Expense Analysis book for the proposed Development's property type and specific location or region. In some cases local or project-specific data such as Public Housing Authority ("PHA") Utility Allowances and property tax rates are also given significant weight in determining the appropriate line item expense estimate. Finally, well documented information provided in the Market Analysis, the application, and other well documented sources may be considered. In most cases, the data points used from a particular source are an average of the per unit and per square foot expense for that item. The Underwriter considers the specifics of each transaction, including the type of development, the size of the units, and the Applicant's expectations as reflected in the proforma to determine which data points are most relevant. The Underwriter will determine the appropriateness of each data point being considered and must use their reasonable judgment as to which one fits each situation. The Department will create and utilize a feedback mechanism to communicate and allow for clarification by the Applicant when the overall expense estimate is over five percent greater or less than the Underwriter's estimate or when specific line items are inconsistent with the Underwriter's expectation based upon the tolerance levels set forth for each line item expense in subparagraphs (A) through (J) of this paragraph. If an acceptable rationale for the individual or total difference is not provided, the discrepancy is documented in the Report and the justification provided by the Applicant and the countervailing evidence supporting the Underwriter's determination is noted. If the Applicant's total expense estimate is within five percent of the final total expense figure calculated by the Underwriter, the Applicant's figure is characterized as acceptable or reasonable in the Report, however, for purposes of calculating debt coverage ratio ("DCR") the Underwriter will maintain and use its independent calculation of expenses regardless of the characterization of the Applicant's figure.

(A) General and Administrative Expense. General and Administrative Expense includes all accounting fees, legal fees, advertising and marketing expenses, office operation, supplies, and equipment expenses. Historically, the TDHCA Database average has been used as the Department's strongest initial data point as it has generally been consistent with IREM regional and local figures. The underwriting tolerance level for this line item is 20%.

(B) Management Fee. Management Fee is paid to the property management company to oversee the effective operation of the property and is most often based upon a percentage of Effective Gross Income as documented in the management agreement contract. Typically, five percent of the effective gross income is used, though higher percentages for rural transactions that are consistent with the TDHCA Database can be concluded. Percentages as low as three percent may be utilized if documented with a Third Party management contract agreement with an acceptable management company. The Underwriter will require documentation for any percentage difference from the 5% of the Effective Gross Income standard.

(C) Payroll and Payroll Expense. Payroll and Payroll Expense includes all direct staff payroll, insurance benefits, and payroll taxes including payroll expenses for repairs and maintenance typical of a conventional Development. It does not, however, include direct security payroll or additional supportive services payroll. In urban areas, the local IREM per unit figure has historically held considerable weight as the Department's strongest initial data point. In rural areas, however, the TDHCA Database is often considered more reliable. The underwriting tolerance level for this line item is 10%.

(D) Repairs and Maintenance Expense. Repairs and Maintenance Expense includes all repairs and maintenance contracts and supplies. It should not include extraordinary capitalized expenses that would result from major renovations. Direct payroll for repairs and maintenance activities are included in payroll expense. Historically, the TDHCA Database average has been used as the Department's strongest data point as it has generally been consistent with IREM regional and local figures. The underwriting tolerance level for this line item is 20%.

(E) Utilities Expense (Gas & Electric). Utilities Expense includes all gas and electric energy expenses paid by the owner. It includes any pass-through energy expense that is reflected in the unit rents. Historically, the lower of an estimate based on 25.5% of the PHA local Utility Allowance or the TDHCA Database or local IREM averages have been used as the most significant data point. The higher amount may be used, however, if the current typical higher efficiency standard utility equipment is not projected to be included in the Development upon completion or if the higher estimate is more consistent with the Applicant's projected estimate. Also a lower or higher percentage of the PHA allowance may be used, depending on the amount of common area, and adjustments will be made for utilities typically paid by tenants that in the subject are owner-paid as determined by the Underwriter. The underwriting tolerance level for this line item is 30%.

(F) Water, Sewer and Trash Expense. Water, Sewer and Trash Expense includes all water, sewer and trash expenses paid by the owner. It would also include any pass-through water, sewer and trash expense that is reflected in the unit rents. Historically, the lower of the PHA allowance or the TDHCA Database average has been used. The underwriting tolerance level for this line item is 30%.

(G) Insurance Expense. Insurance Expense includes any insurance for the buildings, contents, and liability but not health or workman's compensation insurance. Historically, the TDHCA Database is used with a minimum $0.16 per net rentable square foot. Additional weight is given to a Third Party bid or insurance cost estimate provided in the application reflecting a higher amount for the proposed Development. The underwriting tolerance level for this line item is 50%.

(H) Property Tax. Property Tax includes all real and personal property taxes but not payroll taxes. The TDHCA Database is used to interpret a per unit assessed value average for similar properties which is applied to the actual current tax rate. The per unit assessed value is most often contained within a range of $15,000 to $35,000 but may be higher or lower based upon documentation from the local tax assessor. Location, size of the units, and comparable assessed values also play a major role in evaluating this line item expense. Property tax exemptions or proposed payment in lieu of taxes (PILOT) must be documented as being reasonably achievable if they are to be considered by the Underwriter. For Community Housing Development Organization ("CHDO") owned or controlled properties, this documentation includes, at a minimum, evidence of the CHDO designation from the State or local participating jurisdiction and a letter from the local taxing authority recognizing that the Applicant is or will be considered eligible for the property exemption. The underwriting tolerance level for this line item is 10%.

(I) Reserves. Reserves include annual reserve for replacements of future capitalizable expenses as well as any ongoing additional operating reserve requirements. The Underwriter includes reserves of $200 per unit for new construction and $300 per unit for rehabilitation Developments. Higher levels of reserves may be used if they are documented in the financing commitment letters. The Underwriter will require documentation for any difference from the $200 new construction and $300 rehabilitation standard.

(J) Other Expenses. The Underwriter will include other reasonable and documented expenses, other than depreciation, interest expense, lender or syndicator's asset management fees, or other ongoing partnership fees. Lender or syndicator's asset management fees or other ongoing partnership fees are not considered in the Department's calculation of debt coverage in any way. The most common other expenses are described in more detail in clauses (i) through (iii) of this subparagraph.

(i) Supportive Services Expense. Supportive Services Expense includes the cost to the owner of any non-traditional tenant benefit such as payroll for instruction or activities personnel. Documented contract costs will be reflected in Other Expenses. Any selection points for this item will be evaluated prior to underwriting. The Underwriter's verification will be limited to assuring any documented costs are included. For all transactions supportive services expenses are considered part of Other Expenses and are considered part of the debt coverage ratio.

(ii) Security Expense. Security Expense includes contract or direct payroll expense for policing the premises of the Development and is included as part of Other Expenses. The Applicant's amount is moved to Other Expenses and typically accepted as provided. The Underwriter will require documentation of the need for security expenses that exceed 50% of the anticipated payroll and payroll expenses estimate discussed in subsection (d)(4)(C) of this section.

(iii) Compliance Fees. Compliance fees include only compliance fees charged by TDHCA. The Department's charge for a specific program may vary over time, however, the Underwriter uses the current charge per unit per year at the time of underwriting. For all transactions compliance fees are considered part of Other Expenses and are considered part of the debt coverage ratio.

(6) Net Operating Income and Debt Service. NOI is the difference between the EGI and total operating expenses. If the NOI figure provided by the Applicant is within five percent of the NOI figure calculated by the Underwriter, the Applicant's figure is characterized as acceptable or reasonable in the Report, however, for purposes of calculating the DCR the Underwriter will maintain and use its independent calculation of NOI regardless of the characterization of the Applicant's figure. Only if the Applicant's EGI, total expenses, and NOI are each within five percent of the Underwriter's estimates and characterized as acceptable or reasonable in the Report will the Applicant's estimate of NOI be used to determine the acceptable debt service amount. In all other cases the Underwriter's estimates are used. In addition to the NOI, the interest rate, term, and debt coverage ratio range affect the determination of the acceptable debt service amount.

(A) Interest Rate. The interest rate used should be the rate documented in the commitment letter. The maximum rate that will be allowed for a competitive application cycle is evaluated by the Director of Credit Underwriting and posted to the Department's web site prior to the close of the application acceptance period. Historically this maximum acceptable rate has been at or below the average rate for 30-year U.S. Treasury Bonds plus 400 basis points.

(B) Term. The primary debt loan term is reflected in the commitment letter. The Department generally requires an amortization of not less than 30 years and not more than 50 years or an adjustment to the amortization structure is evaluated and recommended. In non-Tax Credit transactions a lesser amortization term may be used if the Department's funds are fully amortized over the same period.

(C) Acceptable Debt Coverage Ratio Range. The initial acceptable DCR range for all priority or foreclosable lien financing plus the Department's proposed financing falls between a minimum of 1.10 to a maximum of 1.30. In rare instances, such as for HOPE VI and USDA Rural Development transactions, the minimum DCR may be less than 1.10 based upon documentation of acceptance of such an acceptable DCR from the lender. If the DCR is less than the minimum, a reduction in the debt service amount is recommended based upon the rates and terms in the permanent loan commitment letter as long as they are within the ranges in subparagraphs (A) and (B) of this paragraph. If the DCR is greater than the maximum, an increase in the debt service amount is recommended based upon the rates and terms in the permanent loan commitment letter as long as they are within the ranges in subparagraphs (A) and (B) of this paragraph, and the funding gap is reviewed to determine the continued need for Department financing. When the funding gap is reduced no adjustments are made to the level of Department financing unless there is an excess of financing, after the need for deferral of any developer fee is eliminated. If the increase in debt capacity provides excess sources of funds, the Underwriter adjusts any Department grant funds to a loan, if possible, and/or adjusts the interest rate of any Department loans upward until the DCR does not exceed the maximum or up to the prevailing current market rate for similar conventional funding, whichever occurs first. Where no Department grant or loan exists or the full market interest rate for the Department's loan has been accomplished, the Underwriter increases the conventional debt amount until the DCR is reduced to the maximum allowable. Any adjustments in debt service will become a condition of the Report, however, future changes in income, expenses, rates, and terms could allow additional adjustments to the final debt amount to be acceptable. In a Tax Credit transaction, an excessive DCR could negatively affect the amount of recommended tax credit, if based upon the Gap Method, more funds are available than are necessary after all deferral of developer fee is reduced to zero.

(7) Long Term Feasibility. The Underwriter will evaluate the long term feasibility of the Development by creating a 30-year operating proforma. A three percent annual growth factor is utilized for income and a four percent annual growth factor is utilized for expenses. The base year projection utilized is the Underwriter's EGI, expenses, and NOI unless the Applicant's EGI, total expenses, and NOI are each within five percent of the Underwriter's estimates and characterized as acceptable or reasonable in the Report. The DCR should remain above a 1.10 and a continued positive Cash Flow should be projected for the initial 30-year period in order for the Development to be characterized as feasible for the long term. Any Development where the amount of cumulative Cash Flow over the first fifteen years is insufficient to pay the projected amount of deferred developer fee amortized in irregular payments at zero percent interest is characterized as infeasible and will not be recommended for funding unless the Underwriter can determine a plausible alternative feasible financing structure and conditions the recommendation(s) in the Report accordingly.

(e) Development Costs. The Department's estimate of the Development's cost will be based on the Applicant's project cost schedule to the extent that it can be verified to a reasonable degree of certainty with documentation from the Applicant and tools available to the Underwriter. For new construction Developments, the Applicant's total cost estimate will be compared to the Underwriter's total cost estimate and where the difference in cost exceeds five percent of the Underwriter's estimate, the Underwriter shall substitute their own estimate for the Total Housing Development Cost to determine the Equity Gap Method and Eligible Basis Method where applicable. In the case of a rehabilitation Development, the Underwriter may use a lower tolerance level due to the reliance upon the Applicant's authorized Third Party cost assessment. Where the Applicant's costs are inconsistent with documentation provided in the Application, the Underwriter may adjust the Applicant's total cost estimate. The Department will create and utilize a feedback mechanism to communicate and allow for clarification by the Applicant before the Underwriter's total cost estimate is substituted for the Applicant's estimate.

(1) Acquisition Costs. The proposed acquisition price is verified with the fully executed site control document(s) for the entirety of the site.

(A) Excess Land Acquisition. Where more land is being acquired than will be utilized for the site and the remaining acreage is not being utilized as permanent green space, the value ascribed to the proposed Development will be prorated from the total cost reflected in the site control document(s). An appraisal or tax assessment value may be tools that are used in making this determination; however, the Underwriter will not utilize a prorated value greater than the total amount in the site control document(s).

(B) Identity of Interest Acquisitions. Where the seller or any principals of the seller is an Affiliate, Beneficial Owner, or Related Party to the Applicant, Developer, General Contractor, Housing Consultant, or persons receiving any portion of the Contractor or Developer Fees, the sale of the property will be considered to be an Identity of Interest transfer. In all such transactions the Applicant is required to provide the additional documentation identified in clauses (i) through (iv) of this subparagraph to support the transfer price and this information will be used by the Underwriter to make a transfer price determination.

(i) Documentation of the original acquisition cost, such as the settlement statement.

(ii) An appraisal that meets the Department's Appraisal Rules and Guidelines as described in §1.34 of this subchapter. In no instance will the acquisition value utilized by the Underwriter exceed the appraised value.

(iii) A copy of the current tax assessment value for the property.

(iv) Any other reasonably verifiable costs of owning, holding, or improving the property that when added to the value from clause (i) of this subparagraph justifies the Applicant's proposed acquisition amount.

(I) For land-only transactions, documentation of owning, holding or improving costs since the original acquisition date may include: property taxes; interest expense; a calculated return on equity at a rate consistent with the historical returns of similar risks; the cost of any physical improvements made to the property; the cost of rezoning, replatting, or developing the property; or any costs to provide or improve access to the property.

(II) For transactions which include existing buildings that will be rehabilitated or otherwise maintained as part of the property, documentation of owning, holding, or improving costs since the original acquisition date may include capitalized costs of improvements to the property and the cost of exit taxes not to exceed an amount necessary to allow the sellers to be indifferent to foreclosure or breakeven transfer.

(C) Non-Identity of Interest Acquisition of Buildings for Tax Credit Properties. In order to make a determination of the appropriate building acquisition value, the Applicant will provide and the Underwriter will utilize an appraisal that meets the Department's Appraisal Rules and Guidelines as described in §1.34 of this subchapter. The value of the improvements are the result of the difference between the as-is appraised value less the land value. Where the actual sales price is more than ten percent different than the appraised value, the Underwriter may alternatively prorate the actual sales price based upon the calculated improvement value over the as-is value provided in the appraisal, so long as the improved value utilized by the Underwriter does not exceed the total as-is appraised value of the entire property.

(2) Off-Site Costs. Off-Site costs are costs of Development up to the site itself such as the cost of roads, water, sewer and other utilities to provide the site with access. All off-site costs must be well documented and certified by a Third Party engineer as presented in the required application form to be included in the Underwriter's cost budget.

(3) Site Work Costs. If Project site work costs exceed $7,500 per Unit, the Applicant must submit a detailed cost breakdown certified as being prepared by a Third Party engineer or architect, to be included in the Underwriter's cost budget. In addition, for applicants seeking Tax Credits, a letter from a certified public accountant properly allocating which portions of the engineer's or architect's site costs should be included in eligible basis and which ones are ineligible, in keeping with the holding of the Internal Revenue Service Technical Advice Memoranda, is required for such costs to be included in the Underwriter's cost budget.

(4) Direct Construction Costs. Direct construction costs are the costs of materials and labor required for the building or rehabilitation of a Development.

(A) New Construction. The Underwriter will use the "Average Quality" multiple or townhouse costs, as appropriate, from the Marshal and Swift Residential Cost Handbook, based upon the details provided in the application and particularly site and building plans and elevations. If the Development contains amenities not included in the Average Quality standard, the Department will take into account the costs of the amenities as designed in the Development.

If the Development will contain single-family buildings, then the cost basis should be consistent with single-family Average Quality as defined by Marshall & Swift Residential Cost Handbook. Whenever the Applicant's estimate is more than five percent greater or less than the Underwriter's Marshall and Swift based estimate, the Underwriter will attempt to reconcile this concern and ultimately identify this as a cost concern in the Report.

(B) Rehabilitation Costs. In the case where the Applicant has provided Third Party signed bids with a work write-up from contractors or estimates from certified or licensed professionals which are inconsistent with the Applicant's figures as proposed in the project cost schedule, the Underwriter utilizes the Third Party estimations in lieu of the Applicant's estimates even when the difference between the Underwriter's costs and the Applicant's costs is less than five percent. The underwriting staff will evaluate rehabilitation Developments for comprehensiveness of the Third Party work write-up and will determine if additional information is needed.

(5) Hard Cost Contingency. This is the only contingency figure considered by the Underwriter and is only considered in underwriting prior to final cost certification. Contingency is limited to a maximum of five percent (5%) of direct costs plus site work for new construction Developments and ten percent (10%) of direct costs plus site work for rehabilitation Developments. The Applicant's figure is used by the Underwriter if the figure is less than five percent (5%).

(6) Contractor Fee Limits. Contractor fees are limited to six percent (6%) for general requirements, two percent (2%) for contractor overhead, and six percent (6%) for contractor profit. These fees are based upon the direct costs plus site work costs. Minor reallocations to make these fees fit within these limits may be made at the discretion of the Underwriter. For Developments also receiving financing from TxRD-USDA, the combination of builder's general requirements, builder's overhead, and builder's profit should not exceed the lower of TDHCA or TxRD-USDA requirements.

(7) Developer Fee Limits. For Tax Credit Developments, the development cost associated with developer's fees cannot exceed fifteen percent (15%) of the project's Total Eligible Basis, as defined in §§49 and 50 of this title (adjusted for the reduction of federal grants, below market rate loans, historic credits, etc.), not inclusive of the developer fees themselves. The fee can be divided between overhead and fee as desired but the sum of both items must not exceed the maximum limit. The Developer Fee may be earned on non-eligible basis activities, but only the maximum limit as a percentage of eligible basis items may be included in basis for the purpose of calculating a project's credit amount. Any non-eligible amount of developer fee claimed must be proportionate to the work for which it is earned. For non-Tax Credit Developments, the percentage remains the same but is based upon total development costs less: the fee itself, land costs, the costs of permanent financing, excessive construction period financing described in paragraph (8) of this subsection, and reserves.

(8) Financing Costs. Eligible construction period financing is limited to not more than one year's worth of fully drawn construction loan funds at the construction loan interest rate indicated in the commitment. Any excess over this amount is removed to ineligible cost and will not be considerd in the determination of developer fee.

(9) Reserves. The Department will utilize the terms proposed by the syndicator or lender as described in the commitment letter(s) or the amount described in the Applicants project cost schedule if it is within the range of two to six months of stabilized operating expenses less management fees plus debt service.

(10) Other Soft Costs. For Tax Credit Developments all other soft costs are divided into eligible and ineligible costs. Eligible costs are defined by Internal Revenue Code but generally are costs that can be capitalized in the basis of the Development for tax purposes; whereas ineligible costs are those that tend to fund future operating activities. The Underwriter will evaluate and accept the allocation of these soft costs in accordance with the Department's prevailing interpretation of the Internal Revenue Code. If the Underwriter questions the eligibility of any soft costs, the Applicant is given an opportunity to clarify and address the concern prior to removal form basis.

(f) Developer Capacity. The Underwriter will evaluate the capacity of the Person(s) accountable for the role of the Developer to determine their ability to secure financing and successfully complete the Development. The Department will review certification of previous participation, financial statements, and personal credit reports for those individuals anticipated to guarantee the completion of the Development.

(1) Previous Experience. The Underwriter will characterize the Development as "high risk" if the Developer has no previous experience in completing construction and reaching stabilized occupancy in a previous Development.

(2) Credit Reports. The Underwriter will characterize the Development as "high risk" if the Developer or principals thereof have a credit score which reflects a 40% or higher potential default rate.

(3) Financial Statements of Principals. The Applicant, Developer, any principals of the Applicant, General Partner, and Developer and any Person who will be required to guarantee the Development will be required to provide a signed and dated financial statement and authorization to release credit information. The financial statement for individuals may be provided on the Personal Financial and Credit Statement form provided by the Department and must not be older than 90 days from the first day of the Application Acceptance Period. If submitting partnership and corporate financials in addition to the individual statements, the certified annual financial statement or audited statement, if available, should be for the most recent fiscal year not more than twelve months from first date of the Application Acceptance Period. This document is required for an entity even if the entity is wholly-owned by a person who has submitted this document as an individual. For entities being formed for the purposes of facilitating the contemplated transaction but who have no meaningful financial statements at the present time, a letter attesting to this condition will suffice.

(A) Financial statements must be provided to the Underwriting Division at least seven days prior to the close of the application acceptance period in order for an acknowledgment of receipt to be provided as a substitute for inclusion of the statements themselves in the application. The Underwriting Division will FAX, e-mail or send via regular mail an acknowledgement for each financial statement received. The acknowledgement will not constitute acceptance by the Department that financial statements provided are acceptable in any manner but only acknowledge their receipt. Where time permits, the acknowledgement may identify the date of the statement and whether it will meet the time constraints under the QAP.

(B) The Underwriter will evaluate and discuss individual financial statements in a confidential portion of the Report. Where the financial statement indicates a limited net worth and/ or lack of significant liquidity and the Development is characterized as a high risk for either of the reasons described in paragraphs (1) and (2) of this subsection, the Underwriter must condition any potential award upon the identification and inclusion of additional Development partners who can meet the criteria described in this subsection.

(g) Other Underwriting Considerations. The Underwriter will evaluate numerous additional elements as described in subsection (b)

of this section and those that require further elaboration are identified in this subsection.

(1) Floodplains. The Underwriter evaluates the site plan and floodplain map and information provided to determine if any of the buildings, drives, or parking areas reside within the 100-year floodplain. If such a determination is made by the Underwriter the Report will include a condition that the Applicant must pursue and receive a Letter of Map Amendment (LOMA) or Letter of Map Revision (LOMR-F) or require the Applicant to identify the cost of flood insurance for the buildings and for the tenant's contents for buildings within the 100-year floodplain.

(2) Inclusive Capture Rate. The Underwriter will not recommend the approval of funds to new housing Developments requesting funds where the anticipated inclusive capture rate is in excess of 25% for the Primary Market unless the market is a rural market or the units are targeted toward the elderly. In rural markets and for Developments that are strictly targeted to the elderly, the Underwriter will not recommend the approval of funds to new housing Developments requesting funds from the Department where the anticipated capture rate is in excess of 100% of the qualified demand. Affordable Housing which replaces previously existing substandard Affordable Housing within the same Submarket on a Unit for Unit basis, and which gives the displaced tenants of the previously existing Affordable Housing a leasing preference, is excepted from these inclusive capture rate restrictions. The inclusive capture rate for the Development is defined as the sum of the proposed units for a given project plus any previously approved but not yet stabilized new Comparable Units in the Submarket divided by the total income-eligible targeted renter demand identified in the Market Analysis for a specific Development's Primary Market. The Department defines Comparable Units, in this instance, as units that are dedicated to the same household type as the proposed subject property using the classifications of family, elderly or transitional as housing types. The Department defines a stabilized project as one that has maintained a 90% occupancy level for at least 12 consecutive months. The Department will independently verify the number of affordable units included in the market study and will ensure that all projects previously allocated funds through the Department are included in the final analysis. The documentation requirements needed to support decisions relating to this item are identified in §1.33 of this subchapter.

§1.33. Market Analysis Rules and Guidelines.

(a) General Provision. A Market Analysis prepared for the Department must evaluate the need for decent, safe, and sanitary housing at rental rates or sales prices that eligible tenants can afford. The analysis must determine the feasibility of the subject property rental rates or sales price and state conclusions as to the impact of the property with respect to the determined housing needs. Furthermore, the Market Analyst shall certify that they are a Third Party and are not being compensated for the assignment based upon a predetermined outcome.

(b) Self-Contained. A Market Analysis prepared for the Department must contain sufficient data and analysis to allow the reader to understand the market data presented, the analysis of the data, and the conclusion(s) derived from such data and its relationship to the subject property. The complexity of this requirement will vary in direct proportion with the complexity of the real estate and the real estate market being analyzed. The analysis must clearly lead the reader to the same or similar conclusion(s) reached by the Market Analyst.

(c) Market Analyst Qualifications. A Market Analysis submitted to the Department must be prepared and certified by an approved Market Analyst. The Department will maintain an approved Market Analyst list based on the guidelines set forth in paragraphs (1) through (3) of this subsection.

(1) Market Analysts must submit subparagraphs (A) through (F) of this paragraph for review by the Department.

(A) A current organization chart or list reflecting all members of the firm who may author or sign the Market Analysis.

(B) General information regarding the firm's experience including references, the number of previous similar assignments and time frames in which previous assignments were completed.

(C) Resumes for all members of the firm who may author or sign the Market Analysis.

(D) Certification from an authorized representative of the firm that the services to be provided will conform to the Department's Market Analysis Rules and Guidelines described in this section.

(E) A sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines described in this section.

(F) Documentation of organization and good standing in the State of Texas.

(2) During the underwriting process each Market Analysis will be reviewed and any discrepancies with the rules and guidelines set forth in this section may be identified and require timely correction. Subsequent to the completion of the funding cycle and as time permits, staff and/or a review appraiser will re-review a sample set of submitted market analyses to ensure that the Department's Market Analysis Rules and Guidelines are met. If it is found that a Market Analyst has not conformed to the Department's Market Analysis Rules and Guidelines, as certified to, the Market Analyst will be notified of the discrepancies in the Market Analysis and will be removed from the approved Market Analyst list.

(A) Removal from the list of approved Market Analysts will not, in and of itself, invalidate a Market Analysis that has already been commissioned not more than 90 days before the Department's due date for submission as of the date the change in status of the Market Analyst is posted to the web.

(B) To be reinstated as an approved Market Analyst, the Market Analyst must submit a new sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines. This new study will then be reviewed for conformance with the rules of this section and if found to be in compliance, the Market Analyst will be reinstated.

(3) The list of approved Market Analysts is posted on the Department's web site and updated within 72 hours of a change in the status of a Market Analyst.

(d) Market Analysis Contents. A Market Analysis for a multifamily Development prepared for the Department must be organized in a format that follows a logical progression and must include, at minimum, items addressed in paragraphs (1) through (17) of this subsection.

(1) Title Page. Include property address and/or location, housing type, TDHCA addressed as client, effective date of analysis, date of report, name and address of person authorizing report, and name and address of Market Analyst.

(2) Letter of Transmittal. Include date of letter, property address and/or location, description of property type, statement as to

purpose of analysis, reference to accompanying Market Analysis, reference to all person(s) providing significant assistance in the preparation of analysis, statement from Market Analyst indicating any and all relationships to any member of the development team and/or owner of the subject property, date of analysis, effective date of analysis, date of property inspection, name of person(s) inspecting subject property, and signatures of all Market Analysts authorized to work on the assignment.

(3) Table of Contents. Number the exhibits included with the report for easy reference.

(4) Summary Form. Complete and include the TDHCA Primary Market Area Analysis Summary form. An electronic version of the form and instructions are available on the Department's website at http://www.tdhca.state.tx.us/underwrite.html.

(5) Assumptions and Limiting Conditions. Include a summary of all assumptions, both general and specific, made by the Market Analyst concerning the property.

(6) Disclosure of Competency. Include the Market Analyst's qualifications, detailing education and experience of all Market Analysts authorized to work on the assignment.

(7) Identification of the Property. Provide a statement to acquaint the reader with the Development. Such information includes street address, tax assessor's parcel number(s), and development characteristics.

(8) Statement of Ownership for the Subject Property. Disclose the current owners of record and provide a three year history of ownership.

(9) Purpose of the Market Analysis. Provide a brief comment stating the purpose of the analysis.

(10) Scope of the Market Analysis. Address and summarize the sources used in the Market Analysis. Describe the process of collecting, confirming, and reporting the data used in the Market Analysis.

(11) Secondary Market Information. Include a general description of the geographic location and demographic data and analysis of the secondary market area if applicable. The secondary market area will be defined on a case-by-case basis by the Market Analyst engaged to provide the Market Analysis. Additional demand factors and comparable property information from the secondary market may be addressed. However, use of such information in conclusions regarding the subject property must be well-reasoned and documented. A map of the secondary market area with the subject property clearly identified should be provided. In a Market Analysis for a Development targeting families, the demand and supply effects from the secondary market are not significant. For a Development that targets smaller subgroups such as elderly households, the demand and supply effects may be more relevant.

(12) Primary Market Information. Include a specific description of the subject's geographical location, specific demographic data, and an analysis of the Primary Market Area. The Primary Market Area will be defined on a case-by-case basis by the Market Analyst engaged to provide the Market Analysis. The Department encourages a conservative Primary Market Area delineation with use of natural political/geographical boundaries whenever possible. Furthermore, the Primary Market for a Development chosen by the Market Analyst will generally be most informative if it contains no more than 250,000 persons, though a Primary Market with more residents may be indicated by the Market Analyst, where political/geographic boundaries indicate doing so, with additional supportive narrative. A summary of the neighborhood trends, future development, and economic viability of the specific area must be addressed with particular emphasis given to Affordable Housing. A map of the Primary Market with the subject property clearly identified must be provided. A separate scaled distance map of the Primary Market that clearly identifies the subject and the Local Amenities must also be included.

(13) Comparable Property Analysis. Provide a comprehensive evaluation of the existing supply of comparable properties in the Primary Market Area defined by the Market Analyst. The analysis should include census data documenting the amount and condition of local housing stock as well as information on building permits since the census data was collected. The analysis must separately evaluate existing market rate housing and existing subsidized housing to include local housing authority units and any and all other rent- or income-restricted units with respect to items discussed in subparagraphs (A) through (F) of this paragraph.

(A) Analyze comparable property rental rates. Include a separate attribute adjustment matrix for the most comparable market rate and subsidized units to the units proposed in the subject, a minimum of three developments each. The Department recommends use of HUD Form 922273. Analysis of the Market Rents must be sufficiently detailed to permit the reader to understand the Market Analyst's logic and rationale. Total adjustments made to the Comparable Units in excess of 15% suggest a weak comparable. Total adjustments in excess of 15% must be supported with additional narrative. The Department also encourages close examination of the overall use of concessions in the Primary Market Area and the effect on effective Market Rents.

(B) Provide an Affordability Analysis of the comparable unrestricted units.

(C) Analyze occupancy rates of each of the comparable properties and occupancy trends by property class. Physical occupancy should be compared to economic occupancy.

(D) Provide annual turnover rates of each of the comparable properties and turnover trends by property class.

(E) Provide absorption rates for each of the comparable properties and absorption trends by property class.

(F) The comparable Developments must indicate current research for the proposed property type. The rental data must be confirmed with the landlord, tenant or agent and individual data sheets must be included. The minimum content of the individual data sheets include: property address, lease terms, occupancy, turnover, development characteristics, current physical condition of the property, etc. A scaled distance map of the Primary Market that clearly identifies the subject Development and existing comparable market rate developments and all existing/proposed subsidized developments must be provided.

(14) Demand Analysis. Provide a comprehensive evaluation of the demand for the proposed housing. The analysis must include an analysis of the need for market rate and Affordable Housing within the subject Development's Primary Market Area using the most current census and demographic data available. The demand for housing must be quantified, well reasoned, and segmented to include only relevant income- and age-eligible targets of the subject Development. Each demand segment should be addressed independently and overlapping segments should be minimized and clearly identified when required. In instances where more than 20% of the proposed units are comprised of three- and four-bedroom units, the analysis should be refined by factoring in the number of large households to avoid overestimating demand. The final quantified demand calculation may

include demand due to items in subparagraphs (A) through (C) of this paragraph.

(A) Quantify new household demand due to documented population and household growth trends for targeted income-eligible rental households OR confirmed targeted income-eligible rental household growth due to new employment growth.

(B) Quantify existing household demand due to documented turnover of existing targeted income-eligible rental households OR documented rent over-burdened targeted income-eligible rental households that would not be rent over-burdened in the proposed Development and documented targeted income-eligible rental households living in substandard housing.

(C) Include other well reasoned and documented sources of demand determined by the Market Analyst.

(15) Conclusions. Include a comprehensive evaluation of the subject property, separately addressing each housing type and specific population to be served by the Development in terms of items in subparagraphs (A) through (F) of this paragraph.

(A) Provide a separate market and subsidized rental rate conclusion for each proposed unit type and rental restriction category. Conclusions of rental rates below the maximum net rent limit rents must be well reasoned, documented, consistent with the market data, and address any inconsistencies with the conclusions of the demand for the subject units.

(B) Provide rental income, secondary income, and vacancy and collection loss projections for the subject derived independent of the applicant's estimates, but based on historic and/or well established data sources of comparable properties.

(C) Correlate and quantify secondary market and Primary Market demographics of housing demand to the current and proposed supply of housing and the need for each proposed unit type and the subject Development as a whole. The subject Development specific demand calculation may consider total demand from the date of application to the proposed place in service date.

(D) Calculate an inclusive capture rate for the subject Development defined as the sum of the proposed subject units plus any previously approved but unstabilized new Comparable Units in the Primary Market divided by the total income-eligible targeted renter demand identified by the Market Analysis for the subject Development's Primary Market Area. The Market Analyst should calculate a separate capture rate for the subject Development's proposed affordable units and market rate units as well as the subject Development as a whole.

(E) Project an absorption period and rate for the subject until a Sustaining Occupancy level has been achieved. If absorption projections for the subject differ significantly from historic data, an explanation of such should be included.

(F) Analyze the effects of the subject Development on the Primary Market occupancy rates and provide sufficient support documentation.

(16) Photographs. Include good quality color photographs of the subject property (front, rear and side elevations, on-site amenities, interior of typical units if available). Photographs should be properly labeled. Photographs of the neighborhood, street scenes, and comparables should also be included. An aerial photograph is desirable but not mandatory.

(17) Appendices. Any Third Party reports relied upon by the Market Analyst must be provided in appendix form and verified directly by the Market Analyst as to its validity.

(e) Single Family Developments.

(1) Market studies for single-family Developments proposed as rental Developments must contain the elements set forth in subsections (d)(1) through (17) of this section. Market analyses for Developments proposed for single-family home ownership must contain the elements set forth in subsections (d)(1) through (17) of this section as they would apply to home ownership in addition to paragraphs (2) through (4) of this subsection.

(2) Include no less than three actual market transactions to inform the reader of current market conditions for the sale of each unit type in the price range contemplated for homes in the proposed Development. The comparables must rely on current research for this specific property type. The sales prices must be confirmed with the buyer, seller, or real estate agent and individual data sheets must be included. The minimum content of the individual data sheets should include property address, development characteristics, purchase price and terms, description of any federal, state, or local affordability subsidy associated with the transaction, date of sale, and length of time on the market.

(3) Analysis of the comparable sales should be sufficiently detailed to permit the reader to understand the Market Analyst's logic and rationale. The evaluation should address the appropriateness of the living area, room count, market demand for Affordable Housing, targeted sales price range, demand for interior and/or exterior amenities, etc. A scaled distance map of the Primary Market that clearly identifies the subject Development and existing comparable single family homes must be provided.

(4) A written statement is required stating if the projected sales prices for homes in the proposed Development are, or are not, below the range for comparable homes within the Primary Market Area. Sufficient documentation should be included to support the Market Analyst's conclusion with regard to the Development's absorption.

(f) The Department reserves the right to require the Market Analyst to address such other issues as may be relevant to the Department's evaluation of the need for the subject property and the provisions of the particular program guidelines.

(g) All applicants shall acknowledge, by virtue of filing an application, that the Department shall not be bound by any such opinion or Market Analysis, and may substitute its own analysis and underwriting conclusions for those submitted by the Market Analyst

§1.34. Appraisal Rules and Guidelines.

(a) General Provisions. Appraisals prepared for the Department must conform to the Uniform Standards of Professional Appraisal Practice (USPAP) as adopted by the Appraisal Standards Board of the Appraisal Foundation. Self-contained reports must describe sufficient and adequate data and analyses to support the final opinion of value. The final value(s) must be reasonable, based on the information included. Any Third Party reports relied upon by the appraiser must be verified by the appraiser as to the validity of the data and the conclusions. The report must contain sufficient data, included in the appendix when possible, and analysis to allow the reader to understand the property being appraised, the market data presented, analysis of the data, and the appraiser's value conclusion. The complexity of this requirement will vary in direct proportion with the complexity of the real estate and real estate interest being appraised. The report should lead the reader to the same or similar conclusion(s) reached by the appraiser.

(b) Value Estimates. All appraisals shall contain a separate estimate of land value, based upon sales comparables. Appraisal assignments for new construction, which are required to provide a future value of to be completed structures, shall provide an "as restricted with favorable financing" value as well as an "unrestricted market" value. Properties to be rehabilitated shall address the "as restricted with favorable financing" value as well as both an "as is" value and an "as completed" value. Include a separate assessment of personal property, furniture, fixtures, and equipment (FF&E) and/or intangible items because their economic life may be shorter than the real estate improvements and may require different lending or underwriting considerations. If personal property, FF&E, or intangible items are not part of the transaction or value estimate, a statement to such effect should be included.

(c) Date of Appraisal. The appraisal report must be dated and signed by the appraiser who inspected the property. The date of the valuation, except in the case of proposed construction or extensive rehabilitation, must be a current date. The date of valuation should not be more than six months prior to the date of the application to the Department.

(d) Appraiser Qualifications. The qualifications of each appraiser are determined and approved on a case-by-case basis by the Director of Credit Underwriting and/or review appraiser, based upon the quality of the report itself and the experience and educational background of the appraiser, as set forth in the Statement of Qualifications appended to the appraisal. At minimum, a qualified appraiser will be certified or licensed by the Texas Appraiser Licensing and Certification Board.

(e) Appraisal Contents. An appraisal of a Development prepared for the Department must be organized in a format that follows a logical progression and must include, at minimum, items addressed in paragraphs (1) through (18) of this subsection.

(1) Title Page. Include identification as to appraisal (e.g., type of process - complete or limited, type of report - self-contained, summary or restricted), property address and/or location, housing type, the Department addressed as the client, effective date of value estimate(s), date of report, name and address of person authorizing report, and name and address of appraiser(s).

(2) Letter of Transmittal. Include date of letter, property address and/or location, description of property type, extraordinary/special assumptions or limiting conditions that were approved by person authorizing the assignment, statement as to function of the report, statement of property interest being appraised, statement as to appraisal process (complete or limited), statement as to reporting option (self-contained, summary or restricted), reference to accompanying appraisal report, reference to all person(s) that provided significant assistance in the preparation of the report, date of report, effective date of appraisal, date of property inspection, name of person(s) inspecting the property, identification of type(s) of value(s) estimated (e.g., market value, leased fee value, as-financed value, etc.), estimate of marketing period, signatures of all appraisers authorized to work on the assignment.

(3) Table of Contents. Number the exhibits included with the report for easy reference.

(4) Assumptions and Limiting Conditions. Include a summary of all assumptions, both general and specific, made by the appraiser(s) concerning the property being appraised. Statements may be similar to those recommended by the Appraisal Institute.

(5) Certificate of Value. This section may be combined with the letter of transmittal and/or final value estimate. Include statements similar to those contained in Standard Rule 2-3 of USPAP.

(6) Disclosure of Competency. Include appraiser's qualifications, detailing education and experience, as discussed in subsection (c) of this section.

(7) Identification of the Property. Provide a statement to acquaint the reader with the property. Real estate being appraised must be fully identified and described by street address, tax assessor's parcel number(s), and development characteristics. Include a full, complete, legible, and concise legal description.

(8) Statement of Ownership of the Subject Property. Discuss all prior sales of the subject property which occurred within the past three years. Any pending agreements of sale, options to buy, or listing of the subject property must be disclosed in the appraisal report.

(9) Purpose and Function of the Appraisal. Provide a brief comment stating the purpose of the appraisal and a statement citing the function of the report.

(A) Property Rights Appraised. Include a statement as to the property rights (e.g., fee simple interest, leased fee interest, leasehold, etc.) being considered. The appropriate interest must be defined in terms of current appraisal terminology with the source cited.

(B) Definition of Value Premise. One or more types of value (e.g., "as is", "as if", "prospective market value") may be required. Definitions corresponding to the appropriate value must be included with the source cited.

(10) Scope of the Appraisal. Address and summarize the methods and sources used in the valuation process. Describes the process of collecting, confirming, and reporting the data used in the assignment.

(11) Regional Area Data. Provide a general description of the geographic location and demographic data and analysis of the regional area. A map of the regional area with the subject identified is requested, but not required.

(12) Neighborhood Data. Provide a specific description of the subject's geographical location and specific demographic data and an analysis of the neighborhood. A summary of the neighborhood trends, future development, and economic viability of the specific area should be addressed. A map with the neighborhood boundaries and the subject identified must be included.

(13) Site/Improvement Description. Discuss the site characteristics including subparagraphs (A) through (F) of this paragraph.

(A) Physical Site Characteristics. Describe dimensions, size (square footage, acreage, etc.), shape, topography, corner influence, frontage, access, ingress-egress, etc. associated with the site. Include a plat map and/or survey.

(B) Floodplain. Discuss floodplain (including flood map panel number) and include a floodplain map with the subject clearly identified.

(C) Zoning. Report the current zoning and description of the zoning restrictions and/or deed restrictions, where applicable, and type of development permitted. Any probability of change in zoning should be discussed. A statement as to whether or not the improvements conform to the current zoning should be included. A statement addressing whether or not the improvements could be rebuilt if damaged or destroyed, should be included. If current zoning is not consistent with the Highest and Best Use, and zoning changes are reasonable to expect, time and expense associated with the proposed

zoning change should be considered and documented. A zoning map should be included.

(D) Description of Improvements. Provide a thorough description and analysis of the improvement including size (net rentable area, gross building area, etc.), number of stories, number of buildings, type/quality of construction, condition, actual age, effective age, exterior and interior amenities, items of deferred maintenance, etc. All applicable forms of depreciation should be addressed along with the remaining economic life.

(E) Fair Housing. It is recognized appraisers are not an expert in such matters and the impact of such deficiencies may not be quantified; however, the report should disclose any potential violations of the Fair Housing Act of 1988, Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990 and/or report any accommodations (e.g., wheelchair ramps, handicap parking spaces, etc.) which have been performed to the property or may need to be performed.

(F) Environmental Hazards. It is recognized appraisers are not an expert in such matters and the impact of such deficiencies may not be quantified; however, the report should disclose any potential environmental hazards (e.g., discolored vegetation, oil residue, asbestos-containing materials, lead-based paint etc.) noted during the inspection.

(14) Highest and Best Use. Market Analysis and feasibility study is required as part of the highest and best use. The highest and best use analysis should consider subsection (d)(13)(A) through (F) of this section as well as a supply and demand analysis.

(A) The appraisal must inform the reader of any positive or negative market trends which could influence the value of the appraised property. Detailed data must be included to support the appraiser's estimate of stabilized income, absorption, and occupancy.

(B) The highest and best use section must contain a separate analysis "as if vacant" and "as improved" (or "as proposed to be improved/renovated"). All four elements in appropriate order as outlined in the Appraisal of Real Estate (legally permissible, physically possible, feasible, and maximally productive) must be sequentially considered.

(15) Appraisal Process. The Cost Approach, Sales Comparison Approach and Income Approach are three recognized appraisal approaches to valuing most properties. It is mandatory that all three approaches are considered in valuing the property unless specifically instructed by the Department to ignore one or more of the approaches; or unless reasonable appraisers would agree that use of an approach is not applicable. If an approach is not applicable to a particular property, then omission of such approach must be fully and adequately explained.

(A) Cost Approach. This approach should give a clear and concise estimate of the cost to construct the subject improvements. The type of cost (reproduction or replacement) and source(s) of the cost data should be reported.

(i) Cost comparables are desirable; however, alternative cost information may be obtained from Marshall & Swift Valuation Service or similar publications. The section, class, page, etc. should be referenced. All soft costs and entrepreneurial profit must be addressed and documented.

(ii) All applicable forms of depreciation must be discussed and analyzed. Such discussion must be consistent with the description of the improvements analysis.

(iii) The land value estimate should include a sufficient number of sales which are current, comparable, and similar to the subject in terms of highest and best use. Comparable sales information should include address, legal description, tax assessor's parcel number(s), sales price, date of sale, grantor, grantee, three year sales history, and adequate description of property transferred. The final value estimate should fall within the adjusted and unadjusted value ranges. Consideration and appropriate cash equivalent adjustments to the comparable sales price for subclauses (I) though (VII) of this clause should be made when applicable.

(I) Property rights conveyed.

(II) Financing terms.

(III) Conditions of sale.

(IV) Location.

(V) Highest and best use.

(VI) Physical characteristics (e.g., topography, size, shape, etc.).

(VII) Other characteristics (e.g., existing/proposed entitlements, special assessments, etc.).

(B) Sales Comparison Approach. This section should contain an adequate number of sales to provide the reader with the current market conditions concerning this property type. Sales data should be recent and specific for the property type being appraised. The sales must be confirmed with buyer, seller, or an individual knowledgeable of the transaction.

(i) Minimum content of the sales should include address, legal description, tax assessor's parcel number(s), sale price, financing considerations, and adjustment for cash equivalency, date of sale, recordation of the instrument, parties to the transaction, three year sale history, complete description of the property and property rights conveyed, and discussion of marketing time. A scaled distance map clearly identifying the subject and the comparable sales must be included.

(ii) Several methods may be utilized in the Sale Comparison Approach. The method(s) used must be reflective of actual market activity and market participants.

(I) Sale Price/Unit of Comparison. The analysis of the sale comparables must identify, relate and evaluate the individual adjustments applicable for property rights, terms of sale, conditions of sale, market conditions and physical features. Sufficient narrative analysis must be included to permit the reader to understand the direction and magnitude of the individual adjustments, as well as a unit of comparison value indicator for each comparable. The appraiser(s) reasoning and thought process must be explained.

(II) Potential Gross Income/Effective Gross Income Analysis. If used in the report, this method of analysis must clearly indicate the income statistics for the comparables. Consistency in the method for which such economically statistical data was derived should be applied throughout the analysis. At least one other method should accompany this method of analysis.

(III) NOI/Unit of Comparison. If used in the report, the net income statistics for the comparables must be calculated in the same manner and disclosed as such. It should be disclosed if reserves for replacement have been included in this method of analysis. At least one other method should accompany this method of analysis.

(C) Income Approach. This section is to contain an analysis of both the actual historical and projected income and expense aspects of the subject property.

(i) Market Rent Estimate/Comparable Rental Analysis. This section of the report should include an adequate number of actual market transactions to inform the reader of current market conditions concerning rental units. The comparables must indicate current research for this specific property type. The rental comparables must be confirmed with the landlord, tenant or agent and individual data sheets must be included. The minimum content of the individual data sheets should include property address, lease terms, description of the property (e.g., unit type, unit size, unit mix, interior amenities, exterior amenities, etc.), physical characteristics of the property, and location of the comparables. Analysis of the Market Rents should be sufficiently detailed to permit the reader to understand the appraiser's logic and rationale. Adjustment for lease rights, condition of the lease, location, physical characteristics of the property, etc. must be considered.

(ii) Comparison of Market Rent to Contract Rent. Actual income for the subject along with the owner's current budget projections must be reported, summarized and analyzed. If such data is unavailable, a statement to this effect is required and appropriate assumptions and limiting conditions should be made. The contract rents should be compared to the market-derived rents. A determination should be made as to whether the contract rents are below, equal to, or in excess of market rates. If there is a difference, its impact on value must be qualified.

(iii) Vacancy/Collection Loss. Historical occupancy data for the subject should be reported and compared to occupancy data from the rental comparable and overall occupancy data for the subject's market area.

(iv) Expense Analysis. Actual expenses for the subject, along with the owner's projected budget, must be reported, summarized, and analyzed. If such data is unavailable, a statement to this effect is required and appropriate assumptions and limiting conditions should be made. Historical expenses should be compared to comparables expenses of similar property types or published survey data (e.g., IREM, BOMA, etc.). Any expense differences should be reconciled. Historical data regarding the subject's assessment and tax rates should be included. A statement as to whether or not any delinquent taxes exist should be included.

(v) Capitalization. Several capitalization methods may be utilized in the Income Approach. The appraiser should present the method(s) reflective of the subject market and explain the omission of any method not considered in the report.

(I) Direct Capitalization. The primary method of deriving an overall rate (OAR) is through market extraction. If a band of investment or mortgage equity technique is utilized, the assumptions must be fully disclosed and discussed.

(II) Yield Capitalization (Discounted Cash Flow Analysis). This method of analysis should include a detailed and supportive discussion of the projected holding/investment period, income and income growth projections, occupancy projections, expense and expense growth projections, reversionary value and support for the discount rate.

(16) Reconciliation and Final Value Estimate. This section of the report should summarize the approaches and values that were utilized in the appraisal. An explanation should be included for any approach which was not included. Such explanations should lead the reader to the same or similar conclusion of value. Although the values for each approach may not "agree", the differences in values should be analyzed and discussed. Other values or interests appraised should be clearly labeled and segregated. Such values may include FF&E, leasehold interest, excess land, etc. In addition, rent restrictions, subsidies and incentives should be explained in the appraisal report and their impact, if any, needs to be reported in conformity with the Comment section of USPAP Standards Rule 1-2(e), which states, "Separation of such items is required when they are significant to the overall value." In the appraisal of subsidized housing, value conclusions that include the intangibles arising from the programs will also have to be analyzed under a scenario without the intangibles in order to measure their influence on value.

(17) Marketing Period. Given property characteristics and current market conditions, the appraiser(s) should employ a reasonable marketing period. The report should detail existing market conditions and assumptions considered relevant.

(18) Photographs. Provide good quality color photographs of the subject property (front, rear, and side elevations, on-site amenities, interior of typical units if available). Photographs should be properly labeled. Photographs of the neighborhood, street scenes, and comparables should be included. An aerial photograph is desirable but not mandatory.

(f) Additional Appraisal Concerns. The appraiser(s) must recognize and be aware of the particular TDHCA program rules and guidelines and their relationship to the subject's value. Due to the various programs offered by the Department, various conditions may be placed on the subject which would impact value. Furthermore, each program may require that the appraiser apply a different set of specific definitions for the conclusions of value to be provided. Consequently, as a result of such criteria, the appraiser(s) should be aware of such conditions and definitions and clearly identify them in the report.

§1.35. Environmental Site Assessment Rules and Guidelines

Environmental Site Assessment Guidelines. The environmental assessment required under Section 50.7(e) of this title should be conducted and reported in conformity with the standards of the American Society for Testing and Materials (ASTM) and such other recognized industry standards as a reasonable person would deem relevant in view of the Property's anticipated use for human habitation. The environmental assessment shall be conducted by an environmental or professional engineer and be prepared at the expense of the Development Owner.

(1) The report must include, but is not limited to:

(A) A review of records, interviews with people knowledgeable about the property;

(B) A certification that the environmental engineer has conducted an inspection of the property, the building(s), and adjoining properties, as well as any other industry standards concerning the preparation of this type of environmental assessment;

(C) A noise study is recommended for property located adjacent to or in close proximity to industrial zones, major highways, active rail lines, and civil and military airfields;

(D) A copy of a current survey, if available, or other drawing of the site reflecting the boundaries and adjacent streets, all improvements on the site, and any items of concern described in the body of the environmental site assessment or identified during the physical inspection;

(E) A copy of the current FEMA Flood Insurance Rate Map showing the panel number and encompassing the site with the site boundaries precisely identified and superimposed on the map. A determination of the flood risk for the proposed Development described

in the narrative of the report includes a discussion of the impact of the 100-year floodplain on the proposed Development based upon a review of the current site plan;

(F) The report should include a statement that clearly states that the person or company preparing the environmental assessment will not materially benefit from the Development in any other way than receiving a fee for the environmental assessment; and

(2) If the report recommends further studies or establishes that environmental hazards currently exist on the Property, or are originating off-site but would nonetheless affect the Property, the Development Owner must act on such a recommendation or provide a plan for either the abatement or elimination of the hazard. Evidence of action or a plan for the abatement or elimination of the hazard must be presented upon Application submittal.

(3) For Developments which have had a Phase II Environmental Assessment performed and hazards identified, the Development Owner is required to maintain a copy of said assessment on site available for review by all persons who either occupy the Development or are applying for tenancy.

(4) Developments whose funds have been obligated by TxRD will not be required to supply this information; however, the Development Owners of such Developments are hereby notified that it is their responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements.

(5) Those Developments which have or are to receive first lien financing from HUD may submit HUD's environmental assessment report, provided that it conforms with the requirements of this subsection.

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

Filed with the Office of the Secretary of State on September 16, 2002.

TRD-200206020
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 27, 2002
For further information, please call: (512) 475-3726

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CHAPTER 49. 2002 LOW INCOME HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN AND RULES

10 TAC §§49.1 - 49.18

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

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of §§49.1-49.18, concerning the Low Income Tax Credit Rules. The Sections are proposed to be repealed in order to enact new sections conforming to the requirements of regulations enacted under the Internal Revenue Code of 1986, §42 as amended, which provides for credits against federal income taxes for owners of qualified low income rental housing.

Edwina Carrington, Executive Director, has determined that for the first five-year period the repeals are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeals.

Ms. Carrington also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be to permit the adoption of new rules for the allocation of low income housing tax credit authority within the State of Texas, thereby enhancing the State's ability to provide decent, safe and sanitary housing for Texans through the tax credit program administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed.

Comments may be submitted to Brooke Boston, Co-Manager, Low Income Housing Tax Credit Program, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas, 78711-3941 or by email at the following address: bboston@tdhca.state.tx.us.

The repeals are proposed pursuant to the authority of the Texas Government Code, Chapter 2306; and the Internal Revenue Code of 1986, §42 as amended, which provides the Department with the authority to adopt rules governing the administration of the Department and its programs and Executive Order AWR-91-4 (June 17, 1991), which provides this Department with the authority to make housing tax credit allocations in the State of Texas.

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

§49.1. Scope.
§49.2. Definitions.
§49.3. State Housing Credit Ceiling.
§49.4. Application Submission; Pre-Application Submission; Unacceptable Applications; Availability of Pre-Application and Application; Confidential Information; Required Application Notifications and Receipt of Public Comment; Board Recommendations; Board Decisions; Commitment Notices and Determination Notices; Board Reevaluation; Appeals Process; Waiting List; Agreements and Election Statement; Cost Certification and Carryover Filings; LURA.
§49.5. Ineligible and Disqualified Applications; Debarment from Program Participation.
§49.6. Regional Allocation Formula and Set-Asides.
§49.7. Pre-Application Evaluation Process and Criteria; Application Evaluation Process; Evaluation Factors; Tie Breaker Criteria; Threshold Criteria; Selection Criteria; Credit Amount; Limitations on the Size of Developments; Tax Exempt Bond Financed Developments; Adherence to Obligations; Amendment of Applications; Housing Tax Credit and Ownerships Transfers.
§49.8. Underwriting Guidelines.
§49.9. Market Study Requirements; Concentration; Environmental Site Assessment Guidelines.
§49.10. Compliance Monitoring and Material Non-Compliance.
§49.11. Housing Credit Allocations.
§49.12. Department Records; Certain Required Filings.
§49.13. Program Fees and Extensions.
§49.14. Manner and Place of Filing Applications and Other Required Documentation.

§49.15. Withdrawals, Cancellations, Amendments.

§49.16. Waiver and Amendment of Rules.

§49.17. Forward Reservations; Binding Commitments.

§49.18. Deadlines for Allocation of Low Income Housing Tax Credits.

This 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 September 16, 2002.

TRD-200206017
Edwina Carrington
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 27, 2002
For further information, please call: (512) 475-3726

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CHAPTER 49. 2003 LOW INCOME HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN AND RULES

10 TAC §§49.1 - 49.24

The Texas Department of Housing and Community Affairs proposes new §§49.1 - 49.24, concerning the 2003 Low Income Housing Tax Credit Qualified Allocation Plan and Rules. The new sections are necessary to provide procedures for the allocation by the Department of certain low income housing tax credits available under federal income tax laws to owners of qualified low income rental housing developments.

Edwina Carrington, Executive Director, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Carrington 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 enhancement of the state's ability to provide safe and sanitary housing for Texans through the efficient and coordinated allocation of federal income tax credit authority available to the state for administration of state housing agencies. There will be no effect on small businesses or persons. There is no anticipated economic costs to persons who are required to comply with the sections as proposed.

The selection criteria, new §49.9(f), reflects a proposed point structure for the 2003 Qualified Allocation Plan. The Texas Department of Housing and Community Affairs would like to receive comment on the weighting of the point structure. To assist in that review, two tables have been provided. The first table reflects each of the 2003 selection criteria and the maximum points available under each scoring category, with a Maximum Total Score which does not account for feasibility or points that are mutually exclusive; the first table also reflects a scenario based on an Average development. The second table evaluates the selection criteria from 2002, by set-aside, and depicts the points and proportional weight of those points for the highest scoring development in the set-aside as well as the median development for the set-aside.

Figure 1: 10 TAC Chapter 49--Preamble

Figure 2: 10 TAC Chapter 49--Preamble

Comments may be submitted to Brooke Boston, Co-Manager, Low Income Housing Tax Credit Program, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas, 78711-3941 or by email at the following address: bboston@tdhca.state.tx.us.

The proposed new sections are proposed under the Texas Government Code, Chapter 2306; the Internal Revenue Code of 1986, §42, as amended, which provides the Department with the authority to adopt rules governing the administration of the Department and its programs; and Executive Order AWR-91-4 (June 17, 1991), which provides this Department with the authority to make housing tax credit allocations in the State of Texas.

No other code, article or statute is affected by these new sections.

§49.1. Purpose, Program Statement, Allocation Goals.

(a) Purpose. The Rules in this chapter apply to the allocation by the Texas Department of Housing and Community Affairs (the Department) of low income housing tax credits authorized by applicable federal income tax laws. The Internal Revenue Code of 1986, §42, as amended, provides for credits against federal income taxes for owners of qualified low income rental housing Developments. That section provides for the allocation of the available tax credit amount by state housing credit agencies. Pursuant to Executive Order AWR-91-4 (June 17, 1991), the Department was authorized to make housing credit allocations for the State of Texas. As required by the Internal Revenue Code, §42(m)(1), the Department developed a Qualified Allocation Plan (QAP) which is set forth in §§49.1 - 49.24 of this title. Sections in this chapter establish procedures for applying for and obtaining an allocation of the low income housing tax credit, along with ensuring that the proper threshold criteria, selection criteria, priorities and preferences are followed in making such allocations.

(b) Program Statement. The Department shall administer the program to encourage the development and preservation of appropriate types of rental housing for households that have difficulty finding suitable, affordable rental housing in the private marketplace; maximize the number of suitable, affordable residential rental units added to the state's housing supply; prevent losses for any reason to the state's supply of suitable, affordable residential rental units by enabling the rehabilitation of rental housing or by providing other preventive financial support; and provide for the participation of for-profit organizations and provide for and encourage the participation of nonprofit organizations in the acquisition, development and operation of affordable housing developments in rural and urban communities.

(c) Allocation Goals. It shall be the goal of this Department and the Board, through these provisions, to encourage diversity through broad geographic allocation of tax credits within the state, and in accordance with the regional allocation formula, and to promote maximum utilization of the available tax credit amount. The processes and criteria utilized to realize this goal are described in §49.8 and §49.9 of this title, without in any way limiting the effect or applicability of all other provisions of this title.

§49.2. Coordination with Rural Agencies.

To assure maximum utilization and optimum geographic distribution of tax credits in rural areas, and to achieve increased sharing of information, reduction of processing procedures, and fulfillment of Development compliance requirements in rural areas, the Department has entered into a Memorandum of Understanding (MOU) with the TX-USDA-RHS to coordinate on existing, rehabilitated, and new

construction housing Developments financed by TX-USDA-RHS; and will jointly administer the Rural Set-Aside with the Texas Office of Rural Community Affairs (ORCA). ORCA will assist in developing all Threshold, Selection and Underwriting Criteria applied to Applications eligible for the Rural Set-Aside. The Criteria will be approved by that Agency. To ensure that the Rural Set-Aside receives a sufficient volume of eligible Applications, the Department and ORCA shall jointly implement outreach, training, and rural area capacity building efforts.

§49.3. Definitions.

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

(1) Administrative Deficiencies--The absence of information or documents from the Application which are essential to a review and scoring of the Development. If an Application contains deficiencies which, in the determination of the Department staff, require clarification of information submitted at the time of the Application, the Department staff shall request correction of such Administrative Deficiencies. The Department staff shall provide this in a deficiency notice in the form of a facsimile and a telephone call to the Applicant advising that such a request has been transmitted. If such Administrative Deficiencies are not corrected to the satisfaction of the Department within three business days of the deficiency notice date, then five points shall be deducted from the Selection Criteria score for each additional day the deficiency remains uncorrected. If such deficiencies are not corrected within five business days from the deficiency notice date, then the Application shall be terminated. The time period for responding to a deficiency notice begins at the start of the business day following the deficiency notice date. Deficiency notices may be sent to an Applicant prior to or after the end of the Application Acceptance Period.

(2) Affiliate--An individual, corporation, partnership, joint venture, limited liability company, trust, estate, association, cooperative or other organization or entity of any nature whatsoever that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with any other Person, and specifically shall include parents or subsidiaries.

(3) Agreement and Election Statement--A document in which the Development Owner elects, irrevocably, to fix the applicable credit percentage with respect to a building or buildings, as that in effect for the month in which the Department and the Development Owner enter into a binding agreement as to the housing credit dollar amount to be allocated to such building or buildings.

(4) Applicable Fraction--The fraction used to determine the Qualified Basis of the qualified low income building, which is the smaller of the Unit fraction or the floor space fraction, all determined as provided in the Code, § 42(c)(1).

(5) Applicable Percentage--The percentage used to determine the amount of the low income housing tax credit, as defined more fully in the Code, §42(b). For purposes of the Application, the Applicable Percentage will be projected at 10 basis points above the greater of:

(A) the current applicable percentage, or

(B) the trailing 1-year, 2-year or 3-year average rate in effect during the month in which the Application is submitted to the Department.

(6) Applicant--Any Person or Affiliate of a Person who files a Pre-Application or an Application with the Department requesting a housing tax credit allocation. For purposes hereof, the Applicant is sometimes referred to as the "housing sponsor."

(7) Application--An application, in the form prescribed by the Department, filed with the Department by an Applicant, including any exhibits or other supporting material.

(8) Application Acceptance Period--That period of time during which Applications for either a Housing Credit Allocation from the State Housing Credit Ceiling or a Determination Notice for Tax Exempt Bond Developments may be submitted to the Department as more fully described in §§49.9(a) and 49.22 of this title.

(9) Application Round--The period beginning on the date the Department begins accepting applications and continuing until all available credits from the State Housing Credit Ceiling (as stipulated by the Department) are allocated, but not extending past the last day of the calendar year.

(10) Application Submission Procedures Manual--The manual produced and amended from time to time by the Department which sets forth procedures, forms, and guidelines for the filing of Pre-Applications and Applications for low income housing tax credits.

(11) Area Median Gross Income (AMGI)--Area median gross household income, as determined for all purposes under and in accordance with the requirements of the Code, §42.

(12) At-Risk Development-- a Development that:

(A) receives the benefit of a subsidy in the form of a below-market interest rate loan, interest rate reduction, equity incentive, rental subsidy, Section 8 housing assistance payment, rental supplement payment, or rental assistance payment under the following federal laws, as applicable:

(i) Sections 221(d)(3), (4) and (5), National Housing Act (12 U.S.C. Section 1715l);

(ii) Section 236, National Housing Act (12 U.S.C. Section 1715z-1);

(iii) Section 202, Housing Act of 1959 (12 U.S.C. Section 1701q);

(iv) Section 101, Housing and Urban Development Act of 1965 (12 U.S.C. Section 1701s);

(v) any project-based assistance authority pursuant to Section 8 of the U.S. Housing Act of 1937;

(vi) Sections 514, 515, 516, and 538 Housing Act of 1949 (42 U.S.C. Sections 1484, 1485, and 1486); or

(vii) Section 42 of the Internal Revenue Code of 1986, and

(B) is subject to the following conditions:

(i) the stipulation to maintain affordability in the contract granting the subsidy is nearing expiration (expiration will occur within two calendar years); or

(ii) the federally insured mortgage on the Development is eligible for prepayment or is nearing the end of its mortgage term (the term will end within two calendar years).

(13) Bedroom--A portion of a Unit set aside for sleeping which is no less than 100 square feet; has no width or length less than 8 feet; has at least one window that provides exterior access; and has at least one closet that is not less than 2 feet deep and 3 feet wide and high enough to accommodate 5 feet of hanging space.

(14) Beneficial Owner--A "Beneficial Owner" means:

(A) Any Person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise has or shares;

(i) voting power which includes the power to vote, or to direct the voting as any other Person or the securities thereof; and/or

(ii) investment power which includes the power to dispose, or direct the disposition of, any Person or the securities thereof.

(B) Any Person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement or device with the purpose or effect of divesting such Person of Beneficial Ownership (as defined herein) of a security or preventing the vesting of such Beneficial Ownership as part of a plan or scheme to evade inclusion within the definitional terms contained herein; and

(C) Any Person who has the right to acquire Beneficial Ownership during the Compliance Period, including but not limited to any right to acquire any such Beneficial Ownership:

(i) through the exercise of any option, warrant or right,

(ii) through the conversion of a security,

(iii) pursuant to the power to revoke a trust, discretionary account or similar arrangement, or

(iv) pursuant to the automatic termination of a trust, discretionary account, or similar arrangement.

(D) Provided, however, that any Person who acquires a security or power specified in clauses (i), (ii) or (iii) of subparagraph (C) of this paragraph, with the purpose or effect of changing or influencing the control of any other Person, or in connection with or as a participant in any transaction having such purpose or effect, immediately upon such acquisition is deemed to be the Beneficial Owner of the securities which may be acquired through the exercise or conversion of such security or power. Any securities not outstanding which are subject to options, warrants, rights or conversion privileges as deemed to be outstanding for the purpose of computing the percentage of outstanding securities of the class owned by such Person but are not deemed to be outstanding for the purpose of computing the percentage of the class by any other Person.

(15) Board--The governing Board of Directors of the Department.

(16) Carryover Allocation--An allocation of current year tax credit authority by the Department pursuant to the provisions of the Code, §42(h)(1)(E) and Treasury Regulations, §1.42-6.

(17) Carryover Allocation Document--A document issued by the Department to a Development Owner pursuant to §49.14 of this title.

(18) Carryover Allocation Procedures Manual--The manual produced and amended from time to time by the Department which sets forth procedures, forms, and guidelines for filing Carryover Allocation requests.

(19) Code--The Internal Revenue Code of 1986, as amended from time to time, together with any applicable regulations, rules, rulings, revenue procedures, information statements or other official pronouncements issued thereunder by the United States Department of the Treasury or the Internal Revenue Service.

(20) Colonia--A geographic area located in a county some part of which is within 150 miles of the international border of this state and that:

(A) has a majority population composed of individuals and families of low income and very low income, based on the federal Office of Management and Budget poverty index, and meets the qualifications of an economically distressed area under §17.921, Water Code; or

(B) has the physical and economic characteristics of a colonia, as determined by the Department.

(21) Commitment Notice--A notice issued by the Department to a Development Owner pursuant to §49.13 of this title and also referred to as the "commitment."

(22) Compliance Period--With respect to a building, the period of 15 taxable years, beginning with the first taxable year of the Credit Period pursuant to the Code, §42(i)(1).

(23) Control--(including the terms "controlling," "controlled by", and/or "under common control with") the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of any Person, whether through the ownership of voting securities, by contract or otherwise, including specifically ownership of more than 50% of the General Partner interest in a limited partnership, or designation as a managing General Partner or the managing member of a limited liability company.

(24) Cost Certification Procedures Manual--The manual produced and amended from time to time by the Department which sets forth procedures, forms, and guidelines for filing requests for IRS Form(s) 8609 for Developments placed in service under the Low Income Housing Tax Credit Program.

(25) Credit Period--With respect to a building within a Development, the period of ten taxable years beginning with the taxable year the building is placed in service or, at the election of the Development Owner, the succeeding taxable year, as more fully defined in the Code, §42(f)(1).

(26) Department--The Texas Department of Housing and Community Affairs, an agency of the State of Texas, established at Chapter 2306, Texas Government Code.

(27) Determination Notice--A notice issued by the Department to the Owner of a Tax Exempt Bond Development which states that the Development may be eligible to claim low income housing tax credits without receiving an allocation of credits from the State Housing Credit Ceiling because it satisfies the requirements of this QAP; sets forth conditions which must be met by the Development before the Department will issue the IRS Form(s) 8609 to the Development Owner; and specifies the amount of tax credits necessary for the financial feasibility of the Development and its viability as a qualified low income housing Development throughout the Credit Period.

(28) Development-- A proposed qualified low income housing Development, for new construction or rehabilitation, for purposes of the Code, §42(g), that consists of one or more buildings containing multiple Units, and that, if the Development shall consist of multiple buildings, is financed under a common plan and is owned by the same Person for federal tax purposes, and the buildings of which are either:

(A) located on a single site or contiguous site; or

(B) located on scattered sites and contain only rent-restricted units.

(29) Development Consultant--Any Person (with or without ownership interest in the Development) who provides professional services relating to the filing of an Application, Carryover Allocation Document, and/or cost certification documents.

(30) Development Owner--Any Person or Affiliate of a Person who owns or proposes a Development or expects to acquire control of a Development under a purchase contract approved by the Department.

(31) Development Team--All Persons or Affiliates thereof which play(s) a material role in the development, construction, rehabilitation, management and/or continuing operation of the subject Property, which will include any consultant(s) hired by the Applicant for the purpose of the filing of an Application for low income housing tax credits with the Department.

(32) Economically Distressed Area --Consistent with §17.921 of Texas Water Code, an area in which:

(A) water supply or sewer services are inadequate to meet minimal needs of residential users as defined by board rules;

(B) financial resources are inadequate to provide water supply or sewer services that will satisfy those needs; and

(C) an established residential subdivision was located on June 1, 1989, as determined by the board.

(33) Eligible Basis--With respect to a building within a Development, the building's Eligible Basis as defined in the Code, §42(d).

(34) Executive Award and Review Advisory Committee ("The Committee")--A Departmental committee that will make funding and commitment recommendations to the Board based upon the evaluation of an Application in accordance with the housing priorities as set forth in Chapter 2306 of the Texas Government Code, and as set forth herein, and the ability of an Applicant to meet those priorities.

(35) Extended Low Income Housing Commitment--An agreement between the Department, the Development Owner and all successors in interest to the Development Owner concerning the extended low income housing use of buildings within the Development throughout the extended use period as provided in the Code, §42(h)(6). The Extended Low Income Housing Commitment with respect to a Development is expressed in the LURA applicable to the Development.

(36) General Contractor--One who contracts for the construction, or rehabilitation of an entire building or Development, rather than a portion of the work. The General Contractor hires subcontractors, such as plumbing contractors, electrical contractors, etc., coordinates all work, and is responsible for payment to the said subcontractors. This party may also be referred to as the "contractor."

(37) General Developments--Any Development which is not a Qualified Nonprofit Development or is not under consideration in the Rural, At-Risk Development or Elderly set-asides as such terms are defined by the Department.

(38) General Partner--The partner, or collective of partners, which has general liability for the partnership during the construction and lease-up period. In addition, unless the context shall clearly indicate to the contrary, if the entity in question is a limited liability company, the term "General Partner" shall also mean the managing member or other party with management responsibility for the limited liability company.

(39) General Pool--The pool of credits that have been returned or recovered from prior years' allocations or the current year's Commitment Notices after the Board has made its initial commitment of the current year's available credit ceiling. General pool credits will be used to fund Applications on the waiting list without regard to set-aside except for the 10% Nonprofit Set-Aside allocation required under §42(h)(5) of the Code.

(40) Governmental Entity--Includes federal or state agencies, departments, boards, bureaus, commissions, authorities, and political subdivisions, special districts and other similar entities.

(41) Historic Development -- A residential Development that has received a historic property designation by a federal, state or local government entity.

(42) Historically Underutilized Businesses (HUB)--Any entity defined as an historically underutilized business with its principal place of business in the State of Texas in accordance with Chapter 2161, Texas Government Code.

(43) Housing Credit Agency--A Governmental Entity charged with the responsibility of allocating low income housing tax credits pursuant to the Code, §42. For the purposes of this title, the Department is the sole "Housing Credit Agency" of the State of Texas.

(44) Housing Credit Allocation--An allocation by the Department to a Development Owner of low income housing tax credit in accordance with §49.17 of this title.

(45) Housing Credit Allocation Amount--With respect to a Development or a building within a Development, that amount the Department determines to be necessary for the financial feasibility of the Development and its viability as a qualified low income housing Development throughout the Compliance Period and allocates to the Development.

(46) Housing Tax Credit ("tax credits")--A tax credit allocated, or for which a Development may qualify, under the low income housing tax credit program, pursuant to the Code, §42.

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

(48) Ineligible Building Types--Those buildings or facilities which are ineligible, pursuant to this QAP, for funding under the tax credit program as follows:

(A) Hospitals, nursing homes, trailer parks and dormitories (or other buildings that will be predominantly occupied by Students) or other facilities which are usually classified as transient housing (other than certain specific types of transitional housing for the homeless and single room occupancy units, as provided in the Code, §§42(i)(3)(B)(iii) and (iv) are not eligible. However, structures formerly used as hospitals, nursing homes or dormitories are eligible for credits if the Development involves the conversion of the building to a non-transient multifamily residential development.

(B) Any Qualified Elderly Development of two stories or more that does not include elevator service for any Units or living space above the first floor.

(C) Any Development with building(s) with four or more stories that does not include an elevator.

(D) Any Development having any Units with four or more bedrooms.

(49) IRS--The Internal Revenue Service, or its successor.

(50) Land Use Restriction Agreement (LURA)--An agreement between the Department and the Development Owner which is binding upon the Development Owner's successors in interest, that encumbers the Development with respect to the requirements of this title and the requirements of the Code, §42.

(51) Material Deficiencies--Deficiencies that are not eligible to be remedied pursuant to paragraph (1) of this subsection. Deficiencies caused by the omission of Threshold Criteria documentation specifically required by §49.9(e) of this title shall automatically be considered Material Deficiencies and shall be cause for termination.

(52) Material Non-Compliance--A property located within the state of Texas will be classified by the Department as being in material non-compliance status if the non-compliance score for such property is equal to or exceeds 30 points in accordance with the provisions of §49.5(b)(6) of this title and under the methodology and point system set forth in §49.19 of this title. A property located outside the state of Texas will be classified by the Department as being in Material Non-compliance status if the non-compliance score for such property is equal to or exceeds 30 points in accordance with the provisions of §49.5(b)(7) of this title and under the methodology and point system set forth in §49.19 of this title.

(53) Minority Owned Business--A business entity at least 51% of which is owned by members of a minority group or, in the case of a corporation, at least 51% of the shares of which are owned by members of a minority group, and that is managed and controlled by members of a minority group in its daily operations. Minority group includes women, African Americans, American Indians, Asian Americans, and Mexican Americans and other Americans of Hispanic origin.

(54) Office of Rural Community Affairs (ORCA)--The state agency designated by the legislature as primarily responsible for rural area development in the state.

(55) Person--Means, without limitation, any natural person, corporation, partnership, limited partnership, joint venture, limited liability company, trust, estate, association, cooperative, government, political subdivision, agency or instrumentality or other organization of any nature whatsoever and shall include any group of Persons acting in concert toward a common goal.

(56) Persons with Disabilities--A person who:

(A) has a physical, mental or emotional impairment that:

(i) is expected to be of a long, continued and indefinite duration,

(ii) substantially impedes his or her ability to live independently, and

(iii) is of such a nature that the ability could be improved by more suitable housing conditions, or

(B) has a developmental disability, as defined in Section 102(7) of the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6001-6007).

(57) Pre-Application--A preliminary application, in a form prescribed by the Department, filed with the Department by an Applicant prior to submission of the Application, including any required exhibits or other supporting material, as more fully described in §49.8 of this title.

(58) Pre-Application Acceptance Period--That period of time during which Pre-Applications for a Housing Credit Allocation from the State Housing Credit Ceiling may be submitted to the Department.

(59) Prison Community--A city or town which is located outside of a Metropolitan Statistical Area (MSA) or Primary Metropolitan Statistical Area (PMSA) and was awarded a state prison.

(60) Property--The real estate and all improvements thereon which are the subject of the Application (including all items of personal property affixed or related thereto), whether currently existing or proposed to be built thereon in connection with the Application.

(61) Qualified Allocation Plan (QAP)--A plan adopted by the Board, and approved by the Governor, under this title, and as provided in the Code, §42(m)(1) (specifically including preference for Developments located in Qualified Census Tracts and the development of which contributes to a concerted community revitalization plan) and as further provided in §§49.1- 49.24 of this title, that:

(A) provides the threshold and scoring, and underwriting process based on housing priorities of the department that are appropriate to local conditions;

(B) gives preference in housing tax credit allocations to Developments that, as compared to other Developments:

(i) when practicable and feasible based on available funding sources, serve the lowest income tenants; and

(ii) are affordable to qualified tenants for the longest economically feasible period.

(C) provides a procedure for the Department, the Department's agent, or another private contractor of the Department to use in monitoring compliance with the Qualified Allocation Plan.

(62) Qualified Basis--With respect to a building within a Development, the building's Eligible Basis multiplied by the Applicable Fraction, within the meaning of the Code, §42(c)(1).

(63) Qualified Census Tract--Any census tract which is so designated by the Secretary of HUD in accordance with §42(d)(5)(C)(ii).

(64) Qualified Elderly Development--A Development which meets the requirements of the federal Fair Housing Act and:

(A) is intended for, and solely occupied by, Persons 62 years of age or older; or

(B) is intended and operated for occupancy by at least one person 55 years of age or older per Unit, where at least 80% of the total housing Units are occupied by at least one person who is 55 years of age or older; and where the Development Owner publishes and adheres to policies and procedures which demonstrate an intent by the owner and manager to provide housing for persons 55 years of age or older.

(65) Qualified Market Analyst--A real estate appraiser certified or licensed by the Texas Appraiser or Licensing and Certification Board or a real estate consultant or other professional currently active in the subject property's market area who demonstrates competency, expertise, and the ability to render a high quality written report. The individual's experience and educational background will provide the general basis for determining competency as a Market Analyst. Such determination will be at the sole discretion of the Department. The Qualified Market Analyst must be a Third Party.

(66) Qualified Nonprofit Organization--An organization that is described in the Code, §501(c)(3) or (4), as these cited provisions may be amended from time to time, that is exempt from federal income taxation under the Code, §501(a), that is not Affiliated with or Controlled by a for profit organization, and includes as one of its exempt purposes the fostering of low income housing within the meaning of the Code, §42(h)(5)(C). A Qualified Nonprofit Organization may select to compete in one or more of the set-asides, including, but not limited to, the nonprofit set-aside, the rural

developments set-aside, the At-Risk Developments set-aside and the general set-aside.

(67) Qualified Nonprofit Development--A Development in which a Qualified Nonprofit Organization (directly or through a partnership or wholly-owned subsidiary) holds a controlling interest, materially participates (within the meaning of the Code, §469(h), as may be amended from time to time) in its development and operation throughout the Compliance Period, and otherwise meets the requirements of the Code, §42(h)(5).

(68) Reference Manual--That certain manual, and any amendments thereto, produced by the Department which sets forth reference material pertaining to the Low Income Housing Tax Credit Program.

(69) Related Party--As defined,

(A) The following individuals or entities:

(i) the brothers, sisters, spouse, ancestors, and descendants of a person within the third degree of consanguinity, as determined by Chapter 573 of the Texas Government Code;

(ii) a person and a corporation, if the person owns more than 50 percent of the outstanding stock of the corporation;

(iii) two or more corporations that are connected through stock ownership with a common parent possessing more than 50 percent of:

(I) the total combined voting power of all classes of stock of each of the corporations that can vote;

(II) the total value of shares of all classes of stock of each of the corporations; or

(III) the total value of shares of all classes of stock of at least one of the corporations, excluding, in computing that voting power or value, stock owned directly by the other corporation;

(iv) a grantor and fiduciary of any trust;

(v) a fiduciary of one trust and a fiduciary of another trust, if the same person is a grantor of both trusts;

(vi) a fiduciary of a trust and a beneficiary of the trust;

(vii) a fiduciary of a trust and a corporation if more than 50 percent of the outstanding stock of the corporation is owned by or for:

(I) the trust; or

(II) a person who is a grantor of the trust;

(viii) a person or organization and an organization that is tax-exempt under the Code, §501(a), and that is controlled by that person or the person's family members or by that organization;

(ix) a corporation and a partnership or joint venture if the same persons own more than:

(I) 50 percent of the outstanding stock of the corporation; and

(II) 50 percent of the capital interest or the profits' interest in the partnership or joint venture;

(x) an S corporation and another S corporation if the same persons own more than 50 percent of the outstanding stock of each corporation;

(xi) an S corporation and a C corporation if the same persons own more than 50 percent of the outstanding stock of each corporation;

(xii) a partnership and a person or organization owning more than 50 percent of the capital interest or the profits' interest in that partnership; or

(xiii) two partnerships, if the same person or organization owns more than 50 percent of the capital interests or profits' interests.

(B) As a note to Applicants, nothing in this definition is intended to constitute the Department's determination as to what relationship might cause entities to be considered "related" for various purposes under the Code.

(70) Rules--The Department's low income housing tax credit Rules as presented in this title.

(71) Rural Area--An area that is located:

(A) outside the boundaries of a primary metropolitan statistical area or a metropolitan statistical area;

(B) within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area, if the statistical area has a population of 20,000 or less and does not share a boundary with an urban area; or

(C) in an area that is eligible for new construction or rehabilitation funding by TX-USDA-RHS.

(72) Rural Development--A Development located within a Rural Area and for which the Applicant applies for tax credits under the Rural Set Aside.

(73) Selection Criteria--Criteria used to determine housing priorities of the State under the Low Income Housing Tax Credit Program as specifically defined in §49.9(f) of this title.

(74) Set Aside--A reservation of a portion of the available Housing Tax Credits to provide financial support for specific types of housing or geographic locations or serve specific types of Applicants on a priority basis as permitted by the Qualified Allocation Plan.

(75) State Housing Credit Ceiling--The limitation imposed by the Code, §42(h), on the aggregate amount of housing credit allocations that may be made by the Department during any calendar year, as determined from time to time by the Department in accordance with the Code, §42(h)(3).

(76) Student Eligibility--Per the Code, §42(I)(3)(D), "A unit shall not fail to be treated as a low-income unit merely because it is occupied:

(A) by an individual who is:

(i) a student and receiving assistance under title IV of the Social Security Act (42 U.S.C. §§ 601 et seq.), or

(ii) enrolled in a job training program receiving assistance under the Job Training Partnership Act (29 USCS §§1501 et seq., generally; for full classification, consult USCS Tables volumes) or under other similar Federal, State, or local laws, or

(B) entirely by full-time students if such students are:

(i) single parents and their children and such parents and children are not dependents (as defined in section 152) of another individual, or

(ii) married and file a joint return."

(77) Tax Exempt Bond Development--A Development which receives a portion of its financing from the proceeds of tax exempt bonds which are subject to the state volume cap as described in the Code, §42(h)(4)(B), such that the Development does not receive an allocation of tax credit authority from the State Housing Credit Ceiling.

(78) Third Party--a Person who is not an Affiliate, Related Party or Beneficial Owner of the Applicant, General Partner, developer or Person(s) receiving a portion of the developer fee or contractor fee.

(79) Threshold Criteria--Criteria used to determine whether the Development satisfies the minimum level of acceptability for consideration as specifically defined in §49.9(e) of this title.

(80) Total Housing Development Cost--The total of all costs incurred or to be incurred by the Development Owner in acquiring, constructing, rehabilitating and financing a Development, as determined by the Department based on the information contained in the Applicant's Application. Such costs include reserves and any expenses attributable to commercial areas. Costs associated with the sale or use of tax credits to raise equity capital shall also be included in the Total Housing Development Cost. Such costs include but are not limited to syndication and partnership organization costs and fees, filing fees, broker commissions, related attorney and accounting fees, appraisal, engineering, and the environmental site assessment.

(81) TX-USDA-RHS--The Rural Housing Services (RHS) of the United States Department of Agriculture (USDA) serving the State of Texas (formerly known as TxFmHA) or its successor.

(82) Unit--Any residential rental unit in a Development consisting of an accommodation including a single room used as an accommodation on a non-transient basis, that contains separate and complete physical facilities and fixtures for living, sleeping, eating, cooking and sanitation.

§49.4. State Housing Credit Ceiling.

The Department shall determine the State Housing Credit Ceiling for each calendar year as provided in the Code, §42(h)(3)(C), using such information and guidance as may be made available by the Internal Revenue Service. The Department shall publish each such determination in the *Texas Register* within 30 days after the receipt of such information as is required for the purpose from the Internal Revenue Service. The aggregate amount of commitments of Housing Credit Allocations made by the Department during any calendar year shall not exceed the State Housing Credit Ceiling for such year as provided in the Code, §42. Housing Credit Allocations made to Tax Exempt Bond Developments are not included in the State Housing Credit Ceiling.

§49.5. Ineligibility, Disqualification and Debarment, Applicant Standards, Representation by Former Board Member or Other Person.

(a) Ineligibility. An Application will be ineligible if:

(1) A member of the Development Team has been or is barred, suspended, or terminated from procurement in a state or federal program or listed in the List of Parties Excluded from Federal Procurement or Non-Procurement Programs; or,

(2) A member of the Development Team has been or is convicted of, under indictment for, or on probation for a state or federal crime involving fraud, bribery, theft, misrepresentations of material facts, misappropriation of funds, or other similar criminal offenses; or,

(3) A member of the Development Team has been or is subject to enforcement action under state or federal securities law, or is the subject of an enforcement proceeding with any Governmental Entity unless such action has been concluded and no adverse action or finding (or entry into a consent order) has been taken with respect to such member.

(4) A member of the Development Team with any past due audits has not submitted those past due audits to the Department in a satisfactory format on or before the close of the Application Acceptance Period. A Person is not eligible to receive a commitment of credits from the Department if any audit finding or questioned or disallowed cost is unresolved as of the date the Board meets to review the recommendations of Department staff regarding Applications.

(b) Disqualification and Debarment. Additionally, the Department will disqualify, and may disbar, an Application if it is determined by the Department that those issues identified in paragraphs (1) through (10) of this subsection exist. A person debarred by the Department from participation in the program may appeal the person's debarment to the Board. The Department shall debar a person for the longer of, one year from the date of debarment, or until the violation causing the debarment has been remedied.

(1) fraudulent information, knowingly false documentation or other material misrepresentation has been provided in the Application or other information submitted to the Department. The aforementioned policy will apply at any stage of the evaluation or approval process; or,

(2) at the time of application or at any time during the two-year period preceding the date the application round begins, the Applicant or a Related Party is or has been:

(A) a member of the Board; or

(B) the executive director, a deputy director, the director of housing programs, the director of compliance, the director of underwriting, or the Low Income Housing Tax Credit Program manager employed by the Department.

(3) the Applicant or any Person, General Partner , general contractor and their respective principals or Affiliates active in the ownership or control of other low income housing tax credit property in the state of Texas who received a commitment of tax credits in the 2001 or 2002 Application Round but did not close the construction loan, or meet the deadlines for the commencement of substantial construction as required under the Carryover Allocation (including any extension period granted by the Board) except for instances where an extension has been approved by the Board.

(4) the Applicant proposes to replace in less than 15 years any private activity bond financing of the Development described by the Application, unless:

(A) the applicant proposes to maintain for a period of 30 years or more 100 percent of the Development units supported by low income housing tax credits as rent-restricted and exclusively for occupancy by individuals and families earning not more than 50 percent of the area median income, adjusted for family size; and

(B) at least one-third of all the units in the Development are public housing units or Section 8 Development-based units; or,

(5) the Applicant or any Person, General Partner , general contractor and their respective principals or Affiliates active in the ownership or control of other low income housing tax credit property has failed to place in service buildings or removed from service buildings for which credits were allocated (either Carryover Allocation or issuance of 8609s). The Department may consider the facts and circumstances on a case-by-case basis, including whether the credits were returned prior to the expiration date for re-issuance of the credits, in its sole determination of Applicant eligibility; or,

(6) the Applicant or any Person, General Partner, general contractor or their respective principals or Affiliates active in the ownership or control of other low income rental housing property in the state of Texas funded by the Department is in Material Non-Compliance with the LURA (or any other document containing an Extended Low Income Housing Commitment) or the program rules in effect for such property on the date the Application Round closes or upon the date of filing Volume I of the Application for a Tax Exempt Bond Development. Any corrective action documentation affecting the Material Non-Compliance status score for Applicant's competing in the 2003 Application Round must be received by the Department no later than February 1, 2003. The Department may take into consideration the representations of the Applicant regarding compliance violations described in §49.7(e)(7)(C) and (D) of this title; however, the records of the Department are controlling; or,

(7) the Applicant or any Person, General Partner, General Contractor or their respective principals or Affiliates active in the ownership or control of other low income rental housing property outside of the state of Texas has incidence of non-compliance with the LURA or the program rules in effect for such tax credit property as reported on the Uniform Application Previous Participation Certification and/or as determined by the state regulatory authority for such state and such non-compliance is determined to be Material Non-Compliance by the Department using methodology as set forth in §49.19 of this title; or,

(8) the Applicant or any Person, General Partner, General Contractor and their respective principals or Affiliates active in the ownership or control of other low income housing tax credit properties in the state of Texas has failed to pay in full any fees billed by the Department, as further described in §49.21 of this title; or

(9) the Development is located on a site that has been determined to be "unacceptable" by the Department staff; or

(10) the Applicant or a Related Party, or any person who is active in the construction, rehabilitation, ownership, or control of the Development including a General Partner or general contractor and their respective principals or affiliates, or person employed as a lobbyist or in another capacity on behalf of the Development, communicates with any Board member or member of the Committee with respect to the Development during the period of time starting with the time an Application is submitted until the time the Board makes a final decision with respect to any approval of that Application, unless the communication takes place at any board meeting or public hearing held with respect to that Application.

(c) Certain Applicant and Development Standards. Notwithstanding any other provision of this section, the Department may not allocate tax credits to a Development proposed by an Applicant if the Department determines that:

(1) the housing development is not necessary to provide needed decent, safe, and sanitary housing at rentals or prices that individuals or families of low and very low income or families of moderate income can afford;

(2) the housing sponsor undertaking the proposed housing development will not supply well-planned and well-designed housing for individuals or families of low and very low income or families of moderate income;

(3) the housing sponsor is not financially responsible;

(4) the housing sponsor has, or will enter into a contract for the proposed housing development with, a Person that:

(A) is on the Department's debarred list, including any parts of that list that are derived from the debarred list of the United States Department of Housing and Urban Development;

(B) breached a contract with a public agency; or

(C) misrepresented to a subcontractor the extent to which the developer has benefited from contracts or financial assistance that has been awarded by a public agency, including the scope of the developer's participation in contracts with the agency and the amount of financial assistance awarded to the developer by the agency;

(5) the financing of the housing development is not a public purpose and will provide a public benefit; and

(6) the housing development will not be undertaken within the authority granted by this chapter to the housing finance division and the housing sponsor.

(d) Representation by Former Board Member or Other Person.

(1) A former board member or a former director, deputy director, director of housing programs, director of compliance, director of underwriting, or Low Income Housing Tax Credit Program Manager previously employed by the Department may not:

(A) for compensation, represent an Applicant for an allocation of tax credits or a Related Party of an Applicant before the second anniversary of the date that the Board member's, director's, or manager's service in office or employment with the Department ceases;

(B) represent any Applicant or a Related Party of an Applicant or receive compensation for services rendered on behalf of any Applicant or Related Party regarding the consideration of an Application in which the former board member, director, or manager participated during the period of service in office or employment with the Department, either through personal involvement or because the matter was within the scope of the board member's, director's, or manager's official responsibility; or for compensation, communicate directly with a member of the legislative branch to influence legislation on behalf of an Applicant or Related Party before the second anniversary of the date that the board member's, director's, or manager's service in office or employment with the Department ceases.

(2) A person commits an offense if the person violates this section. An offense under this section is a Class A misdemeanor.

§49.6. Site and Development Restrictions: Floodplain, Ineligible Building Types, Scattered Site Limitations, Credit Amount, Limitations on the Size of Developments, Rehabilitation Costs.

(a) Floodplain. No Development may have buildings, driveways or parking lots constructed within the 100 year floodplain as identified by the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Maps. If no FEMA Flood Insurance Rate Maps are available for the proposed Development, flood zone documentation must be provided from the local government with jurisdiction identifying the 100 year floodplain.

(b) Ineligible Building Types. Applications involving Ineligible Building Types as defined in §49.3(48) of this title will not be considered for allocation of tax credits under this QAP and the Rules.

(c) Scattered Site Limitations. Consistent with §49.3(28) of this title, a Development must be financed under a common plan, be owned by the same Person for federal tax purposes, and the buildings may be either located on a single site or contiguous site, or be located on scattered sites and contain only rent-restricted units.

(d) Credit Amount. The Department shall issue tax credits only in the amount needed for the financial feasibility and viability of a Development throughout the Compliance Period. The issuance of tax credits or the determination of any allocation amount in no way represents or purports to warrant the feasibility or viability of the Development by the Department, or that the Development will qualify for and be able to claim such credits. The Department will limit the allocation of tax credits to no more than $1.2 million per Development. The allocation of tax credits shall also be limited to not more than $1.6 million per Applicant, Related Party or entity receiving any portion of the developer fee, in a single Application round. Tax Exempt Bond Development Applications are not subject to these credit limitations, and Tax Exempt Bond Developments will not count towards the total limit on tax credits per Applicant. The limitation does not apply:

(1) to an entity which raises or provides equity for one or more Developments, solely with respect to its actions in raising or providing equity for such Developments (including syndication related activities as agent on behalf of investors);

(2) to the provision by an entity of "qualified commercial financing" within the meaning of the Code, (without regard to the 80% limitation thereof);

(3) to a Qualified Nonprofit Organization or other not-for-profit entity, to the extent that the participation in a Development by such organization consists only of the provision of loan funds or grants; and

(4) to a Development Consultant with respect to the provision of consulting services.

(e) Limitations on the Size of Developments.

(1) The minimum Development size will be 16 Units.

(2) Developments involving new construction, that are not Tax Exempt Bond Developments, will be limited to 250 Units. Tax Exempt Bond Developments will be limited to 280 Units. For the 2004 Application Round, Developments involving new construction, that are not Tax Exempt Bond Developments, will be limited to 200 Units. For Applicants competing in the 2004 Texas Bond Review Board Multifamily Lottery, Tax Exempt Bond Developments will be limited to 250 Units. These maximum Unit limitations also apply to those Developments which involve a combination of rehabilitation and new construction. Developments that consist solely of acquisition/rehabilitation or rehabilitation only may exceed the maximum unit restrictions. For those Developments which are a second phase or are otherwise adjacent to an existing tax credit Development unless such proposed Development is being constructed to replace previously existing affordable multifamily units on its site, the combined Unit total for the Developments may not exceed the maximum allowable Development size, unless the first phase has been completed and stabilized for at least six months.

(f) Rehabilitation Costs. Rehabilitation Developments must establish that the rehabilitation will substantially improve the condition of the housing and will involve at least $6,000 per unit in direct hard costs.

§49.7. Regional Allocation Formula, Set-Asides, Redistribution of Credits.

(a) Regional Allocation Formula. As required by §2306.111 of the Texas Government Code, the Department will use a regional distribution formula developed by the Department to distribute credits from the State Housing Credit Ceiling. The formula will be based on the need for housing assistance, and the availability of housing resources, and the Department will use the information contained in the Department's annual state low income housing plan and other appropriate data to develop the formula. This formula will establish targeted tax credit amounts for each of the state service regions. Each region's targeted tax credit amount will be published in the Texas Register and on the Department's web site concurrently with the publication of the QAP.

(b) Set-Asides. The regional credit distribution amounts are additionally subject to the factors presented in paragraphs (1) through (5) of this subsection. An Applicant may elect to compete in as many of the following set-asides for which the proposed Development would qualify:

(1) At least 10% of the State Housing Credit Ceiling for each calendar year shall be allocated to Qualified Nonprofit Developments which meet the requirements of the Code, §42(h)(5). Qualified Nonprofit Organizations must have a controlling interest in the Qualified Nonprofit Development applying for this set-aside. If the organization's Application is filed on behalf of a limited partnership, the Qualified Nonprofit Organization must be the managing General Partner. If the organization's Application is filed on behalf of a limited liability company, the Qualified Nonprofit Organization must be the Managing Member.

(2) At least 15% of the State Housing Credit Ceiling for each calendar year shall be allocated to Developments which meet the Rural Development definition or are located in Prison Communities. Of this 15% allocation, 25% will be set-aside for Developments financed through TX-USDA-RHS. Developments financed through TX-USDA-RHS's 538 Guaranteed Rural Rental Housing Program will not be considered under the 25% portion. Should there not be sufficient qualified applications submitted for the TX-USDA-RHS set-aside, then the credits would revert to Developments that meet the Rural Development definition or are located in Prison Communities.

(3) At least 15% of the State Housing Credit Ceiling will be allocated to the At-Risk Development Set-Aside. Through this set-aside, the Department, to the extent possible, shall allocate credits to Applications involving the preservation of developments designated as At-Risk Developments as defined in §49.3(12) of this title and in both urban and rural communities in approximate proportion to the housing needs of each uniform state service region.

(4) At least 60% of the State Housing Credit Ceiling will be allocated to General Set-Aside.

(5) At least 15% of the State Housing Credit Ceiling for each calendar year shall be allocated to Qualified Elderly Developments.

(c) Redistribution of Credits. If any amount of housing tax credits remain after the initial commitment of housing tax credits among the regions and set-asides, the Department may redistribute the credits amongst the different regions and set asides depending on the quality of Applications submitted as evaluated under the factors described in §49.9(c) of this title and the level of demand exhibited in the regions during the Allocation Round. However as described in paragraph (1) of this subsection, no more than 90% of the State's Housing Credit Ceiling for the calendar year may go to Developments which are not Qualified Nonprofit Developments. If credits will be transferred from a region which does not have enough qualified applications to meet its regional credit distribution amount, then those credits will be apportioned to the other regions based on the quality of the Applications.

§49.8. Pre-Application: Submission, Evaluation Process, Threshold Criteria and Review, Results.

(a) Pre-Application Submission. Any Applicant requesting a Housing Credit Allocation may submit a Pre-Application to the Department during the Pre-Application Acceptance Period along with the required Pre-Application Fee as described in §49.21 of this title. Only one Pre-Application may be submitted by an Applicant for each site under the Credit Ceiling. The Pre-Application submission is a voluntary process. While the Pre-Application Acceptance Period is open, Applicants may withdraw their Pre-Application and subsequently file a new Pre-Application along with the required Pre-Application Fee. The Department is authorized to request the Applicant to provide additional information it deems relevant to clarify information contained in the Pre-Application or to submit documentation for items it considers to be an Administrative Deficiency. The rejection of a Pre-Application shall not preclude an Applicant from submitting an Application with respect to a particular Development or site at the appropriate time.

(b) Pre-Application Evaluation Process. Eligible Pre-Applications will be evaluated for Pre-Application Threshold Criteria, and as requested, evaluated in regards to the Department's concentration policy. Applications that involve financing from TX-USDA-RHS, and Applications for the rehabilitation of TX-USDA-RHS properties that do not have new financing, are exempted from the Pre-Application Evaluation Process and are not eligible to receive points for submission of a Pre-Application. An Application that has not received confirmation from the state office of RHS of its financing from TX-USDA-RHS may qualify for Pre-Application points, but such points shall be withdrawn upon the Development's receipt of TX-USDA-RHS financing.

(c) Pre-Application Threshold Criteria and Review. Applicants submitting a Pre-Application will be required to submit information demonstrating their satisfaction of the Pre-Application Threshold Criteria. The Pre-Applications not meeting the Pre-Application Threshold Criteria will be terminated and the Applicant will receive a written notice to the effect that the Pre-Application Threshold Criteria have not been met. The Department shall not be responsible for the Applicant's failure to meet the Pre-Application Threshold Criteria and any failure of the Department's staff to notify the Applicant of such inability to satisfy the Pre-Application Threshold Criteria shall not confer upon the Applicant any rights to which it would not other wise be entitled. The Pre-Application Threshold Criteria include:

(1) Submission of a "Pre-Application Submission Form" and "Application Self-Scoring Form," and

(2) Evidence of site control as evidenced by the documentation required under § 49.9(e)(6)(A) of this title.

(d) Pre-Application Results. Only Pre-Applications which have satisfied all of the Pre-Application Threshold Criteria requirements set forth in subsection (c) of this section, will be eligible for Pre-Application points. The order and scores of those Developments released on the Pre-Application Submission log do not represent a commitment on the part of the Department or the Board to allocate tax credits to any Development and the Department bears no liability for decisions made by Applicants based on the results of the Pre-Application Submission Log. Inclusion of a Development on the Pre-Application Submission Log does not ensure that an Applicant will receive points for a Pre-Application. To receive points an Applicant must meet the requirements of §49.9(f)(11) of this title.

§49.9. Application: Submission, Adherence to Obligations, Evaluation Process, Required Pre-Certification and Acknowledgement, Threshold Criteria, Selection Criteria, Evaluation Factors, Staff Recommendations.

(a) Application Submission. Any Applicant requesting a Housing Credit Allocation or a Determination Notice must submit an Application, and the required Application fee as described in §49.21 of this title, to the Department during the Application Acceptance Period. A complete Application may be submitted at any time during the Application Acceptance Period, and is not limited to submission after the close of the Pre-Application Cycle. Only one Application may be submitted for a site during the Application Acceptance Period. While the Application Acceptance Period is open, Applicants may withdraw their Application and subsequently file a new Application along with a new required Application fee. The Department is authorized, but not required, to request the Applicant to provide additional information it deems relevant to clarify information contained in the Application or to submit documentation for items it considers to be an Administrative Deficiency, including both threshold and selection criteria documentation. An Applicant may not change or supplement an Application in any manner after the filing deadline, except as it relates to a direct request from the Department to remedy an Administrative Deficiency as further described in §49.3(1) of this title or to the amendment of an application after a commitment or allocation of tax credits as further described in §49.18 of this title.

(b) Adherence to Obligations. All representations, undertakings and commitments made by an Applicant in the application process for a Development, whether with respect to Threshold Criteria, Selection Criteria or otherwise, shall be deemed to be a condition to any Commitment Notice, Determination Notice, or Carryover Allocation for such Development, the violation of which shall be cause for cancellation of such Commitment Notice, Determination Notice, or Carryover Allocation by the Department, and if concerning the ongoing features or operation of the Development, shall be reflected in the LURA. All such representations are enforceable by the Department and the tenants of the Development, including enforcement by administrative penalties for failure to perform, in accordance with the LURA.

(c) Evaluation Process. Applications will be reviewed according to the process outlined in this subsection.

(1) Threshold Criteria Review. Applications will be initially evaluated against the Threshold Criteria. Applications not meeting Threshold Criteria will be terminated, unless the Department determines that the failure to meet the Threshold Criteria is the result of correctable deficiencies, in which event the Applicant shall be given an opportunity to correct such deficiencies. Applications not meeting Threshold Criteria will be rejected and the Applicant will be provided a written notice to the effect that the Threshold Criteria have not been met. The Department shall not be responsible for the Applicant's failure to meet the Threshold Criteria, and any failure of the Department's staff to notify the Applicant of such inability to satisfy the Threshold Criteria shall not confer upon the Applicant any rights to which it would not otherwise be entitled.

(2) Selection Criteria Review. For an Application to be considered under the Selection Criteria, the Applicant must demonstrate that the Development meets all of the Threshold Criteria requirements. Applications that satisfy the Threshold Criteria will then be scored and ranked according to the Selection Criteria listed in subsection (f) of this section. Where a particular scoring criterion involves multiple points, the Department will award points to the degree proportionate, in its determination, to which a proposed Development complied with that criterion. Applications not scored by the Department's staff shall be deemed to have the points allocated through self-scoring by the Applicants until actually scored. This shall apply only for ranking purposes.

(3) Subsequent Evaluation of Prioritized Applications. After the Application is scored under the Selection Criteria, the Department will assign, as herein described, Developments for review for financial feasibility by the Department's credit underwriting division. Assignments for financial feasibility will be determined by selecting

the Applications with the highest scores in each Set-Aside statewide and then in each region. Based on Application rankings, the Department shall continue to underwrite Applications until the Department has processed enough Applications satisfying the Department's underwriting criteria to enable the allocation of all available housing tax credits according to regional allocation goals and Set Aside categories. To enable the Board to establish a Waiting List, the Department shall underwrite as many additional Applications as the Committee and Board consider necessary to ensure that all available housing tax credits are allocated within the period required by law.

(4) Underwriting Evaluation and Criteria. Underwriting of a Development will include a determination by the Department, pursuant to the Code, §42, that the amount of credits recommended for commitment to a Development is necessary for the financial feasibility of the Development and its long-term viability as a qualified low income housing property. In making this determination, the Department will use the Underwriting Rules and Guidelines, §1.32 of this title.

(A) The Department may have an outside third party perform the underwriting evaluation to the extent it determines appropriate. The expense of any third party underwriting evaluation shall be paid by the Applicant prior to the commencement of the aforementioned evaluation.

(B) The Department will reduce the Applicant's estimate of Developer's and/or Contractor fees in instances where these exceed the fee limits determined by the Department. In the instance where the Contractor is an Affiliate of the Development Owner and both parties are claiming fees, Contractor's overhead, profit, and general requirements, the Department shall be authorized to reduce the total fees estimated to a level that it determines to be reasonable under the circumstances. Further, the Department shall deny or reduce the amount of low income housing tax credits allocated with respect to any portion of costs which it deems excessive or unreasonable. The Department also may require bids or third party estimates in support of the costs proposed by any Applicant.

(5) Compliance Evaluation. After the Department has determined which Developments will be reviewed for financial feasibility, those same Developments will be reviewed for evaluation of the compliance status of all members of the ownership structure by the Department's compliance division, in accordance with §49.19 of this title.

(6) Site Evaluation. Site conditions shall be evaluated through a physical site inspection by the Department. Such inspection will evaluate the site based upon the criteria set forth in the Site Evaluation form provided in the Application and the inspector shall provide a written report of such site evaluation. The evaluations shall be based on the condition of the surrounding neighborhood, including appropriate environmental and aesthetic conditions and proximity to retail, medical, recreational, and educational facilities, and employment centers. The site's appearance and visibility to prospective tenants and its accessibility via the existing transportation infrastructure and public transportation systems shall be considered. "Unacceptable" sites would include, without limitation of any sort, those containing a non-mitigable environmental factor that might adversely affect the health and safety of the residents. For Developments applying under the TX-USDA-RHS Set-Aside, the Department will rely on the physical site inspection performed by TX-USDA-RHS.

(d) Required Pre-Certification and Acknowledgement Procedures. No later than 7 days prior to the close of the Application Acceptance Period, an Applicant must submit the documents required in this subsection to obtain the required pre-certification and acknowledgement.

(1) Experience Certificate. Upon receipt of the evidence required under this paragraph, a certification from the Department will be provided to the Applicant for inclusion in their Application(s). Evidence must show that the Development Owner's General Partner, partner (or if Applicant is to be a limited liability company, the managing member), developer or their principals have a record of successfully constructing or developing residential units or comparable commercial property (i.e. dormitory and hotel/motel) in the capacity of owner, General Partner, developer or managing member. If rehabilitation experience is being claimed to qualify for an Application involving new construction, then the rehabilitation must have been substantial and involved at least $6,000 of direct hard cost per unit.

(A) The term "successfully" is defined as acting in a capacity as the owner, General Partner, managing member, or developer of:

(i) at least 100 residential units or comparable commercial property; or

(ii) at least 36 residential units or comparable commercial property if the Development applying for credits is a rural Development.

(B) One of the following documents must be submitted: American Institute of Architects (AIA) Document A111--Standard Form of Agreement Between Owner & Contractor, AIA Document G704--Certificate of Substantial Completion, IRS Form 8609, HUD Form 9822, development agreements, partnership agreements, or other appropriate documentation verifying that the General Partner or their principals have the required experience. If submitting the IRS Form 8609, only one form per Development is required. The evidence must clearly indicate:

(i) that the Development has been completed (i.e. Development Agreements, Partnership Agreements, etc. must be accompanied by certificates of completion.);

(ii) that the names on the forms and agreements tie back to the ownership entity, General Partner and their respective principals as listed in the Application; and

(iii) the number of units completed or substantially completed.

(2) Personal Financial and Credit Statement and Authorization to Release Credit Information. Upon receipt of the evidence required under this paragraph, an acknowledgement from the Department will be provided to the Applicant for inclusion in their Application(s). A "Personal Financial and Credit Statement and Authorization to Release Credit Information" must be completed and signed by each Person with a General Partner (or if Applicant is to be a Limited Liability Company, managing member) interest in the Applicant. The statement must not be older than 90 days from the date of submission. If submitting partnership or corporate financials in addition to the statements of individual persons, the certified financial statements, or audited financial statements if available, should be for the most recent fiscal year ended 90 days prior to the day the documentation is submitted. This document is required for an entity even if the entity is wholly-owned by a person who has submitted this document as an individual. Entities that have not yet been formed and entities that have been formed recently but have no assets, liabilities or net worth are not required to submit this documentation, but must submit a statement that this is the case.

(e) Threshold Criteria. The following Threshold Criteria listed in paragraphs (1) through (14) of this subsection are mandatory requirements at the time of Application submission:

(1) Completion and submission of the Application provided in the Application Submission Procedures Manual, which includes the entire Uniform Application and any other supplemental forms which may be required by the Department.

(2) Completion and submission of the Site Packet as provided in the Application Submission Procedures Manual.

(3) Set Aside Eligibility. Documentation must be provided that confirms eligibility for all Set-Asides under which the Application is seeking funding, other than the General Set-Aside, as required in the Application Submission Procedures Manual.

(4) Certifications and Design Items. The "Certification Form" provided in the Application Submission Procedures Manual and supporting documents. This exhibit will provide:

(A) A description of the type of amenities proposed for the development. The amenities selected must be made available for the benefit of all tenants. If fees in addition to rent are charged for amenities reserved for an individual tenant's use (i.e. covered parking, storage, etc.), then the amenity may not be included among those provided to complete this exhibit. Developments with more than 36 units must provide at least four of the amenities provided in clauses (i) through (viii) of this subparagraph. Developments with 36 Units or less and Developments receiving funding from TX-USDA-RHS must provide at least two of the amenities provided in clauses (i) through (viii) of this subparagraph. Any future changes in these amenities, or substitution of these amenities, may result in a decrease in awarded credits if the substitution or change includes a decrease in cost or in a cancellation of a Commitment Notice or Carryover Allocation if the Threshold Criteria are no longer met.

(i) Full perimeter fencing with controlled gate access;

(ii) designated playground and equipment;

(iii) community laundry room and/or laundry hook-ups in Units (no hook-up fees of any kind may be charged to a tenant for use of the hook-ups);

(iv) furnished community room;

(v) recreation facilities;

(vi) public telephone(s) available to tenants 24 hours a day;

(vii) on-site day care, senior center, or community meals room; or

(viii) computer facilities including internet access.

(B) A certification that the Development will adhere to the Texas Property Code relating to security devices and other applicable requirements for residential tenancies, and will adhere at a minimum to the International Building Code as it relates to access, lighting and life safety issues.

(C) A certification that the Applicant is in compliance with state and federal laws, including but not limited to, fair housing laws, including Chapter 301, Property Code, Title VIII of the Civil Rights Act of 1968 (42 U.S.C. Section 3601 et seq.), and the Fair Housing Amendments Act of 1988 (42 U.S.C. Section 3601 et seq.); the Civil Rights Act of 1964 (42 U.S.C. Section 2000a et seq.); the Americans with Disabilities Act of 1990 (42 U.S.C. Section 12101 et seq.); and the Rehabilitation Act of 1973 (29 U.S.C. Section 701 et seq.)

(D) A certification that the Applicant will attempt to ensure that at least 30% of the construction and management businesses with which the Applicant contracts in connection with the Development are Minority Owned Businesses, and that the Applicant will submit at least once in each 90-day period following the date of the Commitment Notice a report, in a format prescribed by the Department and provided at the time a Commitment Notice is received, on the percentage of businesses with which the Applicant has contracted that qualify as Minority Owned Businesses.

(E) A certification that the Development will comply with the accessibility standards that are required under Section 504, Rehabilitation Act of 1973 (29 U.S.C. Section 794), and specified under 24 C.F.R. Part 8, Subpart C. This includes that for all Developments, a minimum of five percent of the total dwelling Units or at least one Unit, whichever is greater, shall be made accessible for persons with mobility impairments. A Unit that is on an accessible route and is adaptable and otherwise compliant with sections 3-8 of the Uniform Federal Accessibility Standards (UFAS), shall be deemed to meet this requirement. An additional two percent of the total dwelling Units, or at least one Unit, whichever is greater, shall be accessible for persons with hearing or vision impairments. Additionally, in Developments where all Units are two-stories and are normally exempt from Fair Housing accessibility requirements, a minimum of 20% of each Unit type must provide an accessible entry level in compliance with the Fair Housing Guidelines, and include a minimum of one bedroom and one bathroom or powder room at the entry level. At the construction loan closing, a certification from an accredited architect will be required stating that the Development was designed in conformance with these standards and that all features have been or will be installed to make the Unit accessible for persons with mobility impairments or persons with hearing or vision impairments. A similar certification will also be required after the Development is completed. This requirement applies to all Developments including new construction and rehabilitation.

(F) A certification that the Development will adhere to the 2000 International Energy Conservation Code (IECC) and the Department's Minimum Standard Energy Saving Devices in the construction of each tax credit Unit. Minimum Standard Energy Saving Measures are identified in clauses (i) through (vi) of this subparagraph. All Units must be air-conditioned. The measures must be certified by the Development architect as being included in the design of each tax credit Unit prior to the closing of the construction loan and in actual construction upon Cost Certification.

(i) New Construction to have components of the exterior walls that total at least R-15, ceiling insulation at a minimum of R-30, and roof decking to have radiant barriers. Rehabilitation to have ceiling insulation at a minimum of R-30, soffit and ridge vents and storm windows;

(ii) If newly installed, Energy Star or equivalently rated air handler and condenser; or heating and cooling systems with minimum SEER 12 A/C and AFUE 90% furnace if using gas; or in dry climates an evaporative cooling system may replace the Energy Star cooling system;

(iii) All appliances installed to be Energy Star rated and water heaters to have an energy factor greater than .93 for electric or greater than .62 for gas;

(iv) Maximum 2.5 gallon/minute showerheads and maximum 1.5 gallon/minute faucet aerators;

(v) Installation of ceiling fans in living room and each sleeping room; and

(vi) Installation of solar screens or permanently fixed shading devices at sun-exposed windows.

(G) A certification that the Development will be built by a General Contractor that satisfies the requirements of the General Appropriation Act, Article VII, Rider 11(c) applicable to the Department which requires that the General Contractor hired by the Development Owner or the Applicant, if the Applicant serves as General Contractor, must demonstrate a history of constructing similar types of housing without the use of federal tax credits.

(H) All of the architectural drawings identified in clauses (i) through (v) of this subparagraph. While full size design or construction documents are not required, the drawings must have an accurate and legible scale and show the dimensions. All Developments involving new construction, or conversion of existing buildings not configured in the unit pattern proposed in the Application, must provide all of the items identified in clauses (i) through (v) of this subparagraph. For Developments involving rehabilitation for which the unit configurations are not being altered, only the items identified in clauses (i), (ii) and (iii) of this subparagraph are required:

(i) a site survey or drawing of the entire property that is under the control the prospective ownership entity, which must be a professionally generated (e.g. computer-generated or architectural draft; not a sketch) plat drawn to scale from a metes and bounds description;

(ii) a site plan which:

(I) is consistent with the number of Units and Unit mix specified in the "Rent Schedule" provided in the Application;

(II) identifies all residential, common buildings and amenities; and

(III) clearly delineates the flood plain boundary lines and other easements shown in the site survey;

(iii) floor plans for each type of residential building and each type of common area building;

(iv) floor plans and elevations for each type of residential building and each common area building clearly depicting the height of each floor and a percentage estimate of the exterior composition;

(v) unit floor plans for each type of Unit showing special accessibility and energy features. The use of each room must be labeled. The net rentable areas these unit floor plans represent should be consistent with those shown in the "Rent Schedule" provided in the application; and

(I) Rehabilitation Developments must submit photographs of the existing signage, typical building elevations and interiors, existing Development amenities, and site work. These photos should clearly document the typical areas and building components which exemplify the need for rehabilitation.

(5) Evidence of the Development's development costs and corresponding credit request and syndication information as described in subparagraphs (A) through (G) of this paragraph.

(A) A written narrative describing the financing plan for the Development, including any non-traditional financing arrangements; the use of funds with respect to the Development; the funding sources for the Development including construction, permanent and bridge loans, and rents, operating subsidies, and replacement reserves; and the commitment status of the funding sources for the Development. This information must be consistent with the information provided throughout the Application.

(B) All Developments must submit the "Development Cost Schedule" provided in the Application Submission Procedures Manual. This exhibit must have been prepared and executed not more than 6 months prior to the close of the Application Acceptance Period.

(C) Provide a letter of commitment from a syndicator that, at a minimum, provides an estimate of the amount of equity dollars expected to be raised for the Development in conjunction with the amount of housing tax credits requested for allocation to the Applicant, including pay-in schedules, syndicator consulting fees and other syndication costs. No syndication costs should be included in the eligible basis.

(D) For Developments located in a Qualified Census Tract (QCT) as determined by the Secretary of HUD and qualifying for a 30% increase in Eligible Basis, pursuant to the Code, §42(d)(5)(C), Applicants must submit a copy of the census map clearly showing that the proposed Development is located within a QCT. Census tract numbers must be clearly marked on the map, and must be identical to the QCT number stated in the Department's Reference Manual.

(E) Rehabilitation Developments must also submit the "Proposed Work Write Up for Rehabilitation Developments" provided in the Application Submission Procedures Manual. This form must be prepared and certified by a Third Party registered or licensed architect, engineer or construction inspector.

(F) If offsite costs are included in the budget as a line item, or embedded in the site acquisition contract, or referenced in the utility provider letters, then the supplemental form "Off Site Cost Breakdown" must be provided.

(G) If projected site work costs include unusual or extraordinary items or exceed $7,500 per Unit, then the Applicant must provide a detailed cost breakdown prepared by a Third Party engineer or architect, and a letter from a certified public accountant allocating which portions of those site costs should be included in eligible basis and which ones may be ineligible.

(6) Evidence of readiness to proceed as evidenced by at least one of the items under each of subparagraphs (A) through (E) of this paragraph:

(A) Evidence of site control in the name of the ownership entity, or entities which comprise the Applicant. If the evidence is not in the name of the Development Owner, then the documentation should reflect an expressed ability to transfer the rights to the Development Owner. All individual Persons who are members of the ownership entity of the seller of the proposed Development property must be identified. One of the following items described in clauses (i) through (iii) of this subparagraph must be provided:

(i) a recorded warranty deed; or

(ii) a contract for sale or lease (the minimum term of the lease must be at least 45 years) which is valid for the entire period the Development is under consideration for tax credits or at least 90 days, whichever is greater; or

(iii) an exclusive option to purchase which is valid for the entire period the Development is under consideration for tax credits or at least 90 days, whichever is greater.

(B) Evidence from the appropriate local municipal authority that satisfies one of clauses (i) through (iii) of this subparagraph. Documentation must have been prepared and executed not more than 6 months prior to the close of the Application Acceptance Period.

(i) a letter from the chief executive officer of the political subdivision or another local official with appropriate jurisdiction

stating that the Development is located within the boundaries of a political subdivision which does not have a zoning ordinance;

(ii) a letter from the chief executive officer of the political subdivision or another local official with appropriate jurisdiction stating that:

(I) the Development is permitted under the provisions of the ordinance that apply to the location of the Development; or

(II) the Applicant is in the process of seeking the appropriate zoning and has signed and provided to the political subdivision a release agreeing to hold the political subdivision and all other parties harmless in the event that the appropriate zoning is denied, and a time schedule for completion of appropriate zoning. The Applicant must also provide a copy of the application for appropriate zoning filed with the local entity responsible for zoning approval and proof of delivery of that application in the form of a signed certified mail receipt, signed overnight mail receipt, or confirmation letter from said official. No later than April 1, 2003, the Applicant must submit to the Department evidence that the local entity responsible for initial approval of zoning has approved the appropriate zoning and that they will recommend approval of appropriate zoning to the entity responsible for final approval of zoning decisions (city council or county commission). If this evidence is not provided on or before April 1, 2003, the Application will be terminated. Final approval of appropriate zoning must be achieved and documentation of acceptable zoning for the Development, as proposed in the Application, must be provided to the Department at the time the Commitment Fee is paid. If this evidence is not provided with the Commitment Fee, any commitment of credits will be rescinded.

(iii) In the case of a rehabilitation Development, if the property is currently a non-conforming use as presently zoned, a letter which discuss the items in subclauses (I) through (IV) of this clause:

(I) a detailed narrative of the nature of non-conformance;

(II) the applicable destruction threshold;

(III) owner's rights to reconstruct in the event of damage; and

(IV) penalties for noncompliance.

(C) This Exhibit is required for New Construction only. Evidence of the availability of all necessary utilities/services to the development site. Necessary utilities include natural gas (if applicable), electric, trash, water, and sewer. Such evidence must be a letter or a monthly utility bill from the appropriate municipal/local service provider. If utilities are not already accessible, then the letter must clearly state: an estimated time frame for provision of the utilities, an estimate of the infrastructure cost, and an estimate of any portion of that cost that will be borne by the developer. Letters must be from an authorized individual representing the organization which actually provides the services. Such documentation should clearly indicate the Development property. If utilities are not already accessible (undeveloped areas), then the letter should not be older than three months from the first day of the Application Acceptance Period.

(D) Evidence of interim and permanent financing sufficient to fund the proposed Total Housing Development Cost less any other funds requested from the Department and any other sources documented in the Application. Such evidence must be consistent with the sources and uses of funds represented in the Application and shall be provided in one or more of the following forms described in clauses (i) through (iv) of this subparagraph:

(i) bona fide financing in place as evidenced by a valid and binding loan agreement and a deed(s) of trust in the name of the ownership entity which identifies the mortgagor as the Applicant or entities which comprise the General Partner and/or expressly allows the transfer to the Proposed Development Owner; or,

(ii) bona fide commitment or term sheet issued by a lending institution or mortgage company that is actively and regularly engaged in the business of lending money which is addressed to the ownership entity, or entities which comprise the Applicant and which has been executed by the lender (the term of the loan must be for a minimum of 15 years with at least a 30 year amortization). The commitment must state an expiration date and all the terms and conditions applicable to the financing including the mechanism for determining the interest rate, if applicable, and the anticipated interest rate. Such a commitment may be conditional upon the completion of specified due diligence by the lender and upon the award of tax credits; or,

(iii) any Federal, State or local gap financing, whether of soft or hard debt, must be identified a the time of application. At a minimum, evidence from the lending agency that an application for funding has been made and a term sheet which clearly describes the amount and terms of the funding, and the date by which the funding determination will be made and any commitment issued, must be submitted. While evidence of application for funding from another TDHCA program is not required except as indicated on the Uniform Application, the Applicant must clearly indicate that such an application has been filed as required by the Application Submission Procedures Manual. If the necessary financing has not been committed by the applicable lending agency, the Commitment Notice, Housing Credit Allocation or Determination Notice, as the case may be, will be conditioned upon Applicant obtaining a commitment for the required financing by a date certain, but no later than the date the Carryover Allocation Document is due to the Department; or

(iv) if the Development will be financed through Development Owner contributions, provide a letter from an Third Party CPA verifying the capacity of the Applicant to provide the proposed financing with funds that are not otherwise committed together with a letter from the Applicant's bank or banks confirming that sufficient funds are available to the Applicant. Documentation must have been prepared and executed not more than 6 months prior to the close of the Application Acceptance Period.

(E) A copy of the full legal description and either of the documents described in clauses (i) and (ii) of this subparagraph, and satisfying the requirements of clause (iii) of this subparagraph, if applicable:

(i) a copy of the current title policy which shows that the ownership (or leasehold) of the land/Development is vested in the exact name of the Applicant, or entities which comprise the Applicant; or

(ii) a copy of a current title commitment with the proposed insured matching exactly the name of the Applicant or entities which comprise the Applicant and the title of the land/Development vested in the name of the exact name of the seller or lessor as indicated on the sales contract or lease.

(iii) if the title policy or title commitment is more than six months old as of the day the Application Acceptance Period closes, than a letter from the title company indicating that nothing further has transpired on the policy or commitment.

(7) Evidence of all of the notifications described in subparagraphs (A) through (E) of this paragraph. Such notices must be prepared in accordance with "Public Notifications" provided in the Application Submission Procedures Manual.

(A) A copy of the public notice published in the most widely circulated newspaper in the area in which the proposed Development will be located. The newspaper must be intended for the general population and may not be a business newspaper or other specialized publication. Such notice must run at least twice within a thirty day period. Such notice must be published prior to the submission of the Application to the Department and can not be older than three months from the first day of the Application Acceptance Period. In communities located within a Metropolitan Statistical Area the notice should be published in the newspapers of both the Development community and the Metropolitan Statistical Area. Developments that involve rehabilitation and which are already serving low income residents are not required to provide this exhibit.

(B) Evidence of notification of the local chief executive officer(s) (i.e., mayor and county judge), state senator, and state representative of the locality of the Development. Evidence of such notification shall include a letter which at a minimum contains a copy of the public notice sent to the official and proof of delivery in the form of a signed certified mail receipt, signed overnight mail receipt, or confirmation letter from said official. Proof of notification should not be older than three months from the first day of the Application Acceptance Period.

(C) Evidence of notification to the Texas Department of Transportation district. Evidence of such notification shall include a letter which, at a minimum, contains the location of the proposed Development, the proposed population being served, a copy of the public notice, and proof of delivery in the form of a certified mail receipt, overnight mail receipt, or confirmation letter from said office. A return letter from the Texas Department of Transportation is also required which describes the transportation options and availability for the location of the proposed Development. Proof of notification should not be older than six months from the close of the Application Acceptance Period.

(D) If any of the Units in the Development are occupied at the time of application, then the Applicant must post a copy of the public notice in a prominent location at the Development throughout the period of time the Application is under review by the Department. A picture of this posted notice must be provided with this exhibit. When the Department's public hearing schedule for comment on submitted applications becomes available, a copy of the schedule must also be posted until such hearings are completed. Compliance with these requirements shall be confirmed during the Department's site inspection.

(E) Public Housing Waiting List. Evidence that the Development Owner has committed in writing to the local public housing authority (PHA) the availability of Units and that the Development Owner agrees to consider households on the PHA's waiting list as potential tenants and that the Property is available to Section 8 certificate or voucher holders. Evidence of this commitment must include a copy of the Development Owner's letter to the PHA and proof of delivery in the form of a certified mail receipt, overnight mail receipt, or confirmation letter from said PHA. Proof of notification should not be older than six months from the close of the Application Acceptance Period. If no PHA is within the locality of the Development, the Development Owner must utilize the nearest authority or office responsible for administering Section 8 programs.

(8) Evidence of the Development's proposed ownership structure and the Applicant's previous experience as described in subparagraphs (A) through (E) of this paragraph.

(A) A chart which clearly illustrates the complete organizational structure of the final proposed Development Owner, that provides the names and ownership percentages of Persons with an ownership interest in the Development. The percentage ownership of all Persons in Control of these entities and sub-entities must also be clearly defined. The Applicant, General Partner and their Principals, along with the proposed Limited Partner should be listed.

(B) The Applicant, General Partner (or Managing Member) and all Persons with an ownership interest in the General Partner (or the Managing Member) of these entities and sub-entities must also provide documentation of standing to include the following documentation as applicable under clauses (i) through (iii) of this subparagraph.

(i) For entities that are not yet formed but are to be formed either in or outside of the state of Texas:

(I) a certificate of reservation of the entity name from the Texas Secretary of State and from the state in which the entity is to be formed if different from Texas; and

(II) an executed letter of intent to organize, statement of partnership or partnership agreement.

(ii) For existing entities whether formed in or outside of the state of Texas:

(I) if the entity has been formed for three months or longer, a copy of the Certificate of Good Standing from the Comptroller showing good standing; if the entity has been formed for less than three months, a certificate of reservation of the entity name from the Texas Secretary of State and from the state in which the entity was formed if different from Texas; entities formed in other states must also submit a certificate of authority to do business in Texas or an application for a certificate of authority,

(II) a copy of the Articles of Incorporation, Organization or Partnership.

(iii) the Applicant must provide evidence that the signer(s) of the Application have the authority to sign on behalf of the Applicant in the form of a corporate resolution or by-laws which indicate same from the sub-entity in Control of the Applicant, and that those persons constitute all persons required to sign or submit such documents. A cover sheet must be placed before the copy of the Articles of Incorporation, Organization or Partnership, identifying the relevant document(s) where the evidence of authority to sign is to be found and specifying exactly where the applicable information exists within the all relevant documents by page number or by section and subsection if the pages are not numbered.

(C) A copy of the completed and executed" Previous Participation and Background Certification Form," must be submitted listing each Principal and their affiliates for each Person owning an interest in the General Partner (or, if Applicant is to be a limited liability company, the managing member) of the Applicant. If the developer of the Development is receiving more than 10% of the developer fee, he/she will also be required to submit documents for this exhibit. The 2003 versions of these forms, as required in the Uniform Application, must be submitted. Units of local government are also required to submit this document. The form must include a list of all developments that are, or were, previously under ownership or control of the Applicant and their Affiliates. All participation in any TDHCA funded

or monitored activity, including non-housing activities, must be disclosed.

(D) If the Applicant or their Affiliates have, or have had, ownership or control of affordable housing, being housing that receives any form of financing and/or assistance from any unit of Federal, state or local government for the purpose of enhancing affordability to persons of low or moderate income, outside the state of Texas, then Evidence that each Person owning an interest in the General Partner (or if Applicant is to be a limited liability company, the managing member) of the Applicant has sent "National Previous Participation and Background Certification Form," to the appropriate Housing Credit Agency for each state in which they have developed or operated affordable housing. This form is only necessary when the Developments involved are outside of the state of Texas. An original form is not required. Evidence of such notification shall be a copy of the form sent to the agency and proof of delivery in the form of a certified mail receipt, overnight mail receipt, or confirmation letter from said agency.

(E) Evidence that the developer and the Development Owner's General Partner, partner (or if Applicant is to be a limited liability company, the managing member) or their principals have a record of successfully constructing or developing residential units or comparable commercial property (i.e. dormitory and hotel/motel) in the capacity of developer, owner, General Partner or managing member. Evidence must be a certification from the Department that the Person with the experience satisfies this exhibit, as further described under §49.9(d) of this title. Applicants must request this certification at least seven days prior to the close of the Application Acceptance Period. Applicants should ensure that the individual whose name is on the certification appears in the organizational chart provided in subparagraph (A) of this paragraph.

(9) Evidence of the Development's projected income and operating expenses as described in subparagraphs (A) through (D) of this paragraph:

(A) All Developments must provide a 30-year pro-forma estimate of operating expenses and supporting documentation used to generate projections (operating statements from comparable properties).

(B) If rental assistance, an operating subsidy, an annuity, or an interest rate reduction payment is proposed to exist or continue for the Development, any related contract or other agreement securing those funds must be provided, which at a minimum identifies the source and annual amount of the funds, the number of Units receiving the funds, and the term and expiration date of the contract or other agreement.

(C) Applicant must provide documentation from the source of the "Utility Allowance" estimate used in completing the Rent Schedule provided in the Application. This exhibit must clearly indicate which utility costs are included in the estimate. In the event of overlapping jurisdiction between local housing authorities, the utility allowance for the building must be based on where the Development property is located according to the Development's legal description.

(D) Occupied Developments undergoing rehabilitation must also submit the items described in clauses (i) through (iv) of this subparagraph.

(i) Unless the current property owner is unwilling to provide the required documentation, if which even a signed statement as to their unwillingness to do so is required:

(I) historical monthly operating statements of the subject Development for 12 consecutive months ending not more than 45 days prior to the first day of the Application Acceptance Period. In lieu of the monthly operating statements, two annual operating statement summaries may be provided. If 12 months of operating statements or two annual operating summaries cannot be obtained, then the monthly operating statements since the date of acquisition of the Development and any other supporting documentation used to generate projections may be provided; and

(II) a rent roll not more than 6 months old as of the day the Application Acceptance Period closes, that discloses the terms and rate of the lease, rental rates offered at the date of the rent roll, Unit mix, tenant names or vacancy, and dates of first occupancy and expiration of lease.

(ii) a written explanation of the process used to notify and consult with the tenants in preparing the application;

(iii) a relocation plan outlining relocation requirements and a budget with an identified funding source; and

(iv) if applicable, evidence that the relocation plan has been submitted to the appropriate legal agency.

(10) Applications involving Nonprofit General Partners and Qualified Nonprofit Developments.

(A) All Applicants involving a nonprofit General Partner (or Managing Member), regardless of the set-aside applied under, must submit all of the documents described in clauses (i) through (iii) of this subparagraph which confirm that the Applicant is a Qualified Nonprofit Organization pursuant to Code, §42(h)(5)(C):

(i) an IRS determination letter which states that the Qualified Nonprofit Organization is a 501(c)(3) or (4) entity;

(ii) a copy of the articles of incorporation of the nonprofit organization which specifically states that the fostering of affordable housing is one of the entity's exempt purposes;

(iii) "Nonprofit Participation Exhibit"; and

(B) Additionally, all Applicants applying under the Nonprofit Set-Aside, established under §49.7(b)(1) of this title, must also provide the following information with respect to each Development Owner and each General Partner of a Development Owner, as described in clauses (i) through (vi) of this subparagraph.

(i) evidence that one of the exempt purposes of the nonprofit organization is to provide low income housing;

(ii) evidence that the nonprofit organization prohibits a member of its board of directors, other than a chief staff member serving concurrently as a member of the board, from receiving material compensation for service on the board;

(iii) a Third Party legal opinion stating:

(I) that the nonprofit organization is not affiliated with or controlled by a for-profit organization and the basis for that opinion, and

(II) that the nonprofit organization is eligible, as further described, for a housing tax credit allocation from the Nonprofit Set-Aside and the basis for that opinion. Eligibility is contingent upon the non-profit organization controlling a majority of the Development, or if the organization's Application is filed on behalf of a limited partnership, or limited liability company, being the managing General Partner (or Managing Member); and otherwise meet the requirements of the Code, §42(h)(5);

(iv) a copy of the nonprofit organization's most recent audited financial statement;

(v) a list of the names and home addresses of members of the board of directors of the nonprofit organization; and

(vi) evidence, in the form of a certification, that a majority of the members of the nonprofit organization's board of directors principally reside:

(I) in this state, if the Development is located in a rural area; or

(II) not more than 90 miles from the Development in the community in which the Development is located, if the Development is not located in a rural area.

(11) Applicants applying for acquisition credits or affiliated with the seller must provide all of the documentation described in subparagraphs (A) through (C) of this paragraph. Applicants applying for acquisition credits must also provide the items described in subparagraph (D) of this paragraph and as provided in the Application Submission Procedures Manual.

(A) an appraisal, not more than 6 months old as of the day the Application Acceptance Period closes, which complies with the Uniform Standards of Professional Appraisal Practice and the Department's Market Analysis and Appraisal Policy. For Developments qualifying in the TX-USDA-RHS set-aside, the appraisal may be more than 6 months old, but not more than 12 months old as of the day the Application Acceptance Period closes. This appraisal of the Property must separately state the as-is, pre-acquisition or transfer value of the land and the improvements where applicable;

(B) a valuation report from the county tax appraisal district;

(C) clear identification of the selling Persons or entities, and details of any relationship between the seller and the Applicant or any Affiliation with the Development Team, Qualified Market Analyst or any other professional or other consultant performing services with respect to the Development. If any such relationship exists, complete disclosure and documentation of the related party's original acquisition and holding and improvement costs since acquisition, and any and all exit taxes, to justify the proposed sales price must also be provided; and

(D) "Acquisition of Existing Buildings Form."

(12) Evidence of an "Acknowledgement of Receipt of Financial Statement and Authorization to Release Credit Information" must be provided for any person with an ownership interest in the General Partner (or Managing Member), interest in the Applicant or receiving a portion of the developer fee, or anticipated to provide guarantees to secure necessary financing, as required under §49.9(d) of this title.

(13) Supplemental Threshold Reports. Documents under subparagraph (A) and (B) of this paragraph must be submitted as further clarified in subparagraph (C) and (D) of this paragraph and in accordance with Market Analysis Rules and Guidelines and Environmental Site Assessment Rules and Guidelines, §1.33 and §1.35 of this title.

(A) A Phase I Environmental Site Assessment (ESA) on the subject Property, dated not more than 12 months prior to the first day of the Application Acceptance Period. In the event that a Phase I Environmental Site Assessment on the Development is older than 12 months as of the day the Application Acceptance Period closes, the Development Owner must supply the Department with an update letter from the Person or organization which prepared the initial assessment; provided however, that the Department will not accept any Phase I Environmental Site Assessment which is more than 24 months old as of the day the Application Acceptance Period closes. The ESA must be prepared in accordance with the Department Environmental Site Assessment Rules and Guidelines. Developments whose funds have been obligated by TX-USDA-RHS will not be required to supply this information; however, the Development Owners of such Developments are hereby notified that it is their responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements.

(B) A comprehensive Market Study prepared at the developer's expense by a disinterested Qualified Market Analyst in accordance with the Market Analysis Rules and Guidelines. In the event that a Market Study on the Development is older than 6 months as of the day the Application Acceptance Period closes, the Development Owner must supply the Department with an updated Market Study from the Person or organization which prepared the initial report; provided however, that the Department will not accept any Market Study which is more than 12 months old as of the day the Application Acceptance Period closes . The Market Study should be prepared for and addressed to the Department. For Applications in the TX-USDA-RHS Set-Aside, the appraisal, required under paragraph (11)(A) of this subsection, will satisfy the requirement for a Market Study; no additional Market Study is required; however the Department may request additional information as needed.

(i) The Department may determine from time to time that information not required in the Department Market Analysis and Appraisal Rules and Guidelines will be relevant to the Department's evaluation of the need for the Development and the allocation of the requested Housing Credit Allocation Amount. The Department may request additional information from the Qualified Market Analyst to meet this need.

(ii) All Applicants shall acknowledge by virtue of filing an Application that the Department shall not be bound by any such opinion or the Market Study itself, and may substitute its own analysis and underwriting conclusions for those submitted by the Qualified Market Analyst.

(C) Inserted at the front of each of these reports must be a transmission letter from the person preparing the report that states that the Department is granted full authority to rely on the findings and conclusions of the report.

(D) The requirements for each of the reports identified in subparagraphs (A) and (B) of this paragraph can be satisfied in either of the methods identified in clauses (i) or (ii) of this subparagraph.

(i) Upon Application submission, the documentation for each of these exhibits may be submitted in its entirety as described in subparagraphs (A) and (B) of this paragraph; or

(ii) Upon Application submission, the Applicant may provide evidence in the form of an executed engagement letter with the party performing each of the individual reports that the required exhibit has been commissioned to be performed and that the delivery date will be no later than March 31, 2003. Subsequently, the entire exhibit must be submitted on or before 5:00 p.m. CST, March 31, 2003. If the entire exhibit is not received by that time, the Application will be terminated for a Material Deficiency and will be removed from consideration.

(14) Self-Scoring. Applicant's self-score must be completed on the "Application Self-Scoring Form."

(f) Selection Criteria. All Applications will be evaluated and ranking points will be assigned according to the Selection Criteria listed in paragraphs (1) through (12) of this subsection.

(1) Development Location Characteristics. Evidence, not more than 6 months old from the date of the close of the Application Acceptance Period, that the subject Property is located within one of the geographical areas described in subparagraphs (A) through (D) of this paragraph. Areas qualifying under any one of the subparagraphs (A) through (D) of this paragraph will receive 5 points. A Development may only receive points under one of the subparagraphs (A) through (D) of this paragraph. A Development may receive points pursuant to subparagraph (E) of this paragraph in addition to any points awarded in subparagraphs (A) through (D) of this paragraph.

(A) A geographical area which is:

(i) a Targeted Texas County (TTC) or Economically Distressed Area; or

(ii) a Colonia.

(B) a designated state or federal empowerment/enterprise zone, urban enterprise community, or urban enhanced enterprise community. Such Developments must submit a letter and a map from a city/county official verifying that the proposed Development is located within such a designated zone. Letter should be no older than 6 months from the close of the Application Acceptance Period; or

(C) a city-sponsored Tax Increment Financing Zone (TIF), Public Improvement District (PIDs), or other area or zone where a city or county has, through a local government initiative, specifically encouraged or channeled growth, neighborhood preservation or redevelopment. Significant incentives or benefits must be received from the local government which amount to at least 5% of the Total Development Costs. Such Developments must submit all of the following documentation: a letter from a city/county official verifying that the proposed Development is located within the city sponsored zone or district; a map from the city/county official which clearly delineates the boundaries of the district; and a certified copy of the appropriate resolution or documentation from the mayor, local city council, county judge, or county commissioners court which documents that the designated area was:

(i) created by the local city council/county commission,

(ii) targets a specific geographic area which was not created solely for the benefit of the Applicant, and

(iii) offers tangible and significant area-specific incentives or benefit over and above those normally provided by the city or county.

(D) a non-impacted Census Block pursuant to the Young vs. Martinez judgment. Such Developments must submit evidence in the form of a letter from HUD that the Development is located in such an area.

(E) a Development which is located in a city or county with a relatively low ratio of awarded tax credits (in dollars) to its population. If the Development is located in an incorporated city, the city ratio will be used and if the Development is located outside of an incorporated city, then the county ratio will be used. Such ratios shall be calculated by the Department based on its inventory of tax credit developments and the 2000 Census Data. In the event that census data does not have a figure for a specific place, the Department will rely on the Texas State Data Center's place population estimates, or as a final source the Department will rely on the local municipality's most recent population estimate to calculate the ratio. The ratios will be published in the Reference Manual. Geographic area will be eligible for points as described in clauses (i) through (iv) of this subparagraph.

(i) A city or county with no LIHTC developments will receive eight points.

(ii) A city or county with a ratio greater than zero and less than one will receive six points.

(iii) A city or county with a ratio equal to or greater than one, but less than two, will receive two points.

(iv) A city or county with a ratio greater than four, will have four points deducted from its score.

(2) Housing Needs Characteristics. Each Development, dependent on the city or county where it is located, will yield a score based on the Uniform Housing Needs Scoring Component. If a Development is in an incorporated city, the city score will be used. If a Development is outside the boundaries of an incorporated city, then the county score will be used. The Uniform Housing Needs Scoring Component scores for each city and county will be published in the Reference Manual. (20 points maximum).

(3) Support and Consistency with Local Planning. All documents must not be older than 6 months from the close of the Application Acceptance Period. Points may be received under both subparagraph (A) or (B) of this paragraph.

(A) Evidence from the local municipal authority stating that the Development fulfills a need for additional affordable rental housing as evidenced in a local consolidated plan, comprehensive plan, or other local planning document; or a letter from the local municipal authority stating that there is no local plan and that the city supports the Development (6 points).

(B) Community Support. Points will be awarded based on the written statements of support from local and state elected officials representing constituents in areas that include the location of the Development and from neighborhood and/or community civic organizations for areas that encompass the location of the Development. Letters of support must identify the specific Development and must state support of the specific Development at the proposed location. This documentation must be provided as part of the Application. Letters of support from state officials that do not represent constituents in areas that include the location of the Development will not qualify for points under this Exhibit, nor do letters of support from organizations that are not active in the area that includes the location of the Development. For the purposes of this Exhibit neighborhood and/or community civic organizations do not include governmental entities, taxing entities or educational entities. Letters of support received after the close of the Application Acceptance Period will not be accepted for this Exhibit. Points can be awarded for letters of support as identified in clauses (i) through (iv) of this subparagraph, not to exceed a total of 6 points:

(i) from United States Representative or Senate Member (3 points each, maximum of 6 points)

(ii) from State of Texas Representative or Senate Member (3 points each, maximum of 6 points);

(iii) from the Mayor, County Judge, City Council Member, or County Commissioner indicating support; or a resolution from the local governing entity indicating support of the Development (2 points);

(iv) from neighborhood and/or community civic organizations (1 point each, maximum of 2 points).

(4) Development Characteristics. Developments may receive points under as many of the following subparagraphs as are applicable; however to qualify for points under subparagraphs (B) through (J) of this paragraph, the Development must first meet the minimum

requirements identified under subparagraph (A) of this paragraph, unless otherwise provided in the particular subparagraph. This minimum requirement does not apply to Developments involving rehabilitation or Developments receiving funding from TX-USDA-RHS.

(A) Unit Size. The square feet of all of the units in the Development, for each type of unit, must be at minimum:

(i) 500 square feet for an efficiency unit;

(ii) 650 square feet for a non-elderly one bedroom unit; 550 square feet for an elderly one bedroom unit;

(iii) 900 square feet for a two bedroom unit; 750 square feet for an elderly two bedroom unit;

(iv) 1,000 square feet for a three bedroom unit; and

(v) 1,200 square feet for a four bedroom unit.

(B) Development provides Units for housing individuals with children. To qualify for these points, these Units must have at least 2 bathrooms and no fewer than three bedrooms and at least 1000 square feet of net rentable area for three bedroom Units or 1200 square feet of net rentable area for four bedroom Units; these Unit size and bathroom requirements are not required for Developments involving rehabilitation to be eligible for the points below. Unless the building is served by an elevator, 3 or 4 bedroom Units located above the building's second floor will not qualify for these points. If the Development is a mixed-income development, only tax credit Units will be used in computing the percentage of qualified Units for this selection item.

(i) 15% of the Units in the Development are three or four bedrooms (5 points); and

(ii) an additional point will be awarded for each additional 5% increment of Units that are three or four bedrooms up to 30% of the Units (a maximum of three points) (3 points).

(C) Cost per Square Foot. For this exhibit hard costs shall be defined as construction costs, including site work, contractor profit, overhead and general requirements, as represented in Exhibit 102B. This calculation does not include indirect construction costs. The calculation will be hard costs per square foot of net rentable area (NRA). The calculations will be based on the hard cost listed in Exhibit 102B and NRA shown in the Rent Schedule of the Application. Developments do not exceed $60 per square foot. (1 point).

(D) Unit Amenities and Quality. Developments providing specific amenity and quality features in every Unit at no extra charge to the tenant will be awarded points based on the point structure provided in clauses (i) through (xii) of this subparagraph, not to exceed 10 points in total. Developments involving rehabilitation will double the points listed for each item, not to exceed 10 points in total.

(i) Covered entries (1 point);

(ii) Computer line/phone jack available in all bedrooms (only one phone line needed) (1 point);

(iii) Mini blinds or window coverings for all windows (1 point);

(iv) Ceramic tile floors in entry, kitchen and bathrooms (2 point);

(v) laundry connections (1 point);

(vi) storage room or closet, of approximately 9 square feet or greater, which does not include bedroom, entryway or linen closets (1 point);

(vii) Laundry equipment (washers and dryers) in units (3 point);

(viii) Twenty-five year architectural shingle roofing (1 point);

(ix) Covered patios or covered balconies (1 point);

(x) Covered parking of at least one covered space per Unit (2 points);

(xi) Garages, which do not also qualify as covered parking (3 points);

(xii) Greater than 75% masonry on exterior, excluding cementious board products (3 points);

(E) The Development is an existing Residential Development without maximum rent limitations or set-asides for affordable housing for which the proposed rehabilitation is part of a community revitalization plan. If maximum rent limitations had existed previously, then the restrictions must have expired at least one year prior to the date of Application to the Department (4 points).

(F) The proposed Development will support the future quality of the Development by including operating reserves in an amount no less than $300 per Unit for Developments involving rehabilitation and no less than $200 per Unit for Developments involving new construction. The operating reserve figure must be reflected in the Development's operating budget and proforma. The Development must not only book the reserves but also have the cash deposits to support the reserves. (6 points).

(G) Evidence that the proposed historic Residential Development has received an historic property designation by a federal, state or local Governmental Entity. Such evidence must be in the form of a letter from the designating entity identifying the Development by name and address and stating that the Development is:

(i) listed in the National Register of Historic Places under the United States Department of the Interior in accordance with the National Historic Preservation Act of 1966;

(ii) located in a registered historic district and certified by the United States Department of the Interior as being of historic significance to that district;

(iii) identified in a city, county, or state historic preservation list; or

(iv) designated as a state landmark (6 points).

(H) The Development consists of not more than 36 Units and is not a part of, or contiguous to, a larger Development (5 points).

(I) Evidence that the proposed Development is partially funded by a HOPE VI, Section 202 or Section 811 grant from HUD. The Development must have already applied for funding from HUD. Evidence shall include a copy of the application to HUD and a letter from HUD indicating that the application was received. (5 points).

(J) The proposed Development involves the rehabilitation of units that are, and will continue to be, owned by a Public Housing Authority or a nonprofit entity controlled by a Public Housing Authority (5 points.)

(5) Sponsor Characteristics. Developments may only receive points for one of the two criteria listed in subparagraphs (A) and (B) of this paragraph. To satisfy the requirements of subparagraphs (A) or (B) of this paragraph, a copy of an agreement between the two partnering entities must be provided which shows that the nonprofit

organization or HUB will hold an ownership interest in and materially participate (within the meaning of the Code, §469(h)), in the development and operation of the Development throughout the Compliance Period and clearly identifies the ownership percentages of all parties (3 points maximum for subparagraphs (A) and (B) of this paragraph).

(A) Evidence that a HUB, as certified by the Texas Building and Procurement Commission (formerly General Services Commission), has an ownership interest in and materially participates in the development and operation of the Development throughout the Compliance Period. To qualify for these points, the Applicant must submit a certification from the Texas Building and Procurement Commission (formerly General Services Commission) that the Person is a HUB at the close of the Application Acceptance Period. Evidence will need to be supplemented, either at the time the Application is submitted or at the time a HUB certification renewal is received by the Applicant, confirming that the certification is valid through July 31, 2003 and renewable after that date.

(B) Joint Ventures with Qualified Nonprofit Organizations. Evidence that the Development involves a joint venture between a for profit organization and a Qualified Nonprofit Organization. The Qualified Nonprofit Organization must be materially participating in the Development as one of the General Partners (or Managing Members), but is not required to have Control, to receive these points. However, to also be eligible for the Nonprofit Set-Aside, as further described in §49.6 of this title, the Qualified Nonprofit Organization must have Control.

(6) Development Provides Supportive Services to Tenants. Points may be received under both subparagraphs (A) and (B) of this paragraph.

(A) An Applicant will receive points for coordinating their tenant services with those services provided through state workforce development and welfare programs as evidenced by execution of a Tenant Supportive Services Certification (2 points).

(B) The Development Owner must certify that the Development will provide a combination of special supportive services appropriate for the proposed tenants. The provision of supportive services will be included in the LURA as selected from the list of services identified in this paragraph. Services must be provided on-site or transportation to off-site services must be provided (maximum of 6 points).

(i) Applicants will be awarded points for selecting services listed in clause (ii) of this sub-paragraph based on the following scoring range:

(I) Two points will be awarded for providing one of the services; or

(II) Four points will be awarded for providing two of the services; or

(III) Six points will be awarded for providing three of the services.

(ii) Service options include child care; transportation; basic adult education; legal assistance; counseling services; GED preparation; English as a second language classes; vocational training; home buyer education; credit counseling; financial planning assistance or courses; health screening services; health and nutritional courses; youth programs; scholastic tutoring; social events and activities; community gardens or computer facilities; any other program described under Title IV-A of the Social Security Act (42 U.S.C. §§ 601 et seq.) which enables children to be cared for in their homes or the homes of relatives; ends the dependence of needy families on government benefits by promoting job preparation, work and marriage; prevents and reduces the incidence of out-of wedlock pregnancies; and encourages the formation and maintenance of two-parent families; or any other services approved in writing by the Department.

(7) Tenant Characteristics--Populations with Special Needs. Evidence that the Development is designed solely for transitional housing for homeless persons on a non-transient basis, with supportive services designed to assist tenants in locating and retaining permanent housing. For the purpose of this exhibit, homeless persons are individuals or families that lack a fixed, regular, and adequate nighttime residence as more fully defined in 24 Code of Federal Regulations, §91.5, and as may be amended from time to time. All of the items described in subparagraphs (A) through (E) of this paragraph must be submitted:

(A) a detailed narrative describing the type of proposed housing;

(B) a referral agreement, not more than 12 months old from the first day of the Application Acceptance Period, with an established organization which provides services to the homeless;

(C) a marketing plan designed to attract qualified tenants and housing providers;

(D) a list of supportive services; and

(E) adequate additional income source and executed guarantee to supplement any anticipated operating and funding gaps (15 points).

(8) Serving Low Income Tenants. Applicants may receive points for serving low income tenants under both sub-paragraphs (A) and (B) of this paragraph.

(A) Applicants will be eligible for points for serving tenants with rents below the maximum tax credit rents for only one of the clauses listed in this subparagraph. The calculation for these points will be made based on the figures provided in the Rent Schedule submitted with the Application. All representations and commitments made will be reflected in the LURA. For purposes of compliance with these representations, Units rented to Section 8 voucher holders are excluded, unless the actual rent charged for such Units, as opposed to the tenant contribution, meets the requirement:

(i) All low income rents are 5% less than the maximum tax credit rents (4 points); or

(ii) All low income rents are 10% less than the maximum tax credit rents (8 points); or

(iii) All low income rents are 15% less than the maximum tax credit rents (12 points).

(B) Low Income Targeting Points. An Applicant may qualify for points under clause (iv) of this subparagraph. To qualify for these points, the rents for the rent-restricted Units must not be higher than the allowable tax credit rents at the rent-restricted AMGI level. For Section 8 residents, or other rental assistance tenants, the tenant paid rent plus the utility allowance is compared to the rent limit to determine compliance. The Development Owner, upon making selections for this exhibit will set aside Units at the rent-restricted levels of AMGI and will maintain the percentage of such Units continuously over the compliance and extended use period as specified in the LURA.

(i) To qualify for points for Units set aside for tenants at or below 30% of AMGI, an Applicant must provide evidence of a subsidy as documented by a commitment letter or in the case of local, state or federal subsidy, a copy of the application and evidence that the awarding entity has received the application. Commitments of funds must specify the amount of funds committed, the terms of

the commitment and the number of Units targeted at the AMGI level. Evidence of subsidy should be submitted in accordance with subsection (e)(6)(D)(iii) of this section. The commitment of funds can not be provided by any Person with an ownership interest in the Applicant or General Partner(s), the equity provider, the lender, a Related Party, any member of the Development Team, or any entity receiving any portion of the developer fee. Tenant based Section 8 contracts do not constitute evidence of a commitment of subsidy for the Development. If project-based Section 8 is utilized, a letter from the public housing authority indicating that they are committing Section 8 to the Development and that they are permitted by HUD to commit Units to a specific Development. If the project-based Section 8 assistance is not allocated by a public housing authority, appropriate evidence of the Section 8 contract(s) must be provided.

(ii) No more than 50% of the total number of low income units will be counted as designated for tenants at or below 40% of the AMGI for purposes of determining the points in the 40% and 30% AMGI categories. For Developments located in a Qualified Census Tract no more than 30% of the total number of low income units will be counted as designated for tenants at or below 40% of the AMGI for purposes of determining the points in the 40% and 30% of AMGI categories.

(iii) For purposes of calculating points no Unit may be counted twice in determining point eligibility.

(iv) Developments should be scored based on the structure in the table below. Only Developments located in cities (or counties for Developments not located within a city) whose AMGI is below the statewide AMGI, may use Weight Factor B. All other Applicants are required to use Weight Factor A.
Figure 10 TAC §49.9(f)(8)(B)(iv)

(9) Length of Affordability Period. The initial compliance period for a development is fifteen years. In accordance with Code, developments are required to adhere to an extended low income use period for an additional 15 years. To receive points the Development Owner elects, in the Application, to extend the affordability period beyond the extended low income use period. The period commences with the first year of the Credit Period.

(A) Extend the affordability period for an additional 10 years, with an Extended Use Period of 40 years (8 points);

(B) Extend the affordability period for an additional 15 years, with an Extended Use Period of 45 years (10 points);

(C) Extend the affordability period for an additional 20 years, with an Extended Use Period of 50 years (12 points); or

(D) Extend the affordability period for an additional 25 years, with an Extended Use Period of 55 years (14 points);

(10) Evidence that Development Owner agrees to provide a right of first refusal to purchase the Development upon or following the end of the Compliance Period for the minimum purchase price provided in, and in accordance with the requirements of, §42(i)(7) of the Code (the "Minimum Purchase Price"), to a Qualified Nonprofit Organization, the Department, or either an individual tenant with respect to a single family building, or a tenant cooperative, a resident management corporation in the Development or other association of tenants in the Development with respect to multifamily developments (together, in all such cases, including the tenants of a single family building, a "Tenant Organization"). Development Owner may qualify for these points by providing the right of first refusal in the following terms (5 points).

(A) Upon the earlier to occur of:

(i) the Development Owner's determination to sell the Development, or

(ii) the Development Owner's request to the Department, pursuant to §42(h)(6)(E)(II) of the Code, to find a buyer who will purchase the Development pursuant to a "qualified contract" within the meaning of §42(h)(6)(F) of the Code, the Development Owner shall provide a notice of intent to sell the Development ("Notice of Intent") to the Department and to such other parties as the Department may direct at that time. If the Development Owner determines that it will sell the Development at the end of the Compliance Period, the Notice of Intent shall be given no later than two years prior to expiration of the Compliance Period. If the Development Owner determines that it will sell the Development at some point later than the end of the Compliance Period, the Notice of Intent shall be given no later than two years prior to date upon which the Development Owner intends to sell the Development.

(B) During the two years following the giving of Notice of Intent, the Sponsor may enter into an agreement to sell the Development only in accordance with a right of first refusal for sale at the Minimum Purchase Price with parties in the following order of priority:

(i) during the first six-month period after the Notice of Intent, only with a Qualified Nonprofit Organization that is also a community housing development organization, as defined for purposes of the federal HOME Investment Partnerships Program at 24 C.F.R. §92.1 (a "CHDO") and is approved by the Department,

(ii) during the second six-month period after the Notice of Intent, only with a Qualified Nonprofit Organization or a Tenant Organization; and

(iii) during the second year after the Notice of Intent, only with the Department or with a Qualified Nonprofit Organization approved by the Department or a Tenant Organization approved by the Department.

(iv) If, during such two-year period, the Development Owner shall receive an offer to purchase the Development at the Minimum Purchase Price from one of the organizations designated in clauses (i), (ii), and (iii) of this subparagraph (within the period(s) appropriate to such organization), the Development Owner shall sell the Development at the Minimum Purchase Price to such organization. If, during such period, the Development Owner shall receive more than one offer to purchase the Development at the Minimum Purchase Price from one or more of the organizations designated in clauses (i), (ii), and (iii) of this subparagraph (within the period(s) appropriate to such organizations), the Development Owner shall sell the Development at the Minimum Purchase Price to whichever of such organizations it shall choose.

(C) After the later to occur of:

(i) the end of the Compliance Period; or

(ii) two years from delivery of a Notice of Intent, the Development Owner may sell the Development without regard to any right of first refusal established by the LURA if no offer to purchase the Development at or above the Minimum Purchase Price has been made by a Qualified Nonprofit Organization, a Tenant Organization or the Department, or a period of 120 days has expired from the date of acceptance of all such offers as shall have been received without the sale having occurred, provided that the failure(s) to close within any such 120-day period shall not have been caused by the Development Owner or matters related to the title for the Development.

(D) At any time prior to the giving of the Notice of Intent, the Development Owner may enter into an agreement with one or more specific Qualified Nonprofit Organizations and/or Tenant Organizations to provide a right of first refusal to purchase the Development for the Minimum Purchase Price, but any such agreement shall only permit purchase of the Development by such organization in accordance with and subject to the priorities set forth in subparagraph (B) of this paragraph.

(E) The Department shall, at the request of the Development Owner, identify in the LURA a Qualified Nonprofit Organization or Tenant Organization which shall hold a limited priority in exercising a right of first refusal to purchase the Development at the Minimum Purchase Price, in accordance with and subject to the priorities set forth in subparagraph (B) of this paragraph.

(F) The Department shall have the right to enforce the Development Owner's obligation to sell the Development as herein contemplated by obtaining a power-of-attorney from the Development Owner to execute such a sale or by obtaining an order for specific performance of such obligation or by such other means or remedy as shall be, in the Department's discretion, appropriate.

(11) Pre-Application Points. Developments which submit a Pre-Application during the Pre-Application Acceptance Period and meet the requirements of this paragraph shall receive 7 points. To be eligible for these points, the proposed Development in the Application must:

(A) be for the identical site as the proposed Development in the Pre-Application;

(B) have met the Pre-Application Threshold Criteria;

(C) be serving the same target population (family or elderly) in the Pre-Application in the same set-asides; and

(D) achieve an Application score that is not more than 5% greater or less than the number of points requested at Pre-Application.

(12) Point Reductions. Penalties will be imposed on Applicants or Affiliates who have requested extensions of Department deadlines, and did not meet the original submission deadlines, relating to developments receiving a housing tax credit commitment made in the application round preceding the current round. Extensions that will receive penalties include all types of extensions identified in §49.21 of this title, received on or before the close of Application Acceptance Period, including Developments whose extensions were authorized by the Board. For each extension request made, the Applicant will be required to pay a $2,500 extension fee as provided in §49.21(k) of this title and receive a 2 point deduction.

(g) Evaluation Factors. In the event that two or more Applications receive the same number of points in any given set-aside category and region, and are both practicable and economically feasible, the Department will utilize the factors in paragraphs (1) through (8) of this subsection, in the order they are presented, to determine which Development will receive a preference in consideration for a tax credit commitment. In addition, the Committee and Board may also choose to evaluate Applications and proposed Developments, including Tax Exempt Bond Developments, on the basis of factors other than (or in addition to) scoring, for one or more of the following reasons:

(1) to serve a greater number of lower income families for fewer credits;

(2) to serve a greater number of lower income families for a longer period of time in the form of a longer affordability period;

(3) to ensure the Development's consistency with local needs or its impact as part of a revitalization or preservation plan;

(4) to ensure the allocation of credits among as many different entities as practicable without diminishing the quality of the housing that is built as required under the Texas General Appropriations Act applicable to the Department;

(5) to give preference to a Development which is located in a QCT or a Difficult Development Area as specifically designated by the Secretary of HUD, and which also contributes to a concerted community revitalization plan;

(6) to ensure geographic dispersion within each state service region;

(7) to provide the greatest number of quality residential Units; and

(8) to provide integrated, affordable accessible housing for individuals and families with different levels of income.

(h) Staff Recommendations. After eligible Applications have been evaluated, ranked and underwritten in accordance with the QAP and the Rules, the Department staff shall make its recommendations to the Executive Award and Review Advisory Committee. This Committee will develop funding priorities and shall make commitment recommendations to the Board. Such recommendations and supporting documentation shall be made in advance of the meeting at which the issuance of Commitment Notices or Determination Notices shall be discussed. The Committee will provide written, documented recommendations to the Board which will address at a minimum the financial or programmatic viability of each Application and a list of all submitted Applications which enumerates the reason(s) for the Development's proposed selection or denial, including all evaluation factors provided in §49.9(g) of this title that were used in making this determination.

§49.10. Board Decisions; Waiting List; Forward Commitments.

(a) Board Decisions. The Board's decisions shall be based upon its evaluation of proposed Developments' consistency with the criteria and requirements set forth in the QAP and the Rules.

(1) In making a determination to allocate tax credits, the Board shall be authorized not to rely solely on the number of points scored by an Applicant. It shall in addition, be entitled to take into account, as appropriate, the factors described in §49.9(g) of this title. If the Board disapproves or fails to act upon the Application, the Department shall issue to the Development Owner a written notice stating the reason(s) for the Board's disapproval or failure to act.

(2) Before the Board approves any Development Application, the Department shall assess the compliance history of the Applicant and any Affiliate of the Applicant with respect to all applicable requirements; and the compliance issues associated with the proposed Development. The Committee shall provide to the Board a written report regarding the results of the assessments. The written report will be included in the appropriate Development file for Board and Department review. The Board shall fully document and disclose any instances in which the Board approves a Development Application despite any noncompliance associated with the Development, Applicant or Affiliate.

(3) On awarding tax credit commitment, the Board shall document the reasons for each Development's selection, including an explanation of all discretionary factors used in making its determination, and the reasons for any decision that conflicts with the recommendations made by Department staff. The Board may not make, without

good cause, a commitment decision that conflicts with the recommendations of Department staff.

(b) Waiting List. If the entire State Housing Credit Ceiling for the applicable calendar year has been committed or allocated in accordance with this chapter, the Board shall generate a waiting list of additional Applications ranked by score in descending order of priority based on Set Aside categories and regional allocation goals. If at any time prior to the end of the Application Round, one or more Commitment Notices expire and a sufficient amount of the State Housing Credit Ceiling becomes available, the Board shall issue a Commitment Notice to Applications on the waiting list subject to the amount of returned credits, the regional allocation goals and the Set Aside categories, including the 10% Nonprofit Set-Aside allocation required under the Code, §42(h)(5). At the end of each calendar year, all Applications which have not received a Commitment Notice shall be deemed terminated. The Applicant may re-apply to the Department during the next Application Acceptance Period.

(c) Forward Commitments. The Board may determine to issue commitments of tax credit authority with respect to Developments from the State Housing Credit Ceiling for the calendar year following the year of issuance (each a "forward commitment"). The Board will utilize its discretion in determining the amount of credits to be allocated as forward commitments and the reasons for those commitments in meeting compelling housing needs. The Board may utilize the forward commitment authority to allocate credits to TX-USDA-RHS Developments which are experiencing foreclosure or loan acceleration at any time during the 2003 calendar year.

(1) Unless otherwise provided in the Commitment Notice with respect to a Development selected to receive a forward commitment, actions which are required to be performed under this chapter by a particular date within a calendar year shall be performed by such date in the calendar year of the anticipated commitment rather than in the calendar year of the forward commitment.

(2) Any forward commitment made pursuant to this section shall be made subject to the availability of State Housing Credit Ceiling in the calendar year with respect to which the forward commitment is made. If a forward commitment shall be made with respect to a Development placed in service in the year of such commitment, the forward commitment shall be a "binding commitment" to allocate the applicable credit dollar amount within the meaning of the Code, §42(h)(1)(C).

(3) If tax credit authority shall become available to the Department later in a calendar year in which forward commitments have been awarded, the Department may allocate such tax credit authority to any eligible Development which received a forward commitment, in which event the forward commitment shall be canceled with respect to such Development.

§49.11. Required Application Notifications, Receipt of Public Comment, and Meetings with Applicants; Viewing of Pre-Applications and Applications; Confidential Information.

(a) Required Application Notifications, Receipt of Public Comment, and Meetings with Applicants.

(1) Within approximately seven business days after the close of the Pre-Application Acceptance Period, the Department shall publish a Pre-Application Submission Log on its web site. Such log shall contain the Development name, address, set-aside, number of units, requested credits, owner contact name and phone number.

(2) Approximately 30 days before the close of the Application Acceptance Period, the Department will release the evaluation and assessment of the Pre-Applications on its web site.

(3) Within approximately 15 business days after the close of the Application Acceptance Period, the Department shall:

(A) publish an Application submission log, as further described in §49.12(b) of this title, on its web site.

(B) give notice of a proposed Development in writing to the:

(i) mayor or other equivalent chief executive officer of the municipality, if the Development or a part thereof is located in a municipality; otherwise the Department shall notify the chief executive officer of the county in which the Development or a part thereof is located, to advise such individual that the Development or a part thereof will be located in his/her jurisdiction and request any comments which such individual may have concerning such Development. If the local municipal authority expresses opposition to the Development, the Department will give consideration to the objections raised and will visit the proposed site or Development within 30 days of notification to conduct a physical inspection of the Development site and consult with the mayor or county judge before the Application is scored, if opposition is received prior to scoring being completed; and

(ii) state representative and state senator representing the area where a Development would be located. The state representative or senator may hold a community meeting at which the Department shall provide appropriate representation.

(C) The elected officials identified in clauses (i) and (ii) of subparagraph (B) of this paragraph will be provided an opportunity to comment on the Application during the Application evaluation process.

(4) The Department shall hold at least three public hearings in different regions of the state to receive comment on the submitted Applications and on other issues relating to the Low Income Housing Tax Credit Program.

(5) The Department shall provide notice of and information regarding public hearings, board meetings and application opening and closing dates relative to housing tax credits to local housing departments, to appropriate newspapers of general or limited circulation that serve the community in which a proposed Development is to be located, to nonprofit organizations, to on-site property managers of occupied developments that are the subject of Applications for posting in prominent locations at those Developments, and to any other interested persons including community groups, who request the information and shall post all such information to its web site.

(6) Approximately forty days prior to the date of the July Board Meeting at which the issuance of Commitment Notices shall be discussed, the Department will notify each Applicant of the receipt of any opposition received by the Department relating to his or her Development at that time.

(7) Not later than the third working day after the date of the relevant determinations, the results of each stage of the Application process, including the results of the application scoring and underwriting phases and the commitment phase, will be posted to the Department's web site.

(8) At least thirty days prior to the date of the July Board meeting at which the issuance of Commitment Notices or Determination Notices shall be discussed, the Department will:

(A) provide the application scores to the Board;

(B) if feasible, post to the Department's web site the entire Application, including all supporting documents and exhibits,

the Application Log, a scoring sheet providing details of the Application score, and any other documents relating to the processing of the Application.

(9) A summary of comments received by the Department on specific Applications shall be part of the documents required to be reviewed by the Board under this subsection if it is received 30 business days prior to the date of the Board Meeting at which the issuance of Commitment Notices or Determination Notices shall be discussed. Comments received after this deadline will not be part of the documentation submitted to the Board. However, a public comment period will be available prior to the Board's decision, at the Board meeting where tax credit commitment decisions will be made.

(10) Not later than the 120th day after the date of the initial issuance of Commitment Notices for housing tax credits, the Department shall provide an Applicant who did not receive a commitment for housing tax credits with an opportunity to meet and discuss with the Department the Application's deficiencies, scoring and underwriting.

(b) Viewing of Pre-Applications and Applications. Pre-Applications and Applications for tax credits are public information and are available upon request after the Pre-Application and Application Acceptance Periods close, respectively. All Pre-Applications and Applications, including all exhibits and other supporting materials, except Personal Financial Statements and Social Security numbers, will be made available for public disclosure after the Pre-Application and Application periods close, respectively. The content of Personal Financial Statements may still be made available for public disclosure upon request if the Attorney General's office deems it is not protected from disclosure by the Texas Public Information Act.

(c) Confidential Information. The Department may treat the financial statements of any Applicant as confidential and may elect not to disclose those statements to the public. A request for such information shall be processed in accordance with §552.305 of the Government Code.

§49.12. Tax Exempt Bond Financed Developments: Filing of Applications, Applicability of Rules, Supportive Services, Financial Feasibility Evaluation, Satisfaction of Requirements.

(a) Filing of Applications for Tax Exempt Bond Financed Developments. Applications for a Tax Exempt Bond Development may be submitted to the Department as described in paragraphs (1) and (3) of this subsection:

(1) Applicants which receive notice of a Program Year 2003 reservation as a result of the Texas Bond Review Board's (TBRB) lottery for the private activity volume cap, and for which the issuer of the bonds is the Department, must file a complete Application no later than 10 days after the date of the issuance of the bond reservation. Such filing must be accompanied by the Application fee described in §49.21 of this title.

(2) Applicants which receive advance notice of a Program Year 2003 reservation as a result of the Texas Bond Review Board's (TBRB) lottery for the private activity volume cap, and for which the issuer of the bonds is an entity other than the Department, must file a complete Application not later than 60 days after the date of the TBRB lottery. Such filing must be accompanied by the Application fee described in §49.21 of this title.

(3) Applicants which receive advance notice of a Program Year 2003 reservation after being placed on the waiting list as a result of the TBRB lottery for private activity volume cap, and for which the issuer of the bonds is an entity other than the Department, must submit Volume 1 of the Application and the Application fee described in §49.21 of this title prior to the Applicant's bond reservation date as assigned by the TBRB. Any outstanding documentation required under this section must be submitted to the Department at least 45 days prior to the Board meeting at which the decision to issue a Determination Notice would be made.

(b) Applicability of Rules for Tax Exempt Bond Financed Developments. Tax Exempt Bond Financed Development Applications are subject to all rules in this title, with the only exception being to the following sections: §§49.4, 49.7, 49.8, 49.9(c)(2) and (3), 49.9(f), 49.10(b) and (c), 49.11(a) and 49.14 of this title. Such Developments requesting a Determination Notice in the current calendar year must meet all Threshold Criteria requirements stipulated in §49.9(e) of this title. Such Developments which received a Determination Notice in a prior calendar year must meet all Threshold Criteria requirements stipulated in the QAP and Rules in effect for the calendar year in which the Determination Notice was issued; provided, however, that such Developments shall comply with all procedural requirements for obtaining Department action in the current QAP and Rules; and such other requirements of the QAP and Rules as the Department determines applicable. At the time of Application, Developments must demonstrate the Development's consistency with the bond issuer's consolidated plan or other similar planning document. Consistency with the local municipality's consolidated plan or similar planning document must also be demonstrated in those instances where the city or county has a consolidated plan.

(c) Supportive Services for Tax Exempt Bond Financed Developments. Tax Exempt Bond Development Applications must provide an executed agreement with a qualified service provider for the provision of special supportive services that would otherwise not be available for the tenants. The provision of these services will be included in the LURA. Acceptable services as described in paragraphs (1) through (3) of this paragraph include:

(1) the services must be in one of the following categories: child care, transportation, basic adult education, legal assistance, counseling services, GED preparation, English as a second language classes, vocational training, home buyer education, credit counseling, financial planning assistance or courses, health screening services, health and nutritional courses, youth programs, scholastic tutoring, social events and activities, community gardens or computer facilities; or

(2) any other program described under Title IV-A of the Social Security Act (42 U.S.C. §§601 et seq.) which enables children to be cared for in their homes or the homes of relatives; ends the dependence of needy families on government benefits by promoting job preparation, work and marriage; prevents and reduces the incidence of out-of wedlock pregnancies; and encourages the formation and maintenance of two-parent families, or

(3) any other services approved in writing by the Issuer. The plan for tenant supportive services submitted for review and approval of the Issuer must contain a plan for coordination of services with state workforce development and welfare programs. The coordinated effort will vary depending upon the needs of the tenant profile at any given time as outlined in the plan.

(d) Financial Feasibility Evaluation for Tax Exempt Bond Financed Developments. Code §42(m)(2)(D) required the bond issuer (if other than the Department) to make sure that a Tax Exempt Bond Development does not receive more tax credits than the amount needed for the financial feasibility and viability of a Development throughout the Compliance Period. Treasury Regulations prescribe the occasions upon which this determination must be made. In light of the requirement, issuers may either elect to underwrite the Development for this purpose in accordance with the QAP and the Underwriting Rules and

Guidelines, §1.32 of this title or request that the Department perform the function. If the issuer underwrites the Development, the Department will, nonetheless, review the underwriting report and may make such changes in the amount of credits which the Development may be allowed as are appropriate under the Department's guidelines. The Determination Notice issued by the Department and any subsequent IRS Form(s) 8609 will reflect the amount of tax credits for which the Development is determined to be eligible in accordance with this paragraph, and the amount of tax credits reflected in the IRS Form 8609 may be greater or less than the amount set forth in the Determination Notice, based upon the Department's and the bond issuer's determination as of each building's placement in service. Any increase of tax credits at the time of each building's placement in service will only be permitted if it is deemed that causes for the increased credits were beyond the control of the Development Owner, were not foreseeable by the Development Owner at the time of Application and were not preventable during the construction of the Development, as determined by the Board.

(e) Satisfaction of Requirements for Tax Exempt Bond Financed Developments. .If the Department staff determines that all requirements of subsection (i) of this section have been met, the Board, shall authorize the Department to issue a Determination Notice to the Applicant that the Development satisfies the requirements of the QAP and Rules in accordance with the Code, §42(m)(1)(D).

§49.13. Commitment and Determination Notices; Agreement and Election Statement.

(a) Commitment and Determination Notices. If the Board approves an Application, the Department will:

(1) if the Application is for a commitment from the State Housing Credit Ceiling, issue a Commitment Notice to the Development Owner which shall:

(A) confirm that the Board has approved the Application; and

(B) state the Department's commitment to make a Housing Credit Allocation to the Applicant in a specified amount, subject to the feasibility determination described at §49.17 of this title, and compliance by the Development Owner with the remaining requirements of this chapter and any other terms and conditions set forth therein by the Department. This commitment shall expire on the date specified therein unless the Development Owner indicates acceptance of the commitment by executing the Commitment Notice or Determination Notice, pays the required fee specified in §49.21 of this title, and satisfies any other conditions set forth therein by the Department. A Development Owner may request an extension of the Commitment Notice expiration date by submitting extension request and associated extension fee as described in §49.21 of this title. In no event shall the expiration date of a Commitment Notice be extended beyond the last business day of the applicable calendar year.

(2) if the Application is with respect to a Tax Exempt Bond Development, issue a Determination Notice to the Development Owner which shall:

(A) confirm the Board's determination that the Development satisfies the requirements of this QAP; and

(B) state the Department's commitment to issue IRS Form(s) 8609 to the Applicant in a specified amount, subject to the requirements set forth at §49.12 of this title and compliance by the Development Owner with all applicable requirements of this title and any other terms and conditions set forth therein by the Department. The Determination Notice shall expire on the date specified therein unless the Development Owner indicates acceptance by executing the Determination Notice and paying the required fee specified in §49.21 of this title. The Determination Notice shall also expire unless the Development Owner satisfies any conditions set forth therein by the Department within the applicable time period.

(3) notify, in writing, the mayor or other equivalent chief executive officer of the municipality in which the Property is located informing him/her of the Board's issuance of a Commitment Notice or Determination Notice, as applicable.

(4) A Commitment or Determination Notice shall not be issued with respect to any Development for an unnecessary amount or where the cost for the total development, acquisition, construction or rehabilitation exceeds the limitations established from time to time by the Department and the Board, unless the Department staff make a recommendation to the Board based on the need to fulfill the goals of the Program as expressed in this QAP and Rules, and the Board accepts the recommendation. The Department's recommendation to the Board shall be clearly documented.

(5) A Commitment or Determination Notice shall not be issued with respect to any Development in violation of the Concentration Policy, unless the Committee makes a recommendation to the Board based on the need to fulfill the goals of the Program as expressed in this QAP and Rules, and the Board accepts the recommendation. The Department's recommendation to the Board shall be clearly documented.

(6) A Commitment or Determination Notice shall not be issued with respect to any Applicant or any Person, General Partner, general contractor and their respective principals or Affiliates active in the ownership or control of other low income rental housing property in the state of Texas funded by the Department, or outside the state of Texas, that is in Material Non-Compliance with the LURA (or any other document containing an Extended Low Income Housing Commitment) or the program rules in effect for such property as of June 30, 2003. Any corrective action documentation affecting the Material Non-Compliance status score for Applicants must be received by the Department no later than May 15, 2003.

(b) Agreement and Election Statement. Together with or following the Development Owner's acceptance of the commitment or determination, the Development Owner may execute an Agreement and Election Statement, in the form prescribed by the Department, for the purpose of fixing the applicable credit percentage for the Development as that for the month in which the Commitment was accepted (or the month the bonds were issued for Tax Exempt Bond Developments), as provided in the Code, §42(b)(2). Current Treasury Regulations, §1.42-8(a)(1)(v), suggest that in order to permit a Development Owner to make an effective election to fix the applicable credit percentage for a Development, the Carryover Allocation Document must be executed by the Department and the Development Owner in the same month. The Department staff will cooperate with a Development Owner, as needed, to assure that the Commitment Notice can be so executed.

§49.14. Carryover, 10% Test.

(a) Carryover. All Developments which received a Commitment Notice, and will not be placed in service and receive IRS Form 8609 in the year the Commitment Notice was issued, must submit the Carryover documentation to the Department no later than November 1 of the year in which the Commitment Notice is issued. Commitments for credits will be terminated if the Carryover documentation has not been received by this deadline, or an extension approved by the Board. In the event that a Development Owner intends to submit the Carryover documentation in October of the year in which the Commitment Notice is issued, in order to fix the applicable credit percentage for the

Development in October, it must be submitted no later than the first Friday in October. The Carryover Allocation format must be properly completed and delivered to the Department as prescribed by the Carryover Allocation Procedures Manual. All Carryover Allocations will be contingent upon the following, in addition to all other conditions placed upon the Application in the Commitment Notice:

(1) A current original plat of survey of the land, prepared by a duly licensed Texas Registered Professional Land Surveyor. Such survey shall conform to standards prescribed in the Manual of Practice for Land Surveying in Texas as promulgated and amended from time to time by the Texas Surveyors Association as more fully described in the Carryover Procedures Manual.

(2) A review of information provided by the IRS as permitted pursuant to IRS Form 8821, Tax Information Authorization, for the release of tax information relating to non-disclosure or recapture issues. Each Applicant must execute and provide to the Department Form 8821 within ten business days of the issuance of a Commitment Notice or Determination Notice. The form must be signed and executed on behalf of the Development Owner. Any information provided by the IRS will be evaluated by the Department in accordance with §49.2(52) of this title and may be utilized by the Board to determine if a Carryover Allocation will be made.

(3) Attendance of the Development Owner and Development architect at eight hours of Fair Housing training on or before the closing of the construction loan.

(b) 10% Test. No later than six months from the date the Carryover Allocation Document is executed by the Department and the Development Owner, more than 10% of the Development Owner's reasonably expected basis has to have been incurred pursuant to §42(h)(1)(E)(i) and (ii) of the Internal Revenue Code and Treasury Regulations, § 1.42-6. The evidence to support the satisfaction of this requirement must be submitted to the Department no later than June 30 in a format proscribed by the Department.

§49.15. Closing of the Construction Loan, Commencement of Substantial Construction.

(a) Closing of the Construction Loan. The Development Owner must submit evidence of having closed the construction loan no later than the second Friday in June of the year after the execution of the Carryover Allocation Document with the possibility of an extension as described in §49.21 of this title. At the time of submission of the documentation, the Development Owner must also submit a Management Plan and an Affirmative Marketing Plan as further described in the Carryover Allocation Procedures Manual. The Carryover Allocation will automatically be terminated if the Development Owner fails to meet the aforementioned closing deadline (taking into account any extensions), and has not had an extension approved, and all credits previously allocated to that Development will be recovered and become a part of the State Housing Credit Ceiling for the applicable year.

(b) Commencement of Substantial Construction. The Development Owner must commence and continue substantial construction activities not later than the last Friday in August of the year after the execution of the Carryover Allocation Document with the possibility of an extension as described in §49.21 of this title. The minimum activity necessary to meet the requirement of substantial construction for new Developments will be defined as having poured foundations for at least 50% of all of the buildings in the Development. Evidence of such activity shall be provided in a format prescribed by the Department.

§49.16. Cost Certification, LURA.

(a) Cost Certification. Developments that will be placed in service and request IRS Forms 8609 in the year the Commitment Notice was issued must submit the required Cost Certification documentation and the compliance and monitoring fee to the Department by the second Friday in November of that same year. The Department will issue IRS Forms 8609 no later than 90 days from the date of receipt of the Cost Certification documentation, so long as all subsequent documentation requested by the Department related to the processing of the Cost Certification documentation has been provided on or before the seventy-fifth day from the date of receipt of the original Cost Certification documentation. Any deficiency letters issued to the Owner pertaining to the Cost Certification documentation will also be copied to the syndicator.

(b) Land Use Restriction Agreement (LURA). Prior to the Department's issuance of the IRS Form(s) 8609 for building(s) in a Development, the Development Owner must date, sign and acknowledge before a notary public a LURA and send the original to the Department for execution. The Development Owner shall then record said LURA, along with any and all exhibits attached thereto, in the real property records of the county where the Development is located and return the original document, duly certified as to recordation by the appropriate county official, to the Department. If any liens (other than mechanics' or materialmen's liens) shall have been recorded against the Development and/or the Property prior to the recording of the LURA, the Development Owner shall obtain the subordination of the rights of any such lienholder, or other effective consent, to the survival of certain obligations contained in the LURA, which are required by §42(h)(6)(E)(ii) of the Code to remain in effect following the foreclosure of any such lien. Receipt of such certified recorded original LURA by the Department is required prior to issuance of IRS Form 8609. A representative of the Department shall physically inspect the Development for compliance with the Application and the representatives, warranties, covenants, agreements and undertakings contained therein. Such inspection will be conducted before the IRS Form 8609 is issued for a building, but it shall be conducted in no event later than the end of the second calendar year following the year the last building in the Development is placed in service. The Development Owner for Tax Exempt Bond Developments shall obtain a subordination agreement wherein the lien of the mortgage is subordinated to the LURA. If an Owner intends for the Department to execute a LURA by the end of a calendar year, then the proposed LURA, executed by the Owner and lienholder, if necessary, must be submitted to the Department for execution no later than December 1 of that calendar year.

§49.17. Housing Credit Allocations.

(a) In making a commitment of a Housing Credit Allocation under this chapter, the Department shall rely upon information contained in the Applicant's Application to determine whether a building is eligible for the credit under the Code, §42. The Applicant shall bear full responsibility for claiming the credit and assuring that the Development complies with the requirements of the Code, §42. The Department shall have no responsibility for ensuring that an Applicant who receives a housing credit allocation from the Department will qualify for the housing credit.

(b) The Housing Credit Allocation Amount shall not exceed the dollar amount the Department determines is necessary for the financial feasibility and the long term viability of the Development throughout the Compliance Period. Such determination shall be made by the Department at the time of issuance of the Commitment Notice or Determination Notice; at the time the Department makes a Housing Credit Allocation; and as of the date each building in a Development is placed in service. Any Housing Credit Allocation Amount specified in a Commitment Notice, Determination Notice or Carryover Allocation Document is subject to change by the Department based upon such

determination. Such a determination shall be made by the Department based on its evaluation and procedures, considering the items specified in the Code, §42(m)(2)(B), and the department in no way or manner represents or warrants to any applicant, sponsor, investor, lender or other entity that the Development is, in fact, feasible or viable.

(c) The General Contractor hired by the Applicant must meet specific criteria as defined by the Seventy-fifth Legislature. A general contractor hired by an applicant or an applicant, if the applicant serves as general contractor must demonstrate a history of constructing similar types of housings without the use of federal tax credits. Evidence must be submitted to the Department, in accordance with §49.9(e)(4)(G) of this title, which sufficiently documents that the general contractor has constructed some housing without the use of low income housing credits. This documentation will be required as a condition of the commitment notice or carryover agreement, and must be complied with prior to commencement of construction and at cost certification and final allocation of credits.

(d) An allocation will be made in the name of the Applicant identified in the related Commitment Notice or Determination Notice. If an allocation is made in the name of the party expected to be the General Partner or Managing Member in an eventual owner partnership or limited liability company, the Department may, upon request, approve a transfer of allocation to such owner partnership or limited liability company in which such party is the sole General Partner or Managing Member. Any other transfer of an allocation will be subject to review and approval by the Department. The approval of any such transfer does not constitute a representation to the effect that such transfer is permissible under §42 of the Code or without adverse consequences thereunder, and the Department may condition its approval upon receipt and approval of complete documentation regarding the new owner including all the criteria for scoring, evaluation and underwriting, among others, which were applicable to the original Applicant.

(e) The Department shall make a Housing Credit Allocation, either in the form of IRS Form 8609, with respect to current year allocations for buildings placed in service, or in the Carryover Allocation Document, for buildings not yet placed in service, to any Development Owner who holds a Commitment Notice which has not expired, and for which all fees as specified in §49.21 of this title have been received by the Department and with respect to which all applicable requirements, terms and conditions have been met. For Tax Exempt Bond Developments, the Housing Credit Allocation shall be made in the form of a Determination Notice. For an IRS Form 8609 to be issued with respect to a building in a Development with a Housing Credit Allocation, satisfactory evidence must be received by the Department that such building is completed and has been placed in service in accordance with the provisions of the Department's Cost Certification Procedures Manual. The Cost Certification documentation requirements will include a certification and inspection report prepared by a Third-Party accredited accessibility inspector to certify that the Development meets all required accessibility standards. IRS Form 8609 will not be issued until the certifications received by the Department. The Department shall mail or deliver IRS Form 8609 (or any successor form adopted by the Internal Revenue Service) to the Development Owner, with Part I thereof completed in all respects and signed by an authorized official of the Department. The delivery of the IRS Form 8609 will occur only after the Development Owner has complied with all procedures and requirements listed within the Cost Certification Procedures Manual. Regardless of the year of Application to the Department for low income housing tax credits, the current year's Cost Certification Procedures Manual must be utilized when filing all cost certification materials. A separate housing credit allocation shall be made with respect to each building within a Development which is eligible for a housing credit; provided, however, that where an allocation is made pursuant to a Carryover Allocation Document on a Development basis in accordance with the Code, §42(h)(1)(F), a housing credit dollar amount shall not be assigned to particular buildings in the Development until the issuance of IRS Form 8609s with respect to such buildings.

(f) In making a Housing Credit Allocation, the Department shall specify a maximum Applicable Percentage, not to exceed the Applicable Percentage for the building permitted by the Code, §42(b), and a maximum Qualified Basis amount. In specifying the maximum applicable percentage and the maximum Qualified Basis amount, the Department shall disregard the first-year conventions described in the Code, §42(f)(2)(A) and §42(f)(3)(B). The housing credit allocation made by the Department shall not exceed the amount necessary to support the extended low income housing commitment as required by the Code, §42(h)(6)(C)(i).

(g) Development inspections shall be required to show that the Development is built or rehabilitated according to required plans and specifications. At a minimum, all Development inspections must include an inspection for quality during the construction process while defects can reasonably be corrected and a final inspection at the time the Development is placed in service. All such Development inspections shall be performed by the Department or by an independent, third party inspector acceptable to the Department. The Development Owner shall pay all fees and costs of said inspections as described in §49.21 of this title.

(h) After the entire Development is placed in service, which must occur prior to the deadline specified in the Carryover Allocation Document, the Development Owner shall be responsible for furnishing the Department with documentation which satisfies the requirements set forth in the Cost Certification Procedures Manual. For purposes of this title, a newly constructed or rehabilitated building is not placed in service until all units in such building have been completed and certified by the appropriate local authority or registered architect as ready for occupancy. The Cost Certification must be submitted for the entire Development; therefore partial Cost Certifications are not allowed. The Department may require copies of invoices and receipts and statements for materials and labor utilized for the new construction or rehabilitation and, if applicable, a closing statement for the acquisition of the Development as well as for the closing of all interim and permanent financing for the Development. If the Applicant does not fulfill all representations and commitments made in the Application, the Department may make reasonable reductions to the tax credit amount allocated via the IRS Form 8609, may withhold issuance of the IRS Form 8609s until these representations and commitments are met, and/or may terminate the allocation, if appropriate corrective action is not taken by the Development Owner.

(i) The Board in its sole discretion may allocate credits to a Development Owner in addition to those awarded at the time of the initial Carryover Allocation in instances where there is bona fide substantiation of cost overruns and the Department has made a determination that the allocation is needed to maintain the Development's financial viability as a qualified low income Development.

(j) The Department may, at any time and without additional administrative process, determine to award credits to Developments previously evaluated and awarded credits if it determines that such previously awarded credits are or may be invalid and the owner was not responsible for such invalidity. The Department may also consider an amendment to a Commitment Notice or Carryover Allocation or other requirement with respect to a Development if the revisions:

(1) are consistent with the Code and the tax credit program;

(2) do not occur while the Development is under consideration for tax credits;

(3) do not involve a change in the number of points scored (unless the Development's ranking is adjusted because of such change);

(4) do not involve a change in the Development's site; or

(5) do not involve a change in the set-aside election.

§49.18. Board Reevaluation, Appeals; Amendments, Housing Tax Credit and Ownership Transfers, Withdrawals, Cancellations.

(a) Board Reevaluation. Regardless of project stage, the Board shall reevaluate a Development that undergoes a substantial change between the time of initial Board approval of the Development and the time of issuance of a Commitment Notice or Determination Notice for the Development. For the purposes of this subsection, substantial change shall be those items identified in subsection (c)(3) of this section. The Board may revoke any Commitment Notice or Determination Notice issued for a Development that has been unfavorably reevaluated by the Board.

(b) Appeals Process. An Applicant may appeal decisions made by the Department.

(1) The decisions that may be appealed are identified in subparagraphs (A) through (C) of this paragraph.

(A) a determination regarding the Application's satisfaction of:

(i) Pre-Application or Application Threshold Criteria;

(ii) Underwriting Criteria;

(B) the scoring of the Application under the Application Selection Criteria; and

(C) a recommendation as to the amount of housing tax credits to be allocated to the Application.

(2) An Applicant may not appeal a decision made regarding an Application filed by another Applicant.

(3) An Applicant must file its appeal in writing with the Department not later than the seventh day after the date the Department publishes the results of the Application evaluation process identified in §49.9 of this title. In the appeal, the Applicant must specifically identify the Applicant's grounds for appeal, based on the original Application and additional documentation filed with the original Application. If the appeal relates to the amount of housing tax credits recommended to be allocated, the Department will provide the Applicant with the underwriting report upon request.

(4) The Executive Director of the Department shall respond in writing to the appeal not later than the 14th day after the date of receipt of the appeal. If the Applicant is not satisfied with the Executive Director's response to the appeal, the Applicant may appeal directly in writing to the Board, provided that an appeal filed with the Board under this subsection must be received by the Board before:

(A) the seventh day preceding the date of the Board meeting at which the relevant commitment decision is expected to be made; or

(B) the third day preceding the date of the Board meeting described by subparagraph (A) of this paragraph, if the Executive Director does not respond to the appeal before the date described by subparagraph (A) of this paragraph.

(5) Board review of an appeal under paragraph (4) of this subsection is based on the original Application and additional documentation filed with the original Application. The Board may not review any information not contained in or filed with the original Application. The decision of the Board regarding the appeal is final.

(6) The Department will post to its web site an appeal filed with the Department or Board and any other document relating to the processing of the appeal.

(c) Amendment of Application Subsequent to Allocation by Board.

(1) If a proposed modification would materially alter a Development approved for an allocation of a housing tax credit, the Department shall require the Applicant to file a formal, written request for an amendment to the Application.

(2) The Executive Director of the Department shall require the Department staff assigned to underwrite Applications to evaluate the amendment and provide an analysis and written recommendation to the Board. The appropriate party monitoring compliance during construction in accordance with §49.19 of this title shall also provide to the Board an analysis and written recommendation regarding the amendment.

(3) For Applications approved by the Board prior to September 1, 2001, the Executive Director will approve or deny the amendment request. For Applications approved by the Board after September 1, 2001, the Board must vote on whether to approve the amendment. The Board by vote may reject an amendment and, if appropriate, rescind a Commitment Notice or terminate the allocation of housing tax credits and reallocate the credits to other Applicants on the Waiting List if the Board determines that the modification proposed in the amendment:

(A) would materially alter the Development in a negative manner; or

(B) would have adversely affected the selection of the Application in the Application Round.

(4) Material alteration of a Development includes, but is not limited to:

(A) a significant modification of the site plan;

(B) a modification of the number of units or bedroom mix of units;

(C) a substantive modification of the scope of tenant services;

(D) a reduction of three percent or more in the square footage of the units or common areas;

(E) a significant modification of the architectural design of the Development;

(F) a modification of the residential density of the Development of at least five percent; and

(G) any other modification considered significant by the Board.

(5) In evaluating the amendment under this subsection, the Department staff shall consider whether the need for the modification proposed in the amendment was:

(A) reasonably foreseeable by the Applicant at the time the Application was submitted; or

(B) preventable by the Applicant.

(6) This section shall be administered in a manner that is consistent with the Code, §42.

(7) Before the 15th day preceding the date of Board action on the amendment, notice of an amendment and the recommendation of the Executive Director and monitor regarding the amendment will be posted to the Department's web site.

(d) Housing Tax Credit and Ownership Transfers. An Applicant may not transfer an allocation of housing tax credits or ownership of a Development supported with an allocation of housing tax credits to any person other than an Affiliate unless the Applicant obtains the Executive Director's prior, written approval of the transfer. The Executive Director may not unreasonably withhold approval of the transfer. An Applicant seeking Executive Director approval of a transfer and the proposed transferee must provide to the Department a copy of any applicable agreement between the parties to the transfer, including any third-party agreement with the Department. An Applicant seeking Executive Director approval of a transfer must provide to the Department a list of the names of transferees and Related Parties; and detailed information describing the experience and financial capacity of transferees and related parties. The Development Owner shall certify to the Executive Director that the tenants in the Development have been notified in writing of the transfer before the 30th day preceding the date of submission of the transfer request to the Department. Not later than the fifth working day after the date the Department receives all necessary information under this section, the Department shall conduct a qualifications review of a transferee to determine the transferee's past compliance with all aspects of the low income housing tax credit program, LURAs; and the sufficiency of the transferee's experience with Developments supported with housing tax credit allocations.

(e) Withdrawals. An Applicant may withdraw an Application prior to receiving a Commitment Notice, Determination Notice, Carryover Allocation Document or Housing Credit Allocation, or may cancel a Commitment Notice or Determination Notice by submitting to the Department a notice, as applicable, of withdrawal or cancellation, and making any required statements as to the return of any tax credits allocated to the Development at issue.

(f) Cancellations. The Department may cancel a Commitment Notice, Determination Notice or Carryover Allocation prior to the issuance of IRS Form 8609 with respect to a Development if:

(1) the Development Owner or any member of the Development Team, or the Development, as applicable, fails to meet any of the conditions of such Commitment Notice or Carryover Allocation or any of the undertakings and commitments made by the Development Owner in the applications process for the Development;

(2) any statement or representation made by the Development Owner or made with respect to the Development Owner, the Development Team or the Development is untrue or misleading;

(3) an event occurs with respect to any member of the Development Team which would have made the Development's Application ineligible for funding pursuant to §49.5 of this title if such event had occurred prior to issuance of the Commitment Notice or Carryover Allocation; or

(4) the Development Owner, any member of the Development Team, or the Development, as applicable, fails to comply with these Rules or the procedures or requirements of the Department.

§49.19. Compliance Monitoring and Material Non-Compliance.

(a) The Code, §42(m)(1)(B)(iii), requires the Department as the housing credit agency to include in its QAP a procedure that the Department will follow in monitoring Developments for noncompliance with the provisions of the Code, §42 and in notifying the IRS of such noncompliance of which the Department becomes aware. Such procedure is set out in this QAP and in the Owner's Compliance Manual prepared by the Department's Compliance Division, as amended from time to time. Such procedure only addresses forms and records that may be required by the Department to enable the Department to monitor a Development for violations of the Code and the LURA and to notify the IRS of any such non-compliance. This procedure does not address forms and other records that may be required of Development Owners by the IRS more generally, whether for purposes of filing annual returns or supporting Development Owner tax positions during an IRS audit.

(b) The Department, through the division with responsibility for compliance matters, shall monitor for compliance with all applicable requirements the entire construction phase associated with any Development under this title. The Department will monitor under this requirement by requiring a copy of all construction inspections performed for the lender and/or syndicator for the Development. If necessary, the Department may obtain a Third-Party inspection report for purposes of monitoring. The Applicant must provide the Department with copies of all inspections made throughout the construction of the Development within fifteen days of the date the inspection occurred. The Department, or any third-party inspector hired by the Department, shall be provided, upon request, any construction documents, plans or specifications for the Development to perform these inspections. The monitoring level for each Development must be based on the amount of risk associated with the Development. The Department shall use the division responsible for credit underwriting matters and the division responsible for compliance matters to determine the amount of risk associated with each Development. After completion of a Development's construction phase, the Department shall periodically review the performance of the Development to confirm the accuracy of the Department's initial compliance evaluation during the construction phase. Developments having financing from TX-USDA-RHS will be exempt from these inspections, provided that the Applicant provides the Department with copies of all inspections made by TX-USDA-RHS throughout the construction of the Development within fifteen days of the date the inspection occurred.

(c) The Department will monitor compliance with all covenants made by the Development Owner in the Application and in the LURA, whether required by the Code, Treasury Regulations or other rulings of the IRS, or undertaken by the Development Owner in response to Department requirements or criteria.

(d) The Department may contract with an independent third party to monitor a Development during its construction or rehabilitation and during its operation for compliance with any conditions imposed by the Department in connection with the allocation of housing tax credits to the Development and appropriate state and federal laws, as required by other state law or by the Board. The Department may assign Department staff other than housing tax credit division staff to perform the relevant monitoring functions required by this section in the construction or rehabilitation phase of a Development.

(e) The Department shall create an easily accessible database that contains all Development compliance information developed under this section.

(f) The Development Owner must keep records for each qualified low income building in the Development, showing on a monthly basis (with respect to the first year of a building's Credit Period and on an annual basis, thereafter):

(1) the total number of residential rental Units in the building (including the number of bedrooms and the size in square feet of each residential rental Unit);

(2) the percentage of residential rental Units in the building that are low income Units;

(3) the rent charged for each residential rental Unit in the building including, with respect to low income Units, documentation to support the utility allowance applicable to such Unit;

(4) the number of occupants in each low income Unit;

(5) the low income Unit vacancies in the building and information that shows when, and to whom, all available Units were rented;

(6) the annual income certification of each tenant of a low income Unit, in the form designated by the Department in the Compliance Manual, as may be modified from time to time;

(7) documentation to support each low income tenant's income certification, consistent with the determination of annual income and verification procedures under Section 8 of the United States Housing Act of 1937 ("Section 8"), notwithstanding any rules to the contrary for the determination of gross income for federal income tax purposes. In the case of a tenant receiving housing assistance payments under Section 8, the documentation requirement is satisfied if the public housing authority provides a statement to the Development Owner declaring that the tenant's income does not exceed the applicable income limit under the Code, §42(g) as described in the Compliance Manual;

(8) the Eligible Basis and Qualified Basis of the building at the end of the first year of the Credit Period;

(9) the character and use of the nonresidential portion of the building included in the building's Eligible Basis under the Code, §42(d), (e.g. whether tenant facilities are available on a comparable basis to all tenants; whether any fee is charged for use of the facilities; whether facilities are reasonably required by the Development); and

(10) any additional information as required by the Department.

(g) The Development Owner will deliver to the Department no later than March 1 each year , the current audited financial statements, in form and content satisfactory to the Department, itemizing the income and expenses of the Development for the prior year.

(h) Specifically, to evidence compliance with the requirements of the Code, §42(h)(6)(B)(iv) which requires that the LURA prohibit Development Owners of all tax credit Developments placed in service after August 10, 1993 from refusing to lease to persons holding Section 8 vouchers or certificates because of their status as holders of such Section 8 voucher or certificate. Development Owners must comply with Department rules under 10TAC§1.14 of this title. A housing development funded or administered by the Department is prohibited from:

(1) excluding an individual or family from admission to the Development because the individual or family participates in the housing choice voucher program under Section 8, United States Housing Act of 1937 (42 U.S. C. Section 143F); and

(2) using a financial or minimum income standard for an individual or family participating in the voucher program that requires the individual or family to have a monthly income of more than 2.5 times the individual of family's share of the total monthly rent payable to the Development. A Development Owner must maintain a written management plan that is available for review upon request. Such management plan must clearly state the following objectives:

(A) prospective applicants who hold Section 8 vouchers or certificates are welcome to apply and will be provided the same consideration for occupancy as any other applicant;

(B) any minimum income requirements for Section 8 voucher and certificate holders will only be applied to the portion of the rent the prospective tenant would pay, provided, however, that if Section 8 pays 100% of the rent for the Unit, the Development Owner may establish other reasonable minimum income requirements to ensure that the tenant has the financial resources to meet daily living expenses. Minimum income requirements for Section 8 voucher and certificate holders will not exceed 2.5 times the portion of rent the tenant pays; and

(C) all other screening criteria, including employment policies or procedures and other leasing criteria (such as rental history, credit history, criminal history, etc.) must be applied to applicants uniformly and in a manner consistent with the Texas and federal Fair Housing Acts and with Department and Code requirements;

(3) post Fair Housing logos and the Fair Housing poster in the leasing office;

(4) approve and distribute a written Affirmative Marketing Plan to the property management and on-site staff; and

(5) communicate annually during the first quarter of each year in writing with the administrator of each Section 8 program which has jurisdiction within the geographic area where the Development is located. Such communication will include information on the unit characteristics and rents and will advise the administrating agency that the property accepts Section 8 vouchers and certificates and will treat referrals in a fair and equal manner. Copies of such correspondence must be available during on-site reviews conducted by the Department. A prospective tenant participating in the voucher program shall have the right to report to the administrator of the Section 8 program that provided the certificate or voucher an exclusion from admission to a housing development based on a financial or minimum income standard requiring the tenant to have a monthly income of more than 2.5 times the tenant or tenant's family share of the total monthly rent payable to the Development Owner. The administrator shall promptly report such exclusion to the Department. A Housing Sponsor that fails to comply with the requirements and procedures of this §49.19(h) of this title is subject to the following sanctions:

(A) Failure to lease to a prospective tenant due to the applicant's status as a recipient of a federal rental assistance voucher or certificate will result in a material non-compliance score.

(B) A complaint of exclusion from admittance as described in subsection (h)(5) of this section that has been verified by the Department shall result in a non-compliance score for a period of one year from the date of the Department's verification of the complaint.

(i) Record retention provision. The Development Owner is required to retain the records described in subsection (f) of this section for at least six years after the due date (with extensions) for filing the federal income tax return for that year; however, the records for the first year of the Credit Period must be retained for at least six years beyond the due date (with extensions) for filing the federal income tax return for the last year of the Compliance Period of the building.

(j) Certification and Review.

(1) On or before February 1st of each year, the Department will send each Development Owner of a completed Development an Owner's Certification of Program Compliance (form provided by the

Department) to be completed by the Owner and returned to the Department on or before the first day of March of each year in the Compliance Period. Any Development for which the certification is not received by the Department, is received past due, or is incomplete, improperly completed or not signed by the Development Owner, will be considered not in compliance with the provisions of §42 of the Code and reported to the IRS on Form 8823, Low Income Housing Credit Agencies Report of Non Compliance. The Owner Certification of Program Compliance shall cover the proceeding calendar year and shall include at a minimum the following statements of the Development Owner:

(A) the Development met the minimum set-aside test which was applicable to the Development;

(B) there was no change in the Applicable Fraction of any building in the Development, or if there was such a change, the applicable fraction to be reported to the IRS for each building in the Development for the certification year;

(C) the owner has received an annual income certification from each low income resident and documentation to support that certification;

(D) each low income Unit in the Development was rent-restricted under the Code, §42(g)(2);;

(E) all low income Units in the Development are and have been for use by the general public and used on a non-transient basis (except for transitional housing for the homeless provided under the Code, §42(I)(3)(B)(iii));

(F) No finding of discrimination under the Fair Housing Act, 42 U.S.C. 3601-3619, has occurred for this Development. A finding of discrimination includes an adverse final decision by the Secretary of HUD, 24 CFR 180.680, an adverse final decision by a substantially equivalent state or local fair housing agency, 42 U.S.C. 3616a(a)(1), or an adverse judgment from a federal court;

(G) each building in the Development is and has been suitable for occupancy, taking into account local health, safety, and building codes (or other habitability standards), and the state or local government unit responsible for making building code inspections did not issue a report of a violation for any building or low income Unit in the Development. If a violation report or notice was issued by the governmental unit, the Development Owner must attach a copy of the violation report or notice. In addition, the Development Owner must state whether the violation has been corrected;

(H) either there was no change in the Eligible Basis (as defined in the Code, §42(d)) of any building in the Development, or that there has been a change, and the nature of the change (e.g., a common area has become commercial space, a fee is now charged for a tenant facility formerly provided without charge, or the Development Owner has received federal subsidies with respect to the Development which had not been previously received or disclosed to the Department in writing);

(I) all tenant facilities included in the Eligible Basis under the Code, §42(d), of any building in the Development, such as swimming pools, other recreational facilities, washer/dryer hook ups, appliances and parking areas, were provided on a comparable basis without charge to all tenants in the building;

(J) if a low income Unit in the Development became vacant during the year, reasonable attempts were, or are being, made to rent that Unit or the next available Unit of comparable or smaller size to tenants having a qualifying income, and such Unit or the next available Unit of comparable or smaller size was actually rented to tenants having a qualifying income, before any other Units in the Development were, or will be, rented to tenants not having a qualifying income;

(K) if the income of tenants of a low income Unit in the Development increased above the limit allowed in the Code, §42(g)(2)(D)(ii), the next available Unit of comparable or smaller size in that building was, or will be, rented to residents having a qualifying income;

(L) a LURA including an Extended Low Income Housing Commitment as described in the Code, §42(h)(6), was in effect for buildings subject to section 7108(c)(1) of the Omnibus Budget Reconciliation Act of 1989, 103 Stat. 2106, 2308-2311, including the requirement under the Code, §42(h)(6)(B)(iv) that a Development Owner cannot refuse to lease a Unit in the Development to an applicant because the applicant holds a voucher or certificate of eligibility under Section 8 of the United States Housing Act of 1937, 42 U.S.C. 1437f (for buildings subject to section 1314c(b)(4) of the Omnibus Budget Reconciliation Act of 1993, 107 Stat. 312, 438-439;

(M) All low income Units in the Development were used on a nontransient basis (except for transitional housing for the homeless provided under the Code, §42(i)(3)(B)(iv);

(N) no change in the ownership of a Development has occurred during the reporting period;

(O) the Development Owner has not been notified by IRS that the Development is no longer "a qualified low income housing Development" within the meaning of the Code, §42;

(P) the Development met all terms and conditions which were recorded in the LURA, or if no LURA was required to be recorded, the Development met all representations of the Development Owner in the Application for credits;

(Q) if the Development Owner received its Housing Credit Allocation from the portion of the state ceiling set-aside for Developments involving Qualified Nonprofit Organizations under the Code, §42(h)(5), a Qualified Nonprofit Organization owned an interest in and materially participated in the operation of the Development within the meaning of the Code, §469(h); and

(R) no low income Units in the Development were occupied by households in which all members were Students.

(2) Review.

(A) The Department staff will review each Owner's Certification of Program Compliance for compliance with the requirements of the Code, §42.

(B) The Department will perform on-site inspections of all buildings in each low income housing Development by the end of the second calendar year following the year the last building in the Development is placed in service and, for at least 20% of the low income Units in each Development, inspect the Units and review the low income certifications, the documentation the Development Owner has received to support the certifications, the rent records for each low income tenant in those Units, and any additional information that the Department deems necessary.

(C) At least once every three years, the Department will conduct on-site inspections of all buildings in the Development, and for at least 20% of the Development's low income Units, inspect the Units and review the low income certifications, the documentation supporting the certifications, and the rent records for the tenants in those Units; and

(D) The Department may, at the time and in the form designated by the Department, require the Development Owners to submit for compliance review, information on tenant income and rent for each low income Unit, and may require a Development Owner to submit for compliance review copies of the tenant files, including copies of the income certification, the documentation the Development Owner has received to support that certification and the rent record for any low income tenant.

(E) The Department will randomly select which low income Units and tenant records are to be inspected and reviewed by the Department. The review of the tenant records may be undertaken wherever the Development Owner maintains or stores the records. Units and tenant records to be inspected and reviewed will be selected in a manner that will not give Development Owners advance notice that a particular Unit and tenant records for a particular year will or will not be inspected or reviewed. However, the Department will give reasonable notice to the Development Owner that an on-site inspection or a tenant record review will occur, so that the Development Owner may notify tenants of the inspection or assemble tenant records for review.

(3) Exception. The Department may, at its discretion, enter into a Memorandum of Understanding with the TX-USDA-RHS, whereby the TX-USDA-RHS agrees to provide to the Department information concerning the income and rent of the tenants in buildings financed by the TX-USDA-RHS under its §515 program. Owners of such buildings may be excepted from the review procedures of subparagraph (B) or (C) of this paragraph or both; however, if the information provided by TX-USDA-RHS is not sufficient for the Department to make a determination that the income limitation and rent restrictions of the Code, §42(g)(1) and (2), are met, the Development Owner must provide the Department with additional information. TX-USDA-RHS Developments satisfy the definition of Qualified Elderly Development if they meet the definition for elderly used by TX-USDA-RHS , which includes persons with disabilities.

(k) Inspection provision. The Department retains the right to perform an on site inspection of any low income housing Development including all books and records pertaining thereto through either the end of the Compliance Period or the end of the period covered by any Extended Low Income Housing Commitment, whichever is later. An inspection under this subsection may be in addition to any review under subsection (j)(2) of this section.

(l) Inspection Standard. For the on-site inspections of buildings and low income Units, the Department shall review any local health, safety, or building code violations reported to, or notices of such violations retained by, the Development Owner, under subsection (j)(1)(G) of this section, and determine whether the Units satisfy local health, safety, and building codes or the uniform physical condition standards for public housing established by HUD (24 CFR 5.703). The HUD physical condition standards do not supersede or preempt local health, safety and building codes. Developments must continue to satisfy these codes and if the Department becomes aware of any violation of these codes, the violations must be reported to the IRS.

(m) The Department retains the right to require the Owner to submit tenant data in the electronic format as developed by the Department. The Department will provide general instruction regarding the electronic transfer of data.

(n) Notices to Owner. The Department will provide prompt written notice to the Development Owner if the Department does not receive the certification described in subsection (j)(1) of this section or discovers through audit, inspection, review or any other manner, that the Development is not in compliance with the provisions of the Code, §42 or the LURA. The notice will specify a correction period which will not exceed 90 days, during which the Development Owner may respond to the Department's findings, bring the Development into compliance, or supply any missing certifications. The Department may extend the correction period for up to six months if it determines there is good cause for granting an extension. If any communication to the Development Owner under this section is returned to the Department as unclaimed or undeliverable, the Development may be considered not in compliance without further notice to the Development Owner.

(o) Notice to the IRS.

(1) Regardless of whether the noncompliance is corrected, the Department is required to file IRS Form 8823 with the IRS. IRS Form 8823 will be filed not later than 45 days after the end of the correction period specified in the Notice to Owner (including any extensions permitted by the Department), but will not be filed before the end of the correction period. The Department will explain on IRS Form 8823 the nature of the noncompliance and will indicate whether the Development Owner has corrected the noncompliance or failure to certify.

(2) If a particular instance of non-compliance is not corrected within three years after the end of the permitted correction period, the Department is not required to report any subsequent correction to the IRS.

(3) The Department will retain records of noncompliance or failure to certify for six years beyond the Department's filing of the respective IRS Form 8823. In all other cases, the Department will retain the certification and records described in §49.19 of this title for three years from the end of the calendar year the Department receives the certifications and records.

(p) Notices to the Department. A Development Owner must notify the division responsible for compliance within the Department in writing of the events listed in paragraphs (1) through (3) of this subsection.

(1) prior to any sale, transfer, exchange, or renaming of the Development or any portion of the Development. For Rural Developments that are federally assisted or purchased from HUD, the Department shall not authorize the sale of any portion of the Development;

(2) any change of address to which subsequent notices or communications shall be sent; or

(3) within thirty days of the placement in service of each building, the Department must be provided the in service date of each building.

(q) Liability. Compliance with the requirements of the Code, §42 is the sole responsibility of the Development Owner of the building for which the credit is allowable. By monitoring for compliance, the Department in no way assumes any liability whatsoever for any action or failure to act by the Development Owner including the Development Owner's noncompliance with the Code, §42.

(r) These provisions apply to all buildings for which a low income housing credit is, or has been, allowable at any time. The Department is not required to monitor whether a building or Development was in compliance with the requirements of the Code, §42, prior to January 1, 1992. However, if the Department becomes aware of noncompliance that occurred prior to January 1, 1992, the Department is required to notify the IRS in a manner consistent with subsection (j) of this section.

(s) Material Non-Compliance. In accordance with §49.5(b)(6) and (7) of this title, the Department will disqualify an Application

for funding if the Applicant or other Persons, General Partner , General Contractor, and their respective principals or Affiliates active in the ownership or control of low income housing located in or outside the State of Texas is determined by the Department to be in Material Non-Compliance on the date the Application Round closes. The Department will classify a property as being in Material Non-Compliance when such property has a Non-Compliance score that is equal to or exceeds 30 points in accordance with the methodology and point system set forth in this subsection, or if in accordance with §49.5(b)(7) of this title, the Department makes a determination that the non-compliance reported would equal or exceed a non-compliance score of 30 points if measured in accordance with the methodology and point system set forth in this subsection.

(1) Each property that has received an allocation from the Department will be scored according to the type and number of non-compliance events as it relates to the tax credit program or other Department programs. All Developments regardless of status that have received an allocation are scored even if the project no longer actively participates in the program.

(2) Uncorrected non-compliance will carry the maximum number of points until the non-compliance event has been reported corrected by the Department. Once reported corrected by the Department the score will reduce to the "corrected value" in paragraph (4) of this subsection. Corrected non-compliance will no longer be included in the Development score three years after the date the non-compliance was reported corrected by the Department. Non-compliance events that occurred and were identified by the Department through the issuance of the IRS form 8823 prior to January 1, 1998 are assigned corrected point values to each non-compliance event. The score for these events will no longer be included in the Development's score three years after the date the form 8823 was executed. For Applicants under this QAP, a non-compliance report will be run by the Department's Compliance Division on the date the Application Round closes. Any corrective action documentation affecting this compliance status score must be received by the Department no later than February 1, 2003.

(3) Events of non-compliance are categorized as either "development events" or "unit/building events". Development events of non-compliance affect all the buildings in the property. However, the property will receive only one score for the event rather than a score for each building. Other types of non-compliance are identified individually by unit. This type of non-compliance will receive the appropriate score for each building cited with an event. The building scores accumulate towards the total score of the Development.

(4) Each type of non-compliance is assigned a point value. The point value for non-compliance is reduced upon correction of the non-compliance. The scoring point system and values are as described in subparagraphs (A) and (B) of this paragraph. The point system weighs certain types of non-compliance more heavily than others; therefore certain non-compliance events carry a sufficient number of points to automatically place the property in Material Non-Compliance. However other types of non-compliance by themselves do not warrant the classification of Material Non-Compliance. Multiple occurrences of these types of non-compliance events may produce enough points to cause the property to be in Material Non-Compliance. For purposes of these scores, the terms "uncorrected" and "corrected" refer to actions taken subsequent to notification of non-compliance by the Department. Scores identified below become effective April 1, 2003.

(A) Development Non-Compliance items are identified in clauses (i) through (xxi) of this subparagraph.

(i) Major property condition violations. As determined by the Department the project displays major violations of health, safety and building code or the property does not satisfy the uniform physical condition standards. Uncorrected is 30 points. Corrected is 20 points.

(ii) Owner refused to lease to a holder of rental assistance certificate/voucher because of the status of the prospective tenant as such a holder. Uncorrected is 30 points. Corrected is 10 points.

(iii) Development not available to general public. Determination of violation under the Fair Housing Act. Uncorrected is 30 points. Corrected is 10 points.

(iv) Development is out of compliance and never expected to comply. Uncorrected is 30 points.

(v) Failure to meet minimum low-income occupancy levels. Development failed to meet required minimum low-income occupancy levels of 20/50 (20% of the units occupied by tenants with household incomes of less than or equal to 50% of area median gross income) or 40/60. Uncorrected is 20 points. Corrected is 10 points.

(vi) No evidence or failure to certify to non-profit material participation. Uncorrected is 10 points. Corrected is 3 points.

(vii) Failure to meet additional State required rent and occupancy restrictions. Development has failed to meet state restrictions that exist in addition to the federal requirements. Uncorrected is 10 points. Corrected is 3 points.

(viii) Failure to provide required supportive services as promised at application. Uncorrected is 10 points. Corrected is 3 points.

(ix) Failure to provide housing to the elderly as promised at application. Uncorrected is 10 points. Corrected is 3 points.

(x) Failure to provide special needs housing. Development has failed to provide housing for tenants with special needs as promised at application. Uncorrected is 10 points. Corrected is 3 points.

(xi) Owner failed to provide required annual notification to local administering agency for the Section 8 program. Uncorrected is 5 points. Corrected is 2 point.

(xii) Changes in eligible basis. Changes occur when common areas become commercial; fees are charged for facilities, etc. Uncorrected is 10 points. Corrected is 3 point.

(xiii) Owner failed to post Fair Housing Logo and/or poster in leasing offices. Uncorrected is 3 points. Corrected is 1 point.

(xiv) LURA not in effect. The LURA was not executed within the required time period. Uncorrected is 10 points. Corrected is 3 point.

(xv) Owner failed to pay fees or allow on-site monitoring review. Uncorrected is 3 points. Corrected is 1 point.

(xvi) Failure to submit annual Owner Certification of Program Compliance or other annual, monthly, or quarterly reports. Uncorrected is 10 points. Corrected is 3 point.

(xvii) Owner failed to make available or maintain management plan with required language. Uncorrected is 3 points. Corrected is 1 point.

(xviii) Owner failed to approve and distribute Affirmative Marketing Plan. Uncorrected is 3 points. Corrected is 1 points.

(xix) Pattern of minor property condition violations. Development displays a pattern of property violations. However those violations do not impair essential services and safeguards for tenants. Uncorrected is 5 points. Corrected is 2 point.

(xx) Failure to comply with requirements limiting minimum income standards for Section 8 residents. Complaints verified by the Department regarding violations of the income standard which cause exclusion from admission of section 8 resident(s) results in a violation. Uncorrected score 10 points. Corrected 3 point.

(B) Unit Non-Compliance items are identified in clauses (i) through (x) of this subparagraph.

(i) Unit not leased to Low Income Household. Development has units that are leased to households whose income was above the income limit upon initial occupancy. Uncorrected is 3 points. Corrected is 1 point.

(ii) Low-income units occupied by nonqualified full-time students. Uncorrected is 3 points. Corrected is 1 point.

(iii) Low income units used on transient basis. Uncorrected is 3 points. Corrected is 1 point.

(iv) Household Income increased above the re-certification limit and available unit was rented to market tenant. Uncorrected is 3 points. Corrected is 1 point.

(v) Gross rent exceeds tax credit rent limits. Uncorrected is 3 points. Corrected is 1 point.

(vi) Utility allowance not calculated properly. Uncorrected is 3 points. Corrected is 1 point.

(vii) Failure to maintain or provide tenant income certification and documentation. Uncorrected is 3 points. Corrected is 1 point.

(viii) Casualty loss. Units not available for occupancy due to natural disaster or hazard due to no fault of the Owner. This carries no point value.

(ix) When a low income unit became vacant, owner failed to lease to a low income household before any units were rented to tenants not having a qualifying income. Uncorrected 3 points. Corrected 1 point.

(x) Unit not available for rent. Unit is used for non-residential purposes. Uncorrected is 3 points. Corrected is 1 point.

(t) Utility Allowances utilized during Affordability Period. The Department will monitor to determine whether rents comply with the published tax credit rent limits using the utility allowances established by the local housing authority. When there are overlapping jurisdictions between local housing authorities, the utility allowance for the building will be utilized based on where the property is located according to the Development's legal description.

§49.20. Department Records, Application Log, IRS Filings.

(a) Department Records. At all times during each calendar year the Department shall maintain a record of the following:

(1) the cumulative amount of the State Housing Credit Ceiling that has been reserved pursuant to reservation notices during such calendar year;

(2) the cumulative amount of the State Housing Credit Ceiling that has been committed pursuant to Commitment Notices during such calendar year;

(3) the cumulative amount of the State Housing Credit Ceiling that has been committed pursuant to Carryover Allocation Documents during such calendar year;

(4) the cumulative amount of housing credit allocations made during such calendar year; and

(5) the remaining unused portion of the State Housing Credit Ceiling for such calendar year.

(b) Application Log. The Department shall maintain for each Application an Application Log that tracks the Application from the date of its submission. The Application Log will contain, at a minimum, the information identified in paragraphs (1) through (9) of this subsection.

(1) the names of the Applicant and Related Parties, the owner contact name and phone number, and full contact information for all members of the Development Team;

(2) the name, physical location, and address of the Development, including the relevant region of the state;

(3) the number of Units and the amount of housing tax credits requested for allocation by the Department to the Applicant;

(4) any set-aside category under which the Application is filed;

(5) the requested and awarded score of the Application in each scoring category adopted by the Department under the Qualified Allocation Plan;

(6) any decision made by the Department or Board regarding the Application, including the Department's decision regarding whether to underwrite the Application and the Board's decision regarding whether to allocate housing tax credits to the Development;

(7) the names of persons making the decisions described by paragraph (6) of this subsection, including the names of Department staff scoring and underwriting the Application, to be recorded next to the description of the applicable decision;

(8) the amount of housing tax credits allocated to the Development; and

(9) a dated record and summary of any contact between the Department staff, the Board, and the Applicant or any Related Parties.

(c) IRS Filings. The Department shall mail to the Internal Revenue Service, not later than the 28th day of the second calendar month after the close of each calendar year during which the Department makes housing credit allocations, the original of each completed (as to Part I) IRS Form 8609, a copy of which was mailed or delivered by the Department to a Development Owner during such calendar year, along with a single completed IRS Form 8610, Annual Low Income Housing Credit Agencies Report. When a Carryover Allocation is made by the Department, a copy of IRS Form 8609 will be mailed or delivered to the Development Owner by the Department in the year in which the building(s) is placed in service, and thereafter the original will be mailed to the Internal Revenue Service in the time sequence in this subsection. The original of the Carryover Allocation Document will be filed by the Department with IRS Form 8610 for the year in which the allocation is made. The original of all executed Agreement and Election Statements shall be filed by the Department with the Department's IRS Form 8610 for the year a housing credit allocation is made as provided in this section. The Department shall be authorized to vary from the requirements of this section to the extent required to adapt to changes in IRS requirements.

§49.21. Program Fees, Refunds, Public Information Requests, Amendments of Fees and Notification of Fees, Extensions.

(a) Timely Payment of Fees. All fees must be paid as stated in this section. Any fees, as further described in this section, that are not timely paid will cause an Applicant to be ineligible to apply for tax credits and additional tax credits and ineligible to submit extension requests, ownership changes and application amendments. Payments made by check, for which insufficient funds are available, will cause the Application, commitment or allocation to be terminated.

(b) Pre-Application Fee. Each Applicant that submits a Pre-Application shall submit to the Department, along with such Pre-Application, a non refundable Pre-Application fee, in the amount of $5 per Unit. Units for the calculation of the Pre-Application Fee include all Units within the Development, including tax credit, market rate and owner-occupied Units. Pre-Applications without the specified Pre-Application Fee in the form of a check will not be accepted. Community Housing Development Organizations (CHDOs) and Qualified Nonprofit Organizations will receive a discount of 10% off the calculated Pre-Application fee.

(c) Application Fee. Each Applicant that submits an Application shall submit to the Department, along with such Application, an Application fee. For Applicants having submitted a Pre-Application which met Pre-Application Threshold and for which a Pre-Application fee was paid, the Application fee will be $15 per Unit. For Applicants not having submitted a Pre-Application, the Application fee will be $20 per Unit. Units for the calculation of the Application Fee include all Units within the Development, including tax credit, market rate and owner-occupied Units. Applications without the specified Application Fee in the form of a check will not be accepted. Community Housing Development Organizations and Qualified Nonprofit Organizations will receive a discount of 10% off the calculated Application fee.

(d) Refunds of Pre-Application or Application Fees. The Department shall refund the balance of any fees collected for a Pre-Application or Application that is withdrawn by the Applicant or that is not fully processed by the Department. The amount of refund on Applications not fully processed by the Department will be commensurate with the level of review completed. Intake and data entry will constitute 30% of the review, the site visit will constitute 45% of the review, and Threshold and Selection review will constitute 25% of the review. The Department must provide the refund to the Applicant not later than the 30th day after the date the last official action is taken with respect to the Application.

(e) Third Party Underwriting Fee. Applicants will be notified in writing prior to the evaluation of a Development by an independent third party underwriter in accordance with §49.7(b)(3) of this title if such a review is required. The fee must be received by the Department prior to the engagement of the underwriter. The fees paid by the Development Owner to the Department for the third party underwriting will be credited against the commitment fee established in subsection (e) of this section, in the event that a Commitment Notice or Determination Notice is issued by the Department to the Development Owner.

(f) Commitment or Determination Notice Fee. Each Development Owner that receives a Commitment Notice or Determination Notice shall submit to the Department, not later than the expiration date on the commitment notice, a non-refundable commitment fee equal to 4% of the annual housing credit allocation amount. The commitment fee shall be paid by check.

(g) Compliance Monitoring Fee. Upon the Development being placed in service, the Development Owner will pay a compliance monitoring fee in the form of a check equal to $25 per tax credit Unit per year or $100, whichever is greater. Payment of the first year's compliance monitoring fee must be received by the Department prior to the release of the IRS Form 8609 on the Development. Subsequent anniversary dates on which compliance monitoring fee payments are due shall be determined by the date the Development was placed in service.

(h) Building Inspection Fee. The Building Inspection Fee must be paid at the time the Commitment Fee is paid. The Building Inspection Fee for all Developments is $500. .

(i) Public Information Requests. Public information requests are processed by the Department in accordance with the provisions of the Government Code, Chapter 552. The Texas Building and Procurement Commission (formerly General Services Commission) determines the cost of copying, and other costs of production.

(j) Periodic Adjustment of Fees by the Department and Notification of Fees. All fees charged by the Department in the administration of the tax credit program will be revised by the Department from time to time as necessary to ensure that such fees compensate the Department for its administrative costs and expenses. The Department shall publish not later than July 1 of each year a schedule of Application fees that specifies the amount to be charged at each stage of the application process. Unless otherwise determined by the Department, all revised fees shall apply to all Applications in process and all Developments in operation at the time of such revisions.

(k) Extension Requests. All extension requests relating to the Commitment Notice, Carryover, Closing of Construction Loan, Substantial Construction Commencement, Placed in Service or Cost Certification requirements shall be submitted to the Department in writing and be accompanied by a non-refundable extension fee in the form of a check in the amount of $2,500. Such requests must be submitted to the Department at least 30 days prior to the date for which an extension is being requested. Extension requests and fees will not be accepted any later than this deadline date. The extension request shall specify a requested extension date and the reason why such an extension is required. The Department, in its sole discretion, may consider and grant such extension requests for all items except for the Closing of Construction Loan and Substantial Construction Commencement. The Board may grant extensions, for the Closing of Construction Loan and Substantial Construction Commencement. The Board may waive related fees.

§49.22. Manner and Place of Filing All Required Documentation.

(a) All Applications, letters, documents, or other papers filed with the Department will be received only between the hours of 8:00 a.m. and 5:00 p.m. on any day which is not a Saturday, Sunday or a holiday established by law for state employees.

(b) All notices, information, correspondence and other communications under this title shall be deemed to be duly given if delivered or sent and effective in accordance with this subsection. Such correspondence must reference that the subject matter is pursuant to the Tax Credit Program and must be addressed to the Low Income Housing Tax Credit Program, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, TX 78711-3941 or for hand delivery or courier to 507 Sabine, Suite 400, Austin, Texas 78701. Every such correspondence required or contemplated by this title to be given, delivered or sent by any party may be delivered in person or may be sent by courier, telecopy, express mail, telex, telegraph or postage prepaid certified or registered air mail (or its equivalent under the laws of the country where mailed), addressed to the party for whom it is intended, at the address specified in this subsection. Notice by courier, express mail, certified mail, or registered mail will be effective on the date it is officially recorded as delivered by return receipt or equivalent

and in the absence of such record of delivery it will be presumed to have been delivered by the fifth business day after it was deposited, first-class postage prepaid, in the United States first class mail. Notice by telex or telegraph will be deemed given at the time it is recorded by the carrier in the ordinary course of business as having been delivered, but in any event not later than one business day after dispatch. Notice not given in writing will be effective only if acknowledged in writing by a duly authorized officer of the Department.

§49.23. Waiver and Amendment of Rules.

(a) The Board, in its discretion, may waive any one or more of these Rules in cases in which the Board finds that compelling circumstances exist outside the control of the Applicant or Development Owner..

(b) The Department may amend this chapter and the Rules contained herein at any time in accordance with the Government Code, Chapter 2001, as may be amended from time to time.

§49.24. Deadlines for Allocation of Low Income Housing Tax Credits.

(a) Not later than September 30 of each year, the Department shall prepare and submit to the Board for adoption the draft Qualified Allocation Plan required by federal law for use by the Department in setting criteria and priorities for the allocation of tax credits under the low income housing tax credit program.

(b) The Board shall adopt and submit to the Governor the Qualified Allocation Plan not later than November 15 of each year.

(c) The Governor shall approve, reject, or modify and approve the Qualified Allocation Plan not later than December 1 of each year.

(d) An Applicant for a low income housing tax credit to be issued a Commitment Notice during the Application Round in a calendar year must submit an Application to the Department not later than March 1.

(e) The Board shall review the recommendations of Department staff regarding Applications and shall issues a list of approved Applications each year in accordance with the Qualified Allocation Plan not later than June 30.

(f) The Board shall issue final Commitment Notices for allocations of housing tax credits each year in accordance with the Qualified Allocation Plan not later than July 31.

This 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 September 16, 2002.

TRD-200206018
Edwina Carrington
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 27, 2002
For further information, please call: (512) 475-3726

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 8. PIPELINE SAFETY REGULATIONS

The Railroad Commission of Texas proposes new §8.235, relating to Community Liaison and Public Awareness for Natural Gas Pipelines, and §8.310, relating to Community Liaison and Public Education for Hazardous Liquids and Carbon Dioxide Pipelines. The proposed rules implement provisions of the Texas Natural Resources Code and Texas Utilities Code enacted by the Texas legislature in Senate Bill (SB) 310, 77th Legislature, 2001. Section 8.235 will be in Subchapter C, relating to Requirements for Natural Gas Pipelines Only, and §8.310 will be in Subchapter D, relating to Requirements for Hazardous Liquids Pipelines Only.

Proposed new §8.235 governs operators of natural gas pipelines or pipeline facilities. Subsection (a) of the proposed new rule requires each operator of such pipelines or pipeline facilities or the operator's designated representative to communicate and conduct liaison activities with fire, police, and other appropriate public emergency response officials. The liaison activities must be conducted by meetings in person except as otherwise provided by the rule.

Proposed new §8.235(b) provides that the operator or the operator's representative would be permitted to conduct the required community liaison activities as provided by subsection (c) of the rule only if the operator or the operator's representative has made an effort to conduct a community liaison meeting in person with the officials by one of the following methods: (1) mailing a written request for a meeting in person to the appropriate officials by certified mail, return receipt requested; (2) sending a request for a meeting in person to the appropriate officials by facsimile transmission; or (3) making one or more telephone calls or e-mail message transmissions to the appropriate officials to request a meeting in person.

Proposed new §8.235(c) provides that if the operator or operator's representative is unable to arrange a meeting in person, the operator or the operator's representative must make an effort to conduct community liaison activities by means of a telephone conference call with the officials by one of the following methods: (1) mailing a written request for a telephone conference to the appropriate officials by certified mail, return receipt requested; (2) sending a request for a telephone conference to the appropriate officials by facsimile transmission; or (3) making one or more telephone calls or e-mail message transmissions to the appropriate officials to request a telephone conference.

Proposed new §8.235(d) provides that if the operator or the operator's representative has made all of these efforts but still has not successfully arranged either a meeting in person or a telephone conference, the community liaison information required to be conveyed may be delivered by mailing the information by certified mail, return receipt requested.

Proposed new §8.310 governs operators of hazardous liquids or carbon dioxide pipelines or pipeline facilities. Subsection (a) of the proposed new rule would require each operator of such pipelines or pipeline facilities or the operator's designated representative to communicate and conduct liaison activities with fire, police, and other appropriate public emergency response officials. The operator or the operator's designated representative must conduct liaison activities by meetings in person except as otherwise provided by the rule.

Proposed new §8.310(b) provides that the operator or the operator's representative may conduct required community liaison

activities as provided by subsection (c) of the rule only if the operator or the operator's representative has made all the following efforts to conduct a community liaison meeting in person with the officials: (1) mailing a written request for a meeting in person to the appropriate officials by certified mail, return receipt requested; (2) sending a request for a meeting in person to the appropriate officials by facsimile transmission; and (3) making one or more telephone calls or e-mail message transmissions to the appropriate officials to request a meeting in person.

Proposed new §8.310(c) provides that if the operator or operator's representative is unable to arrange a meeting in person, the operator or the operator's representative must make all the following efforts to conduct community liaison activities by means of a telephone conference call with the officials: (1) mailing a written request for a telephone conference to the appropriate officials by certified mail, return receipt requested; (2) sending a request for a telephone conference to the appropriate officials by facsimile transmission; and (3) making one or more telephone calls or e-mail message transmissions to the appropriate officials to request a telephone conference.

Proposed new §8.310(d) provides that if the operator or the operator's representative has made all the efforts required by subsections (b) and (c) but still has not successfully arranged a meeting in person or a telephone conference, the community liaison information required to be conveyed may be delivered by mailing the information by certified mail, return receipt requested.

Proposed new §8.310(e) would require the owner or operator of each interstate or intrastate hazardous liquid or carbon dioxide pipeline or pipeline facility any part of which is located within 1,000 feet of a public school to: (1) develop an emergency response plan in consultation with the fire department in whose jurisdiction the school is located or with another local emergency response entity; and (2) present the plan at the first annual budget meeting of the board of trustees of the school district in which the school is located after the plan is developed and at subsequent annual budget meetings of the board of trustees of the school district on the request of the board.

Proposed new §8.310(f) prescribes the minimum components of public education and liaison plan: (1) a description of the pipeline and pipeline facilities within the school district; (2) a list of the products carried by the pipelines and material safety data sheets for the products; (3) general facility maps; (4) emergency names and phone numbers to reach in the event of an emergency; (5) general information numbers for the pipeline facilities; (6) provisions for an emergency preparedness drill; and (7) information regarding the prevention of third party damage.

Mary McDaniel, assistant director, Gas Services Division, Pipeline Safety Section, has determined that for each of the first five years the proposed new section is in effect there will be no fiscal implications for state government as a result of enforcing or administering this rule. There may be fiscal implications for any local governments that participate in community liaison meetings in person with pipeline operators or their representatives, unless the local government is already participating in such meetings in person, and for those local governments whose fire departments or other emergency response entities would be required to consult with the owner or operator of each interstate or intrastate hazardous liquid or carbon dioxide pipeline or pipeline facility any part of which is located within 1,000 feet of a public school to develop an emergency response plan. There may be fiscal implications for school districts in which there is a school within 1000 feet of a hazardous liquid or carbon dioxide pipeline or pipeline facility because of the requirement that the board of trustees of such a school district entertain the emergency response plan at the first annual budget meeting after the plan is developed, and at subsequent annual budget meetings of the board of trustees of the school district on the request of the board. The Commission does not have data showing which school districts have schools within 1000 feet of a hazardous liquid or carbon dioxide pipeline or pipeline facility or how many schools or school districts might be affected by this requirement.

Ms. McDaniel has also determined that the public benefit anticipated as a result of the new sections will be a general improvement of the communication between pipeline operators and local emergency response entities. Specifically with respect to proposed new §8.310, there is an anticipated increase in the overall safety of occupants of school facilities as they become more aware of the pipeline facilities located in their areas as well as the procedures to follow in the event of an emergency involving pipeline facilities.

There should be no additional cost for individual, small business, or micro-business pipeline operators to comply with the proposed new rules because the operator emergency response plans should already have been developed and in place. The cost for individual, small business, or micro-business pipeline operators to comply with proposed new §8.310 cannot be determined, because the Commission has no data available as to the number of school districts the proposed rule will affect. However, proposed new §8.310 expands the liaison responsibility only to school districts with a school or schools located within 1000 feet of the hazardous liquid or carbon dioxide pipeline or pipeline facility.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.state.tx.us/rules/commentform.html; or by electronic mail to rulescoordinator@rrc.state.tx.us. The Commission will accept comments for 30 days after publication in the *Texas Register* and should refer to Gas Utilities Docket No. 9330. For further information, call Mary McDaniel at (512) 463-7058. The status of Commission rulemakings in progress is available at www.rrc.state.tx.us/rules/proposed.html.

SUBCHAPTER C. REQUIREMENTS FOR NATURAL GAS PIPELINES ONLY

16 TAC §8.235

The Commission proposes new §8.235 pursuant to Texas Utilities Code, §121.2015, which requires the Commission to adopt rules regarding public education and awareness relating to gas pipeline facilities and community liaison for responding to an emergency relating to a gas pipeline facility and mandates that the Commission require operators or their designated representatives to communicate and conduct liaison activities with fire, police, and other appropriate public emergency response officials by meetings in person except as provided by §121.2015.

Texas Natural Resources Code, §§117.011 and 117.012, and Texas Utilities Code, §121.2015, are affected by the proposed new rules.

Issued in Austin, Texas on September 12, 2002.

§8.235. Community Liaison and Public Awareness for Natural Gas Pipelines.

(a) Liaison activities required. Each operator of a natural gas pipeline or pipeline facilities or the operator's designated representative shall communicate and conduct liaison activities with fire, police, and other appropriate public emergency response officials. The liaison activities shall be conducted by meetings in person except as provided by this section.

(b) Minimum efforts. The operator or the operator's representative may conduct required community liaison activities as provided by subsection (c) of this section only if the operator or the operator's representative has made an effort to conduct a community liaison meeting in person with the officials by one of the following methods:

(1) mailing a written request for a meeting in person to the appropriate officials by certified mail, return receipt requested;

(2) sending a request for a meeting in person to the appropriate officials by facsimile transmission; or

(3) making one or more telephone calls or e-mail message transmissions to the appropriate officials to request a meeting in person.

(c) Conference call. If the operator or operator's representative cannot arrange a meeting in person after complying with subsection (b) of this section, the operator or the operator's representative shall make an effort to conduct community liaison activities by means of a telephone conference call with the officials by one of the following methods:

(1) mailing a written request for a telephone conference to the appropriate officials by certified mail, return receipt requested;

(2) sending a request for a telephone conference to the appropriate officials by facsimile transmission; or

(3) making one or more telephone calls or e-mail message transmissions to the appropriate officials to request a telephone conference.

(d) Mailing liaison information. If the operator or the operator's representative has made the efforts required by subsections (b) and (c) of this section but has not successfully arranged a meeting in person or a telephone conference, the community liaison information required to be conveyed may be delivered by mailing the information by certified mail, return receipt requested.

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

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TRD-200205964
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
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For further information, please call: (512) 475-1295

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SUBCHAPTER D. REQUIREMENTS FOR HAZARDOUS LIQUIDS PIPELINES ONLY

16 TAC §8.310

The Commission proposes new §8.310 pursuant to Texas Natural Resources Code, §117.011, which gives the Commission jurisdiction over all pipeline transportation of hazardous liquids or carbon dioxide and over all hazardous liquid or carbon dioxide pipeline facilities as provided by 49 U.S.C. §60101, *et seq*., and §117.012, which directs the Commission to adopt rules regarding public education and awareness concerning hazardous liquid or carbon dioxide pipeline facilities and community liaison for the purpose of responding to an emergency concerning a hazardous liquid or carbon dioxide pipeline facility and mandates that the Commission require operators of hazardous liquids or carbon dioxide pipelines or pipeline facilities to conduct liaison activities with fire, police, and other appropriate public emergency response officials by meetings in person except as otherwise provided by §117.012.

Texas Natural Resources Code, §§117.011 and 117.012, and Texas Utilities Code, §121.2015, are affected by the proposed new rules.

Issued in Austin, Texas on September 12, 2002.

§8.310. Community Liaison and Public Education for Hazardous Liquids and Carbon Dioxide Pipelines.

(a) Liaison activities required. Each operator of hazardous liquids or carbon dioxide pipelines or pipeline facilities or the operator's designated representative shall communicate and conduct liaison activities with fire, police, and other appropriate public emergency response officials. The operator or the operator's designated representative shall conduct liaison activities by meetings in person except as provided by this section.

(b) Minimum efforts. The operator or the operator's representative may conduct required community liaison activities as provided by subsection (c) of this section only if the operator or the operator's representative has made the following efforts to conduct a community liaison meeting in person with the officials:

(1) mailing a written request for a meeting in person to the appropriate officials by certified mail, return receipt requested;

(2) sending a request for a meeting in person to the appropriate officials by facsimile transmission; and

(3) making one or more telephone calls or e-mail message transmissions to the appropriate officials to request a meeting in person.

(c) Conference call. If the operator or operator's representative cannot arrange a meeting in person after complying with subsection (b) of this section, the operator or the operator's representative shall make the following efforts to conduct community liaison activities by means of a telephone conference call with the officials:

(1) mailing a written request for a telephone conference to the appropriate officials by certified mail, return receipt requested;

(2) sending a request for a telephone conference to the appropriate officials by facsimile transmission; and

(3) making one or more telephone calls or e-mail message transmissions to the appropriate officials to request a telephone conference.

(d) Mailing liaison information. If the operator or the operator's representative has made the efforts required by subsections (b) and (c) of this section but has not successfully arranged a meeting in person or a telephone conference, the community liaison information required to be conveyed may be delivered by mailing the information by certified mail, return receipt requested.

(e) Proximity to public school. The owner or operator of each interstate or intrastate hazardous liquid or carbon dioxide pipeline or pipeline facility any part of which is located within 1,000 feet of a public school shall:

(1) develop an emergency response plan in consultation with the fire department in whose jurisdiction the school is located or with another local emergency response entity; and

(2) present the plan:

(A) at the first annual budget meeting of the board of trustees of the school district in which the school is located after the plan is developed; and

(B) at subsequent annual budget meetings of the board of trustees of the school district on the request of the board.

(f) Minimum components of public education and liaison plan. The public education and liaison plan shall at a minimum contain the following components:

(1) a description of the pipeline and pipeline facilities within the school district;

(2) a list of the products carried by the pipelines and material safety data sheets for the products;

(3) general facility maps;

(4) emergency names and phone numbers to reach in the event of an emergency;

(5) general information numbers for the pipeline facilities;

(6) provisions for an emergency preparedness drill; and

(7) information regarding the prevention of third party damage.

This 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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Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
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PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER E. CERTIFICATION, LICENSING AND REGISTRATION

16 TAC §25.113

The Public Utility Commission of Texas (commission) proposes new §25.113 relating to Municipal Registration of Retail Electric Providers (REPs). The proposed actions will simplify and provide certainty to the registration process thereby facilitating the development of a competitive retail electric market in Texas. Project Number 25963 is assigned to this proceeding.

The project team solicited draft rule language on June 24, 2002 and received comments from interested stakeholders on July 9, 2002. Considering the comments that were received, the project team has prepared the proposed new §25.113 and standard registration form relating to municipal registration of REPs.

The proposed rule establishes an optional "safe harbor" process for municipal registration of REPs. The rule incorporates the threshold legal/policy decisions in the preliminary orders issued in Docket Numbers 25275, *Appeal of TXU Energy Services Company from an Ordinance (No. 2001-47) of the City of Copperas Cove,* and 25310, *Appeal of Reliant Resources, Inc. from Ordinance No. 2007-12-01, City of Allen* on February 27, 2002 and in Docket Number 24906, *Appeal of TXU Energy Services Company of City of Coppell Ordinance No. 2001-967,* on February 28, 2002. These orders addressed threshold issues related to the type of information a municipality can require to register a REP under the Public Utility Regulatory Act (PURA) §39.358, and the commission's authority to hear appeals of municipal ordinances adopted under that section. The rule also incorporates the threshold legal/policy decisions in the supplemental preliminary orders issued on June 21, 2002 in Docket Numbers 24906, 25275, 25310, 25462, 25484, 25485, 25513, 25615, 25649, 25650, 25685, 25686, 25687, 25688, 25689, 25690, 25691, 25766, 25767, 25768, 25769, and 25770. These orders addressed threshold issues related to the scope of registration, re-registration of a REP, the reasonableness of registration fees, reasonableness of sanctions against a REP, definition of "residents of the municipality," discrimination against REPs or types of REPs, REP reporting requirements, notice requirements, and suspension and revocation procedures.

The proposed "safe harbor" registration is a one-time registration process, not an annual registration, and standardizes filing procedures, deadlines, registration information, and fees. REPs are obligated to update their registration information, but a municipality may not require a REP to re-register. However, if a REP's registration is revoked, and the REP subsequently cures its defects and resumes operations, the REP may register in the same manner as a new REP.

The proposed rule prohibits a municipality that adopts the "safe harbor" process from excluding any REP or type of REP from its registration requirement. However if a REP provides service only to the municipality's own electric accounts and not to its residents, it may be excluded from the municipality's registration requirement because the municipality would already have the necessary contact information. Accordingly, the definition of "resident" includes all entities within the municipality except the municipality itself. This ensures that a municipality knows of all REPs operating within its boundaries and is consistent with the provision prohibiting discrimination in PURA §39.001(c), by making all REPs serving within one municipality subject to the same registration requirements.

The proposed rule requires municipalities that adopt the "safe harbor" registration process to file a copy of its ordinance with the commission. Having a centralized place for the ordinances will advance a municipality's interests and facilitate compliance with the ordinance requirements by the REPs.

The proposed rule does not allow municipalities that have adopted the "safe harbor" process to require REPs to file reports regarding complaints. Instead, municipalities may access REP complaint information from the commission's Customer Protection Division (CPD currently provides quarterly complaint databases on the commission's website).

The proposed rule establishes standard suspension and revocation procedures for municipalities that adopt the "safe harbor" process. A municipality may suspend or revoke a REP's registration and authority to operate within the municipality only upon a commission finding that the REP has committed significant violations of PURA Chapter 39 or rules adopted under that chapter. In addition, a municipality may not assess fines or take action against any REP other than suspension or revocation. The affiliated REP (while it is required to offer the price-to-beat) and the POLR are given vital roles in the new competitive market. Accordingly, to preserve these essential functions, a municipality may not suspend or revoke the registration of the affiliated REP or POLR serving residents in the municipality.

Carrie Collier, Retail Market Analyst, Electric Division, has determined that for each year of the first five-year period the proposed section is in effect there will be no fiscal implications for state government as a result of enforcing or administering the section. There may be a reduction in costs to local governments as a result of enforcing or administering this section. Municipalities that adopt the optional registration process under the proposed rule would avoid litigation expenditures in an appeals process before the commission. The anticipated reduction in costs to local governments is difficult to ascertain or quantify at this time.

Ms. Collier has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be an efficient, streamlined process that will accommodate both the needs of the municipalities to know of and be able to contact the entities providing electric services in their areas, and the REPs' need for consistent and easy-to-comply-with requirements throughout the Texas market. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing these sections. There is no anticipated economic cost to persons who are required to comply with the section as proposed. The proposed rule will reduce REPs cost of compliance with multiple and varying municipal registration ordinances.

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

The commission staff will conduct a public hearing on this rulemaking under Government Code §2001.029 at the commission's offices, located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701, on Tuesday, November 12, 2002 at 1:30 p.m. in the Commissioners' Hearing Room located on the seventh floor.

The commission seeks comments on the proposed new section from interested persons. Comments on the proposal (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326. The deadline for submission of comments is October 28, 2002. Reply comments may be submitted by November 4, 2002. Comments should be organized in a manner consistent with the organization of the proposed rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should be filed in Project Number 25963.

In addition to the proposed new substantive rule, the commission is proposing a form for the optional "safe harbor" municipal registration of REPs under proposed new §25.113. The commission is also requesting comments concerning the proposed registration form. Copies of the proposed registration form may be obtained from the commission's Central Records, the commission's Interchange, and the commission's website under Project Number 25963.

In addition to the proposed new rule and registration form, the commission requests comments on the following question: Should the commission develop an online registration procedure? Such a procedure would allow REPs to register once on the commission website and allow registration information to be electronically forwarded to those municipalities adopting ordinances that comply with this rule. Please submit implementing rule language.

The new section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2002) (PURA), which authorizes the Public Utility Commission to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §17.051(a) which instructs the commission to implement rules relating to the registration for a retail electric provider; PURA §39.001(d) which instructs the commission to implement rules that impose the least impact on competition; PURA §39.002, which states that if there is a conflict between provisions of Chapter 39 and other provisions of PURA, except for Chapters 40 and 41, the provisions of Chapter 39 control; PURA §39.352 relating to Certification of Retail Electric Providers; and PURA §39.356 relating to Revocation of Certification.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 17.051, 39.001, 39.002, 39.352, and 39.356.

§25.113. Municipal Registration of Retail Electric Providers.

(a) Applicability. This section applies to municipalities that require retail electric providers (REPs) to register in accordance with the Public Utility Regulatory Act (PURA) §39.358 and to all REPs with a certificate granted by the commission pursuant to PURA §39.352(a) and §25.107 of this title (relating to Certification of Retail Electric Providers).

(b) Purpose. A municipality may require a REP to register as a condition of serving residents of the municipality, in accordance with PURA §39.358. This section establishes an optional "safe harbor" process for municipal registration of REPs to standardize notice and filing procedures, deadlines, and registration information and fees. The optional "safe harbor" registration process simplifies and provides certainty to both municipalities and REPs, thereby facilitating the development of a competitive retail electric market in Texas. If a municipality enacts a registration ordinance that is consistent with this section, the ordinance shall be deemed to comply with PURA §39.358.A municipality may exercise its authority under PURA §39.358 and adopt an ordinance that is not consistent with this section; however, such ordinance could be subject to an appeal to the commission under PURA §32.001(b).

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

(1) Resident - Any electric customer located within the municipality, except the municipality itself, regardless of customer class.

(2) Revocation - The cessation of all REP business operations within a municipality, pursuant to commission order.

(3) Suspension - The cessation of all REP business operations within a municipality associated with obtaining new customers, pursuant to commission order.

(d) Non-discrimination in REP registration requirements. A municipality shall not establish registration requirements that are different for any REP or type of REP or that impose any disadvantage or confer any preference on any REP or type of REP. However, a municipality may exclude from its registration requirement a REP that provides service only to the municipality's own electric accounts and not to any residents of the municipality.

(e) Notice. A municipality that enacts an ordinance adopting the standard registration process under this section shall file only the ordinance or section of ordinance, including the effective date, with the commission at least 30 days before the effective date of the ordinance. The filing shall not exceed ten pages.

(f) Standards for registration of REPs. A municipality that adopts a "safe harbor" ordinance in accordance with this section shall process a REP's registration request on an administrative basis only. A municipality shall not deny a REP's request for registration based upon investigations into the fitness or capability of a REP that has a current certificate from the commission. A municipality shall not require a REP to undergo a hearing before the municipality for the purposes of registration, nor require the REP to send a representative to the municipality for purposes of processing the registration form.

(1) A REP shall register with a municipality that adopts an ordinance in accordance with this section within 30 days after the ordinance requiring registration becomes effective or 30 days after providing retail electric service to any resident of the municipality, whichever is later.

(2) A REP shall register with a municipality that adopts an ordinance in accordance with this section by completing a form approved by the commission, verified by oath or affirmation, and signed by an owner, partner, officer, or other authorized representative of the registering party. Forms may be submitted to a municipality by mail, facsimile, or online where online registration is available. Registration forms may be obtained from the commission's Central Records division during normal business hours, or from the commission's website.

(3) The municipality shall review the submitted form for completeness, including the remittance of the registration fee. Within 15 business days of receipt of an incomplete registration, the municipality shall notify the registering party in writing of the deficiencies in the registration. The registering party shall have ten business days from the issuance of the notification to cure the deficiencies. If the deficiencies are not cured within ten business days, the municipality shall notify the registering party that the registration is rejected without prejudice.

(g) Information. A municipality may require a REP to provide only the information set forth below. A REP shall provide all of the following information on the commission's prescribed form to a municipality that has adopted a "safe harbor" ordinance under this section:

(1) The legal name(s) of the retail electric provider and all trade or commercial names;

(2) The registering party's certificate number, as approved under §25.107 of this title and the docket number under which the certification was granted by the commission;

(3) The Texas business address, mailing address, and principal place of business of the registering party. The business address provided shall be a physical address that is not a post office box;

(4) The name, physical business address, telephone number, fax number, and e-mail address for a Texas regulatory contact person and for an agent for service of process, if a different person;

(5) Toll-free telephone number for the customer service department or the name, title and telephone number of the customer service contact person;

(6) The types of electric customer classes that the REP intends to serve within the municipality; and

(7) The location of each office maintained by the registering person within the municipal boundaries, including postal address, physical address, telephone number, hours of operation, and listing of the services available through each office.

(h) Registration fees. A municipality adopting the "safe harbor" registration process may require REPs to pay a reasonable administrative fee for the purpose of registration.

(1) Registration fees shall be based on the municipality's cost to administer the statute. A one-time registration fee of not more than $25 shall be deemed reasonable. The municipality shall file with the commission a statement of costs incurred if they exceed the $25 threshold.

(2) A municipality may require a REP to pay a late fee, which shall not exceed $15, only if the REP fails to register within 30 days after the ordinance requiring registration becomes effective or 30 days after providing retail electric service to any resident of the municipality, whichever is later.

(i) Post-registration requirements and re-registration.

(1) A REP shall notify municipalities adopting the "safe harbor" registration within 30 days of any change in information provided in its registration. In addition, a REP shall notify a municipality within ten days if it discontinues offering service to residents of the municipality.

(2) A municipality shall not require REPs to file periodic reports regarding complaints, or any other matter, as part of the registration process.

(3) A municipality shall not require a periodic re-registration process or fee.

(4) A municipality shall not require a REP to re-register unless a REP's registration is revoked and the REP subsequently cures its defects and resumes operations. In that circumstance, the REP may register in the same manner as a new REP.

(j) Suspension and revocation. A municipality may suspend or revoke a REP's registration and authority to operate within the municipality only upon a commission finding that the REP has committed significant violations of PURA Chapter 39 or rules adopted under that chapter. A municipality shall not suspend or revoke the registration of the affiliated REP or provider of last resort (POLR) serving residents in the municipality. A municipality shall not take any action against a REP other than suspension or revocation of a REP's registration and authority to operate in the municipality, or imposition of a late fee in accordance with subsection (h)(2) of this section.

(1) A municipality may provide a REP with a warning prior to seeking to suspend or revoke a REP's registration.

(2) A municipality seeking to suspend or revoke a REP's registration shall provide the REP with at least 20 calendar days written notice, informing the REP that its registration and authority to operate shall be suspended or revoked. The notice shall specify the reason(s) for such suspension or revocation.

(3) A municipality may order that the REP's registration be suspended or revoked only after the notice period has expired.

(4) In its suspension order, a municipality shall specify the reasons for the suspension and provide a date certain or provide conditions that a REP must satisfy to cure the suspension. Once the suspension period has expired or the reasons for the suspension have been rectified, the suspension shall be lifted.

(5) In its revocation order, a municipality shall specify the reasons for the revocation.

(6) A REP may appeal a municipality's suspension or revocation order to the commission.

(7) A municipality shall be entitled to recover from the REP costs reasonably expended in revoking or suspending the REP's registration.

This 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 September 13, 2002.

TRD-200205973
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: October 27, 2002
For further information, please call: (512) 936-7308

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SUBCHAPTER R. CUSTOMER PROTECTION RULES FOR RETAIL ELECTRIC SERVICE

16 TAC §25.472

The Public Utility Commission of Texas (commission) proposes an amendment to §25.472, relating to Privacy of Customer Information. The proposed amendment will amend the requirements for the mass customer list. Project Number 26551 is assigned to this proceeding.

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

Ms. Corona has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be to clarify the requirements for issuance of a mass customer list by an electric utility and to eliminate the requirement that a mass customer list be issued by a retail electric provider in a market open to retail competition. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Ms. Corona has also determined that for each year of the first five years the proposed section is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act, Texas Government Code Annotated §2001.022 (Vernon 2000 & Supplement 2002).

The commission staff will conduct a public hearing on this rulemaking under the Administrative Procedure Act, Texas Government Code §2001.029 at the commission's offices, located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701, on Thursday, October 31, 2002 at 9:30 a.m. in the Commissioners' Hearing Room.

Comments on the proposed amendment (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326, within 20 days after publication. Comments should be organized in a manner consistent with the organization of the proposed rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 26551.

This amendment is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2002) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; PURA §39.001, which directs that electric services should be determined by customer choices and the normal forces of competition; PURA §39.101, which grants the commission authority to establish various specific protections for retail customers; and PURA §39.202, which governs the terms of the price-to-beat offering.

Cross Reference to Statutes: PURA §§14.002, 39.001, 39.101, and 39.202.

§25.472. Privacy of Customer Information.

(a) Mass customer lists.

(1) Contents of mass customer list. A mass customer list shall consist of the name, billing address, rate classification, monthly kilowatt-hour usage for the most recent 12-month period, meter type, and account number or electric service identifier (ESI). All customers eligible for the price to beat pursuant to the Public Utility Regulatory Act §39.202 shall be included on the mass customer list, except a customer who opts not to be included on the list pursuant to paragraph (2) of this subsection.

(2) Prior to the release of a mass customer list, an electric utility [~~the entity required to release the mass customer list~~] shall issue a mailing to all customers who may be included on the list [~~, but that have not previously received such a mailing from that entity~~]. The mailing shall:

(A) explain the issuance of the mass customer list;

(B) provide the customer with the option of not being included on the list and allow the customer at least 15 days to exercise that option;

(C) inform the customer of the availability of the no call lists [statewide Do Not Call List] pursuant to §25.484 of this title (relating to Texas Electric No-Call List[Do Not Call List]) and §26.37 of this title (relating to Texas No-Call List), and shall provide the customer with information on how to request placement on the list;

(D) provide [a postage-paid postcard,] a toll free telephone number [,] and an Internet website address to notify the electric utility [entity required to release the list] of the customer's desire to be excluded from the mass customer list.

(3) Release date[dates]. The commission will require the electric utility to release a mass customer list no later than 120 days before the commencement of customer choice.[on or before September 1, 2001. Each retail electric provider (REP) shall release a mass customer list on December 31 of each year from 2002 to 2006. A customer that elects, at any time, not to be included on the mass customer list shall have that option honored through December 31, 2006.]

(4) The mass customer list shall be issued, at no charge, to all REPs certified by, and aggregators registered with, the commission that will be providing retail electric or aggregation services to residential or small commercial customers.

(5) A REP shall not use the list for any purpose other than marketing electric service and verifying a customer's authorized selection of a REP prior to submission of the customer's enrollment to the registration agent.

(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 September 13, 2002.

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Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936-7308

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CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

SUBCHAPTER R. PROVISIONS RELATING TO MUNICIPAL REGULATION AND RIGHTS-OF-WAY MANAGEMENT

16 TAC §26.465

The Public Utility Commission of Texas (commission) proposes amendments to §26.465, relating to Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers. The proposed amendments will clarify the definition of "transmission path," eliminate the reference to the Tel-Assistance program, and delete the reporting requirements in this section. Project Number 26412 is assigned to this proceeding.

The proposed amendment to the definition of "transmission path" accounts for new switching technologies, thereby clarifying which access lines a certificated telecommunications provider (CTP) shall include in quarterly access line reporting. The proposed amendments to §26.465(c)(2) simplify the language to indicate that switched services include, but are not limited to, circuit-switched and packet-switched services. The Tel-Assistance program was repealed by House Bill (H.B.) 2156, 77th Legislature (2001 Texas General Laws 5160), Relating to Eligibility Process for Certain Utility Customer Discounts, Public Utilities Regulatory Act (PURA) §55.015. Therefore, the commission proposes to delete the reference to the Tel-Assistance program in §26.465(e)(8), consistent with amendments previously proposed by the commission in Project Number 26135, *Rulemaking Proceeding to Amend Rules Referencing Tel- Assistance.* In addition, in Project Number 25433, *Rulemaking to Address Municipal Authorized Review of Access Line Reporting* pursuant to H.B. 1777, 76th Legislative Session, the commission is simultaneously proposing a rulemaking to amend §26.467, relating to Rates, Allocation, Compensation, Adjustments and Reporting, to add and amend the reporting requirements proposed for deletion in this project from §26.465(g). The proposed amendments to the reporting requirements in §26.467 delete obsolete provisions and consolidate reporting requirements.

Hayden Childs, Senior Policy Analyst, Telecommunications Division, and Michelle Lingo, Senior Attorney, Policy Development Division, have determined that for each year of the first five-year period the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Hayden Childs and Michelle Lingo have determined that for each year of the first five years the proposed amendments are in effect the public benefit anticipated as a result of enforcing the section will be: 1) clarification of the existing definition of "transmission path;" 2) consistency with the legislative mandate found in H.B. 2156; and 3) clarification of the reporting requirements of Texas Local Government Code, Chapter 283. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section. There is no anticipated economic cost to persons who are required to comply with the section as proposed for amendment.

Hayden Childs and Michelle Lingo have also determined that for each year of the first five years the proposed amendments are in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act §2001.022.

These conclusions are reasonable and justified because the amendments merely clarify an existing rule, reflect the repeal of the Tel-Assistance program, and consolidate reporting requirements.

The commission staff will conduct a public hearing on this rulemaking under the Administrative Procedure Act, Texas Government Code, §2001.029 at the commission's offices, located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701, in the Commissioner's Hearing Room on Wednesday, December 4, 2002 at 9:30 a.m. Please note that the public hearing in Project Number 25433, *Rulemaking to Address Municipal Authorized Review of Access Line Reporting*, pursuant to H.B. 1777, will immediately follow.

Comments on the proposed amendment (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Reply comments may be submitted within 45 days after publication. Electronic copies should be included with the filings. Comments should be organized in a manner consistent with the organization of the proposed amendments. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed amendments. The commission specifically requests comments regarding whether digital subscriber line (DSL) service delivered over the same physical path as switched voice-grade local exchange service constitutes a separate transmission path and specifically requests submission of suggested rule amendment language, if any. The commission will consider the costs and benefits in deciding whether to adopt the amendments. All comments should refer to Project Number 26412.

These amendments are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2002) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, House Bill 2156, 77th Legislature, which repealed the Tel-Assistance program, and Texas Local Government Code, §283.058, which grants the commission the jurisdiction over municipalities and CTPs necessary to enforce the whole of Chapter 283 and to ensure that all other legal requirements are enforced in a competitively neutral, non-discriminatory, and reasonable manner.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §55.015 and Texas Local Government Code §283.058.

§26.465. Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers.

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

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

(1) (No change.)

(2) Transmission path - A path within the transmission media that allows the delivery of switched local exchange service.

(A) Each individual switched [~~circuit-switched~~] service shall constitute a single transmission path.

(B) Where services are offered as part of a bundled group of services, each switched service in that bundled group of services shall constitute a single transmission path.

[~~(C) Only those services that require the use of a circuit switch shall constitute a switched service.~~]

(C) [~~(D)~~] Services that constitute vertical features of a switched service, such as call waiting, caller-ID, etc., that do not require a separate switched path, do not constitute a transmission path.

(D) [~~(E)~~] Where a service or technology is channelized by the CTP and results in a separate switched path for each channel, each such channel shall constitute a single transmission path.

(3) (No change.)

(d) (No change.)

(e) Lines to be counted. A CTP shall count the following access lines:

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

(8) Lifeline [~~and Tel-assistance~~] lines.

(f) (No change.)

(g) Reporting procedures and requirements.

[~~(1) Who shall file.~~] The record keeping, reporting and filing requirements listed in §26.467 of this title (relating to Rates, Allocation, Compensation, Adjustments and Reporting) [~~this section~~] shall apply to all CTPs in the State of Texas.

[~~(2) Reporting requirements. Unless otherwise specified, periodic reporting shall be consistent with this subsection and subsection (d) of this section.~~]

[~~(A) Initial reporting.~~]

~~*(i)* No later than January 24, 2000, a CTP shall file its access line count using the commission-approved *Form for Counting Access Line or Program for Counting Access Lines* with the commission. The CTP shall report the access line count as of December 31, 1998, except as provided in clause (iii) of this subparagraph.~~]

~~*(ii)* A CTP shall not include in its initial report any access lines that are resold, leased, or otherwise provided to a CTP, unless it has agreed to a request from another CTP to include resold or leased lines as part of its access line report.~~]

~~*(iii)* A CTP that cannot file access line count as of December 31, 1998 shall file request for good cause exemption and shall file the most recent access line count available for December, 1999.~~]

~~*(iv)* A CTP shall not make a distinction between facilities and capacity leased or resold in reporting its access line count.~~]

[~~(B) Subsequent reporting.~~]

~~*(i)* Each CTP shall file with the commission a quarterly report beginning the second quarter of the year 2000, showing the number of access lines, including access lines by category, that the CTP has within each municipality at the end of each month of the quarter. The report shall be filed no later than 45 days after the end of the quarter using the commission-approved Form for Quarterly Reporting of Access Lines and shall coincide with the payment to a municipality.~~]

~~*(ii)* The first report shall be due to the commission no later than August 15, 2000 and shall include access line for the second calendar quarter of 2000 and shall coincide with the first payment to a municipality pursuant to the Local Government Code, Chapter 283.~~]

~~*(iii)* Except as provided in clause (iv) of this subparagraph, on request of the commission, and to the extent available, the report filed under clause (i) of this subparagraph shall identify, as part of the CTP's monthly access line count, the access lines that are provided by means of resold services or unbundled facilities to another CTP who is not an end-use customer, and the identity of the CTPs obtaining the resold services or unbundled facilities to provide services to customers.~~]

~~*(iv)* A CTP may not include in its monthly count of access lines any access lines that are resold, leased, or otherwise provided to another CTP if the CTP receives adequate proof that the CTP leasing or purchasing the access lines will include the access lines in its own monthly count. Adequate proof shall consist of a notarized statement prepared consistent with subsection (k) of this section.~~]

~~*[(v)* The CTP shall respond to any request for additional information from the commission within 30 days from receipt of the request.]~~

~~*[(vi)* Reports required under this subsection may be used by the commission only to verify the number of access lines that serve customer premises within a municipality.]~~

~~*[(vii)* On request from a municipality, and subject to the confidentiality protections of subsection (j) of this section, each CTP shall provide each affected municipality with a copy of the municipality's access line count.]~~

(h) - (m) (No change.)

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

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Rhonda Dempsey
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16 TAC §26.467, §26.469

The Public Utility Commission of Texas (commission) proposes an amendment to §26.467, relating to Rates, Allocation, Compensation, Adjustments and Reporting, and new §26.469, relating to Municipal Authorized Review of a Certificated Telecommunication Provider's Business Records. The proposed new rule and amendment will define the authorized review of a provider's business records by a municipality pursuant to Texas Local Government Code §283.056(c)(3), clarify some of the procedures related to the quarterly reporting of municipal access lines, and consolidate the reporting requirements into one section. Project Number 25433 is assigned to this proceeding.

Hayden Childs, Senior Policy Analyst, Telecommunications Division, has determined that for each year of the first five-year period the proposed sections are in effect there will be no fiscal implications as a result of enforcing or administering the section for state government, but there will be some fiscal implications for local government, insomuch as local governments will have the costs of pursuing an authorized review of a provider's business records and the benefits of potentially discovering misreported access lines and the subsequent compensation due.

Hayden Childs has determined that for each year of the first five years the proposed sections are in effect the public benefit anticipated as a result of enforcing new §26.469 will be the ability of the municipality to conduct an authorized review to ensure that providers are complying with the reporting requirements of Texas Local Government Code, Chapter 283, whereas the public benefit anticipated as a result of enforcing the amendment to §26.467 will be to clarify some of the procedures related to the quarterly reporting of municipal access lines and to consolidate the reporting requirements into one section. There will be no adverse economic effect on small businesses or micro- businesses as a result of enforcing these sections. There is some anticipated economic cost to persons who are required to comply with the sections as proposed, but the public benefit of enabling municipalities to conduct statutorily allowed authorized reviews should outweigh those costs.

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

The commission staff will conduct a public hearing on this rulemaking under the Administrative Procedure Act, Texas Government Code §2001.029 at the commission's offices, located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701, in the Commissioner's Hearing Room on Wednesday, December 4, 2002 immediately following the public hearing for Project Number 26412, *Rulemaking to Amend P.U.C. Substantive Rule 26.465.*

Comments on the proposed new section and amendment (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Reply comments may be submitted within 45 days after publication. All comments should be submitted electronically at the same time. Comments should be organized in a manner consistent with the organization of the proposed rule and amendment. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 25433.

This new section and amendment are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2002) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. This new section and amendment are also proposed under the Texas Local Government Code, §283.056(c)(3) and §283.058, which grant the commission the jurisdiction over municipalities and certificated telecommunications providers necessary to enforce the whole of Chapter 283 and to ensure that all other legal requirements are enforced in a competitively neutral, non-discriminatory, and reasonable manner.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and Texas Local Government Code §283.056 and §283.058.

§26.467. Rates, Allocation, Compensation, Adjustments and Reporting.

(a) (No change.)

(b) Application. The provisions of this section apply to certificated telecommunication providers (CTPs) and municipalities in the State of Texas, unless specified otherwise in this section.

(c)-(j) (No change.)

(k) CTP implementation of commission-established rates. The requirements listed in this subsection shall apply to all CTPs in the State of Texas, except those exempted pursuant to §26.465 of this title.

(1) Interim compensation. CTPs shall continue to compensate municipalities at the rates required under the terms of the expired or terminated agreements or ordinances until the CTP implements

the commission-established [~~commission established initial and/or updated~~] rates. A CTP not subject to an existing franchise agreement or ordinance that wants to construct facilities to offer telecommunications services in the municipality shall pay fees that are competitively neutral and non-discriminatory, consistent with the charges of the most recent agreement or ordinance between the municipality and the CTP serving the largest number of access lines within the municipality until the right-of-way fees established by the commission take effect.

(2) [~~(1)~~] Development of billing systems. A CTP [~~No later June 1, 2000, CTPs~~] shall complete the development of billing systems necessary to implement access line rates, by category, as established by the commission.

~~[(2) Initial quarterly compensation and reporting.]~~

~~[(A) Implementation. CTPs may apply the commission-established initial and updated rates (as applicable) to access lines in a municipality for the second calendar quarter of 2000 (the months of April, May and June).]~~

~~[(B) Quarterly access line count report. No later than August 15, 2000, CTPs that implemented commission-established rates pursuant to subparagraph (A) of this paragraph shall file the first quarterly access line count report with the commission. The report shall include a count of the number of access lines, by category, by municipality, at the end of each month of the preceding quarter (April, May and June) that the CTP implemented commission-established rates. The quarterly report shall exclude lines that are leased or resold to other CTPs unless an intercarrier agreement has been reached pursuant to subsection (l) of this section. The CTP shall include with the report a certified statement from an authorized officer or duly authorized representative of the CTP certifying that the information contained in the report is true and correct to the best of the officer's or representative's knowledge and belief after inquiry. On request and subject to the confidentiality protections of the Local Government Code, §283.005, each CTP shall provide each affected municipality with a copy of the report required by this subsection.]~~

~~[(C) Compensation. No later than August 15, 2000, CTPs that applied commission established rates pursuant to subparagraph (A) of this paragraph shall pay municipalities, compensation for the preceding quarter at that rate. The municipal compensation shall be the amount equal to the rate per category of access line multiplied by the monthly access line count reported pursuant to subparagraph (B) of this paragraph.]~~

~~[(D) True-up. Where a municipality is compensated under the terms of an expired franchise contract, agreement or ordinance for the period between March 1, 2000 and June 30, 2000, no true-up to the commission established rates will be allowed for that period.]~~

(3) Quarterly [~~Subsequent quarterly~~] compensation and reporting. All CTPs shall implement commission-established rates for each quarter. Unless otherwise specified, periodic reporting shall be consistent with this subsection and §26.465 of this title. [~~All CTPs shall implement commission-established initial and updated rates (as applicable) no later than July 1, 2000, and revised rates (as applicable) for the subsequent quarters.~~]

(A) Quarterly access line count report. [~~No later than November 15, 2000, a CTP shall file a quarterly access line count report for the preceding calendar quarter with the commission. All subsequent quarterly access line count reports shall be due no later than 45 days from the end of the preceding calendar quarter. The quarterly access line count report shall include a count of the number of access lines, by category, by municipality, for the end of each month of the preceding quarter. The report shall exclude lines that are resold or leased to other CTPs unless an intercarrier agreement has been reached pursuant to subsection (l) of this section. The CTP shall include with the report a certified statement from an authorized officer or duly authorized representative of the CTP certifying that the information contained in the report is true and correct to the best of the officer's or representative's knowledge and belief after inquiry. On request and subject to the confidentiality protections of the Local Government Code, §283.005, each CTP shall provide each affected municipality with a copy of the report required by this subsection.~~]

(i) No later than 45 days from the end of the preceding calendar quarter, a CTP shall file a quarterly access line count report for the preceding calendar quarter with the commission.

(ii) The quarterly access line count report shall include a count of the number of access lines, by category, by municipality, for the end of each month of the preceding quarter.

(iii) The report shall exclude lines that are resold, leased or otherwise provided to other CTPs unless the CTP is reporting for an affiliate pursuant to subsection (l) of this section.

(iv) The CTP shall include with the report a certified statement from an authorized officer or duly authorized representative of the CTP certifying that the information contained in the report is true and correct to the best of the officer's or representative's knowledge and belief after reasonable inquiry.

(v) The CTP shall respond to any request for additional information from the commission within 30 days from receipt of the request.

(vi) Reports required under this subsection may be used by the commission only to verify the number of access lines that serve customer premises within a municipality.

(vii) On request and subject to the confidentiality protections of the Local Government Code, §283.005, each CTP shall provide each affected municipality with a copy of the report required by this subsection.

(B) Compensation.

(i) All [~~Beginning July 1, 2000,~~] CTPs shall apply the most recent commission-established rates to access lines[~~line~~] in a municipality.

(ii) The municipal compensation shall be an amount equal to the rate per category of access line multiplied by the number of access lines in that category in that municipality at the end of each month in a calendar quarter as reflected in reports filed pursuant to subparagraph (A) of this paragraph. [~~All CTPs shall pay to municipalities the compensation for the third calendar quarter of 2000, no later than November 15, 2000.~~]

(iii) All payments for subsequent calendar quarters shall be made no later than 45 days from the end of that quarter.

(4) Reconciliation report. If the CTP deducts or includes a direct write-off pursuant to subsection (m)(2) of this section, the CTP must include a reconciliation report with its compensation to each affected municipality. This reconciliation report does not need to be filed with the commission. The reconciliation report must include a monthly delineation of: [~~Waiver of reporting requirements. A CTP that has reached an intercarrier agreement pursuant to subsection (l) of this section shall be relieved of the quarterly access line count reporting requirements until the expiration of that agreement.~~]

(A) the amount deducted from total payment due to direct write-offs; and

(B) the amount added to the total payment due to previously uncollectible direct write-offs.

(5) Report of reselling CTP by underlying CTPs. On request of a municipality, a CTP that owns facilities in the rights-of-way of municipalities (an underlying CTP) shall report the identities of the CTPs to whom it resold, leased or otherwise provided access lines that extend to the end-use customer's premises (reselling CTPs) within each exchange that lies wholly or partially within a municipality's boundaries. This report does not need to be filed with the commission.

(6) Adequate proof of reporting and compensation responsibilities.

(A) To ensure that each CTP only reports and compensates municipalities for those lines that it uses to serve end-use customers, an underlying CTP shall obtain adequate proof that the reselling CTP will directly report any leased or resold access lines and remit the related payments to municipalities.

(B) Adequate proof shall consist of a written agreement separate from any other agreement that cites the Texas Local Government Code, Chapter 283, and the reporting and compensation requirements of this section. The written agreement shall include the names of the municipalities to which the reseller will directly report access lines.

(C) If the underlying CTP fails to obtain adequate proof that the reselling CTP will include the access line in its monthly count and remit payment on those access lines to the municipality, the underlying CTP must include such lines in its monthly count of access lines and remit a right-of-way fee to the municipality.

(l) Alternate reporting and compensation arrangements. Notwithstanding any other subsection, a CTP shall be subject to the following terms when making alternate reporting and compensation arrangements.

(1) Designated reporting party. A CTP may reach a written agreement separate from any other agreement, including the adequate proof agreement, to have a designated reporting party fulfill the reporting and compensation requirements of this section on its behalf. If the CTP is a reselling CTP, the designated reporting party may be the underlying CTP.

(A) If such an agreement is reached, the designated reporting party shall file the quarterly access line count report in each municipality, by category, on behalf of the CTP, and also compensate the municipality for those lines.

(B) The designated reporting party shall file the quarterly access line count report for each municipality, by category, with the commission on a disaggregated basis by CTP.

(C) Nothing in this subsection shall prevent a designated reporting party from charging a reasonable administrative fee for reporting and compensating a municipality on behalf of a CTP.

(D) Nothing in this subsection shifts the liability from a CTP, reselling or otherwise, for non-payment of municipal compensation and failure to report pursuant to this section.

(2) Affiliates. A CTP may file access line counts in each municipality for itself and its affiliates that are CTPs on an aggregated basis. If the CTP files access line counts for itself and its CTP affiliates on an aggregated basis, the CTP shall include a list of the affiliates and their certification numbers in its Reconciliation Report to the municipalities pursuant to subsection (k) of this section.

~~[(l) Reporting and compensation on behalf of another CTP. Notwithstanding any other subsection, a CTP may report and compensate a municipality on behalf of another CTP subject to the following terms.]~~

~~[(1) All CTPs are responsible for reporting to the commission their own quarterly access line count report and compensating each municipality pursuant to subsection (k) of this section.]~~

~~[(2) CTPs that own facilities in the rights-of-way of municipalities shall directly compensate each municipality quarterly, based upon a monthly access line count. The compensation shall be the amount equal to the rate per category of access line multiplied by the number of access lines in that category in that municipality, at the end of each month, for the preceding quarter.]~~

~~[(3) CTPs that do not own facilities in the rights-of-way of municipalities have the option of compensating the municipality through the underlying CTP, so long as the reselling CTP and the underlying CTP have reached a written agreement.]~~

~~[(4) An underlying CTP and a reselling CTP may reach an agreement that the underlying CTP shall file the quarterly access line count report in each municipality, by category, on behalf of the reselling CTP, and also compensate the municipality for those lines. The quarterly access line count report may be filed with the commission on an aggregated basis.]~~

~~[(5) A CTP may file access line counts in each municipality for itself and its affiliates that are CTPs on an aggregated basis.]~~

~~[(6) A CTP that reports on behalf of another CTP shall, on request from the commission or a municipality, provide a disaggregated line count for each CTP included in the report filed pursuant to subsection (k) of this section.]~~

~~[(7) No later than 45 days after entering into an agreement to provide joint access line counts and municipal compensation pursuant to paragraphs (4) and (5) of this subsection, a CTP that reports and compensates municipalities on behalf of another CTP shall identify in a report filed with the commission, the CTPs on whose behalf access line counts will be reported to the commission.]~~

~~[(8) Nothing in this section shall prevent a CTP from charging to another CTP a reasonable administrative fee for reporting and compensating a municipality on behalf of another CTP to which it has resold, leased, or otherwise provided access lines.]~~

~~[(9) Nothing in this section shifts the liability from a reselling CTP for non- payment of municipal compensation and failure to report pursuant to this section]~~

(m) Pass-through. A CTP recovering its municipal compensation from its customers within the boundaries of a municipality shall not recover a total amount greater than the sum of the amounts derived from the multiplication of access line rates by the number of lines, per category, for that municipality. Pass-through of the commission's rates established under this chapter shall be considered to be a pro rata charge to customers.

(1) (No change.)

(2) A CTP shall be allowed to deduct from its current payment any amounts that are direct write-offs as a result of its collection efforts. Any amounts subsequently recovered from the customer after the direct write-offs shall be included in the amounts payable to each affected municipality [~~the cities~~] in the month(s) received. There shall be no reduction in payment for any estimated uncollectible allowances reported for financial purposes by the CTP.

(3) (No change.)

(n) (No change.)

§26.469. Municipal Authorized Review of a Certificated Telecommunication Provider's Business Records.

(a) Purpose. This section establishes uniform guidelines for a municipal authorized review of a certified telecommunications provider's (CTP's) access line reports, pursuant to Texas Local Government Code, Chapter 283.

(b) Application. This section applies to all municipalities and CTPs in the State of Texas, insofar as the municipality collects fees for use of the public right-of-way pursuant to Texas Local Government Code, Chapter 283, and insofar as the CTP is not fully exempt per §26.468 of this title (relating to Procedures for Standardized Access Line Reports and Enforcement Relating to Quarterly Reporting).

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

(1) Commission filings--All filings with the commission by CTPs and municipalities which would reasonably provide information to verify access line reports, subject to the confidentiality provisions of subsection (g) of this section.

(2) Business records--All CTP business records, its agents and independent contractors of the CTP, to the extent such records would reasonably provide information to assist in the verification of the accuracy of access line fee reports and access line fee payments to municipalities by CTPs.

(3) Authorized review--Inspection by one or more municipalities of a CTP's relevant business records, including any third-party compliance reports and workpapers, to ensure compliance with access line reporting requirements of Texas Local Government Code, Chapter 283.

(d) Relevant business records. A municipality may review a provider's business records to the extent necessary to ensure compliance with the access line reporting requirements in §26.467 of this title (relating to Rates, Allocation, Compensation, Adjustments and Reporting). The CTP shall provide prompt and reasonable access to such records at a location within the State of Texas, or at a mutually agreeable site of the parties. Relevant business records include the following:

(1) a current listing of all company product codes and associated access lines category;

(2) procedures of classification of services and identification of categories of access lines;

(3) street addresses and corresponding tax codes; and

(4) procedures and documentation for assessing uncollectibles.

(e) Sampling. Supplemental to the authorized review of a CTP's business records, a municipality or aggregation of municipalities may request sampling data to support the documentation. A CTP must provide a statistically significant sample of data, including statewide customer records with any sensitive information obscured.

(f) Authorized review. The authorized review may be conducted by a municipality or its designated agents. Multiple municipalities undertaking an authorized review of a commission filing by the same CTP must form a joint review committee. Commission staff may serve as a mediator to clarify the concern(s) and assure that a reasonable response is provided by the CTP.

(1) Notice of intent. If a municipality determines to undertake an authorized review, it shall commence such review under this subsection by giving a written Notice of Intent (NOI) to each CTP subject to the authorized review. A NOI is deemed made upon receipt or three days after deposited in U.S. mail. The NOI shall advise the CTP of the concerns that the municipality wants the CTP to address. Such notice shall be given to the CTP within 90 days after the filing with the commission of a CTP's report of access lines to which the concern(s) apply.

(2) Notice of aggregation. Within ten days after the 90-day deadline for NOIs, a CTP shall send a written Notice of Aggregation (NOA) to all the municipalities that requested an authorized review of a particular filing. If only one municipality files a NOI with the CTP, the requirements of this paragraph are not applicable. The NOA shall include:

(A) the contact information for all of the other municipalities that requested an authorized review for the same filing;

(B) the CTP's designated contact person for the authorized review, including the contact person's telephone number, email, address and fax number;

(C) the location of the relevant business records; and

(D) a list of the principal individuals assisting the municipality in obtaining and explaining the relevant CTP business records.

(3) Joint Review Committee proposal. Within 30 days after the deadline for the NOA, all of the municipalities that filed a NOI for any particular CTP shall form a joint review committee consisting of representatives or delegated agents of each municipality. The joint review committee shall file a proposal with the CTP specifying the audit program. If only one municipality files a NOI with the CTP, the requirements of this paragraph are not applicable.

(4) Preliminary review. The CTP and the municipality or Joint Review Committee may hold a preliminary meeting where the CTP shall discuss their processes and procedures in identifying customers within a jurisdiction, determination of access lines, reporting to the commission, and compensation of municipalities. This meeting will allow the CTP and municipality or joint review committee to review the audit program and provide input in determining the extent of the review. This preliminary review must be completed within a reasonable time to allow the authorized review process to meet the deadline pursuant to paragraph (5) of this subsection. Failure to maintain a reasonable time frame may lead to enforcement action by the commission for one or both parties.

(5) Deadline. The authorized review of the relevant CTP business records under this subsection must be completed within 90 days from the joint review committee proposal if multiple municipalities are involved, or within 90 days of the NOI if only one municipality is involved. Any sampling data must be provided by the CTP to the municipality or joint review committee within 90 days after the completion of the authorized review of the relevant CTP business records. Any mutually agreeable extensions to this deadline or any other aspect of the timeline are allowed.

(6) Notification to commission staff. If an authorized review committee should uncover evidence of reporting errors, the committee must notify commission staff within a reasonable amount of time but no later than 90 days after the completion of the authorized review or submission of the sampling data, whichever comes later.

(g) Proprietary or confidential information.

(1) All information presented by a CTP for inspection, as part of an authorized review, is deemed confidential and proprietary upon request by the CTP. The confidentiality provisions of §26.465 of this title (relating to Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers) shall apply.

(2) CTPs may require reasonable confidentiality agreements to be executed by a municipality and its representatives prior to review of confidential and proprietary information or work papers of the third-party independent auditor.

This 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 September 16, 2002.

TRD-200206016
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: October 27, 2002
For further information, please call: (512) 936-7306

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PART 9. TEXAS LOTTERY COMMISSION

CHAPTER 402. BINGO REGULATION AND TAX

16 TAC §402.558

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

The Texas Lottery Commission proposes the repeal of §402.558, relating to seal required on disposable bingo cards. The rule provided for play of disposable bingo cards in Texas. Contemporaneous with the proposal to repeal this section, the Commission is proposing a new §402.558 because the changes to the rule are so substantial that it is less confusing to the reader of the rules to propose a new rule.

Bart Sanchez, Financial Administration Director, Texas Lottery Commission has determined that for each year of the first five-year period the repeal is in effect there will be fiscal implications for state or local government as a result of enforcing or administering the section but that fiscal impact will be offset by the anticipated fiscal impact of proposing the new §402.558 contemporaneous with proposing this repeal.

Mr. Sanchez has also determined that for each year of the first five-year period the repeal is in effect there will be no cost to small businesses. There will be no impact on local employment.

William L. Atkins, Charitable Bingo Operations Director, Texas Lottery Commission has determined that for each year of the first five-year period the repeal is in effect, the public benefit anticipated as a result of enforcing or administering the repeal will be to propose a new section §402.558 that will provide new game styles and generate additional revenue for charitable organizations and the State of Texas.

Comments on the proposal may be submitted to Kimberly L. Kiplin, General Counsel, Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630.

The repeal is proposed under the Government Code, §467.102 and the Occupations Code, §2001.054 which provide the Commission with the authority to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

The proposed repeal implements Occupations Code, Chapter 2001.

§402.558. Seal Required on Disposable Bingo Cards.

This 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 September 13, 2002.

TRD-200206000
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Earliest possible date of adoption: October 27, 2002
For further information, please call: (512) 344-5113

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16 TAC §402.558

The Texas Lottery Commission proposes new §402.558, relating to bingo card/paper. Specifically, the new section identifies the different forms of bingo card/paper that can be played in Texas. The new section sets out the standards that must be met for approval of bingo card/paper, the reasons for disapproval of bingo card/paper, manufacturing requirements, sales and redemption requirements, authority to inspect the bingo card/paper, records requirements, and the different styles of play.

Bart Sanchez, Financial Administration Director, has determined for each year of the first five years the section is in effect there will not be additional fiscal implications for state or local government as a result of enforcing or administering the rule. The Commission does not anticipate any additional cost to the state or local government as a result of enforcing or administering the rule. While the Commission anticipates that the adoption of the rule may result in the potential increase of bingo card/paper sales, the Commission is not able to estimate that amount of additional revenue to the organizations conducting bingo. There is no anticipated adverse impact on small businesses, micro businesses or local or state employment as a result of implementing the section.

William L. Atkins, Director, Charitable Bingo Operations Division, has determined that each of the first five years the section as proposed is in effect, the public benefit anticipated as a result of the proposed new section is to authorize different play styles of bingo card/paper that may have the potential to generate additional revenue for charitable organizations that could increase funds distributed for charitable purposes. Also, bingo players will have the opportunity to play new game styles.

Written comments on the proposed new rule may be submitted to Kimberly L. Kiplin, General Counsel, Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630. The Texas Lottery

Commission will also conduct a hearing to receive comment on the proposed new rule on October 10, 2002, at 10:00 a.m. at the Texas Lottery Commission, Commission Auditorium, First Floor, 611 E. Sixth Street, Austin, Texas.

The new rule is proposed under Occupations Code, Section 2001.054 which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, under Government Code, Section 467.102 which authorizes the Commission to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction, and under Occupations Code, Section 2001.051(b) which grants the Commission broad authority to exercise strict control and close supervision over all bingo conducted in Texas so that bingo is fairly conducted and the proceeds derived from bingo are used for an authorized purpose.

The new rule implements Occupations Code, Chapter 2001.

§402.558. Bingo Card/Paper.

(a) Definitions. The following words and terms, shall have the following meanings unless the context clearly indicates otherwise:

(1) Bingo card/paper. A hard card, disposable bingo card/paper, shutter card, or any other bingo card/paper approved by the Texas Lottery Commission (Commission).

(2) Bingo hard card. A device made of cardboard, plastic or other suitable material that is intended for repeated use of the bingo card at multiple bingo occasions.

(3) Bonus number(s). A type of bingo card/paper that has an identified number or numbers which when called could result in an additional prize awarded.

(4) Braille bingo card. A device that contains raised symbols that reflect numbers on a reusable card.

(5) Break-open bingo. A type of disposable bingo card/paper that is sealed, that conceals the bingo card/paper face, that may be folded, and where the bingo game or a portion of the bingo game has been pre-called.

(6) Case. A receptacle that contains bingo card/paper products.

(7) Cut. The sheet of disposable bingo card/paper printed by the manufacturer of a specific group of disposable bingo card/paper that can be subdivided vertically or horizontally into sheets.

(8) Defective. Bingo card/paper missing specifications as originally approved by the Commission.

(9) Disposable bingo card/paper. A sheet or sheets of paper or other suitable material that is designed or intended for use at a single bingo occasion.

(10) Double numbers. Bingo card/paper with two numbers in each of the 24 spaces on each face.

(11) Face. A specific configuration of numbers, symbols, or blank squares imprinted on paper, cardboard, or other materials, and designed to be used to conduct bingo games. The bingo card/paper normally consists of five rows of five columns that may bear 24 pre-printed numbers between 1 and 75, symbols, or blank squares, except for the center square which is a free space and have the letters B-I-N-G-O appear in order above the five columns, with the exception of bonus number(s) that may appear on the bingo card/paper.

(12) Free space. The center square on the face of a bingo card/paper, which is a free space.

(13) Loteria. A type of bingo that utilizes symbols or pictures. Normally playing cards are utilized instead of numbered balls.

(14) Multi-part card/paper. A type of disposable bingo card/paper where the player selects the numbers. The player retains one part of the disposable bingo card/paper while the licensee for the purpose of verification retains the other part of the disposable bingo card/paper.

(15) On. The number of faces imprinted on a sheet of disposal bingo card/paper after it is cut. The number of bingo card/paper faces normally precedes this term.

(16) Pre-called. A game of bingo where the numbers for the game have been pre-called and identified prior to the start of the game.

(17) Product line. A specific type of bingo card/paper, identifiable by features or characteristics that are unique when compared to other bingo card/paper manufactured by the manufacturer.

(18) Serial number. The unique identification number assigned by the manufacturer to a specific product line of bingo card/paper.

(19) Series number. The specific number assigned by the manufacturer that identifies the unique configuration of numbers that appears on an individual bingo card/paper face.

(20) Sheet. A single piece of paper that contains one or more disposable bingo card/paper faces.

(21) Shutter card. A device made of cardboard with plastic "shutters" that cover a number to simulate the number being daubed.

(22) UP. The number of sheets of disposable bingo paper glued together by the manufacturer. The number of sheets normally precedes this term.

(23) UPS pads. A bound collection of disposable bingo card/paper where each sheet in the collection is used to play a separate bingo game during the occasion.

(b) Approval of bingo card/paper.

(1) Bingo card/paper shall not be sold in the state of Texas, nor furnished to any person in this state, nor used for play in this state until the manufacturer of the bingo card/paper has received written approval for use within the state of Texas by the Commission. The manufacturer at its own expense must present the bingo card/paper to the Commission for approval.

(2) A letter of introduction including the style of play must be presented to Commission headquarters for review. The manufacturer must submit one complete color positive or sample for each type of bingo card/paper. The color positive or sample bingo card/paper must:

(A) bear on the face of every disposable bingo card/paper used, sold, or furnished in this state an impression of the State of Texas and a star of five points encircled by olive and live oak branches and the words "Texas Lottery Commission," in accordance with detailed specification, available on request from the Commission. The face of each disposable bingo card/paper must also have printed on it in a conspicuous location the name of the manufacturer or trademark, which has been filed with the Commission; and,

(B) contain the serial and series numbers assigned by the manufacturer on the face of each of the bingo card/paper.

(3) The bingo card/paper may contain numbers or symbols so long as the numbers or symbols preserve the integrity of the

Commission. The Commission will not approve any bingo paper that displays images or text that could be interpreted as depicting alcoholic beverages, violent acts, weapons, profane language, provocative, explicit or derogatory images or text. All images or text are subject to final approval by the Commission.

(4) If the bingo card/paper is approved the manufacturer will be notified of the approval. This approval only extends to the specific bingo card/paper submitted and will be cited in the Commission's approval letter. If the bingo card/paper is modified in any way, with the exception of the color, series number, and/or serial number it must be resubmitted to the Commission for approval.

(5) The Commission may require resubmission of an approved bingo card/paper at any time.

(6) If an approved bingo card/paper is discontinued or no longer manufactured for sale in Texas, the manufacturer must provide the Commission written notification within ten days of discontinuance or cessation of manufacturing for sale in Texas. The written notification may be sent to the Commission via facsimile, e-mail, delivery services or postal delivery.

(c) Disapproval of bingo card/paper.

(1) After inspection of the bingo card/paper by the Commission, if the bingo card/paper does not comply with the provisions of this rule and/or the Bingo Enabling Act, the Commission shall disapprove the bingo card/paper and shall notify the manufacturer of the disapproval. Any bingo card/paper that is disapproved by the Commission may not be displayed or sold in the state of Texas by licensed manufacturers. Disapproval of and prohibition to use, purchase, sell or otherwise distribute, is effective immediately upon notice to the manufacturer by the Commission.

(2) Manufacturers or distributors shall not buy, sell, furnish, or otherwise obtain disapproved bingo card/paper from a manufacturer for use in Texas.

(3) A licensed authorized organization shall not purchase, obtain, or use disapproved bingo card/paper in this state.

(4) If the manufacturer modifies the bingo card/paper that was previously disapproved, the manufacturer may resubmit the modified bingo card/paper for Commission approval. At any time the manufacturer may withdraw any disapproved bingo card/paper from further consideration.

(5) The Commission may disapprove the bingo card/paper at any stage of review. The disapproval of the bingo card/paper is administratively final.

(d) Manufacturing requirements.

(1) A manufacturer shall not sell, or furnish unapproved bingo card/paper to anyone, including another manufacturer or distributor for use in this state. A manufacturer shall not sell, or furnish bingo card/paper not bearing the seal of the Texas Lottery Commission on the face of the bingo card/paper and the manufacturer's name or trademark to distributors for use in this state. This requirement also applies to any manufacturer who assembles bingo card/paper for sale in Texas.

(2) Bingo card/paper must comply with the following construction standards.

(A) The disposable paper used shall be of sufficient weight and quality to allow for clearly readable numbers and to prevent ink from spreading or bleeding through an UPS pad thereby obscuring other numbers or bingo card/paper;

(B) series numbers may be displayed in the center square of the bingo card/paper;

(C) numbers printed on the bingo card/paper shall be randomly assigned; and,

(D) a manufacturer shall not repeat a serial number on or in the same product line, series, and color of bingo card/paper within one year of the last printing of that serial number.

(3) UPS pad must comply with the following construction standards.

(A) Bingo card/paper in UPS pads must only be glued and not stapled; and,

(B) the disposable bingo card/paper assembled into UPS pads shall not be separated, with the exception of the multi-part disposable bingo card/paper, nor shall single sheets already manufactured be cut for sale for special bingo games.

(4) Inspection. The Commission, its authorized representative or designee may examine and inspect any individual bingo card/paper or series of bingo card/paper and may pull all remaining bingo card/paper in the inventory if the Commission, its authorized representative or designee determines that the bingo card/paper is defective or has not been approved.

(5) Packaging.

(A) Bingo card/paper shall be sealed in shrink wrap and be designed so that if the shrink wrapped bingo card/paper, package, or case was opened or tampered with, it would be easily noticed.

(B) Barcodes may be included on each bingo card/paper, package, or case provided the barcode contains information required in subparagraph (C).

(C) A label shall be placed on, or be visible from, the exterior of each package or case of bingo card/paper listing the following information:

(i) Type of product;

(ii) Series number of the UPS pads and/or sheet(s);

(iii) Serial numbers of the top sheet of the UPS pads and/or sheet(s)

(iv) Number of package or cases; and,

(v) Cut and color of paper.

(D) A packing slip shall be included with the package or case listing the following information:

(i) Type of product;

(ii) Number of UPS pads or sheets;

(iii) Series number of the UPS pads and/or sheet(s);

(iv) Serial numbers of the top sheet of the UPS pads and/or sheet(s);

(v) Number of package or cases; and,

(vi) Cut and color of paper.

(e) Records.

(1) Manufacturers and distributors must provide the following information on each invoice and other documents used in connection with a sale, return or any other type of transfer of bingo card/paper:

(A) Date of sale;

(B) Quantity sold and number of faces per sheet;

(C) Serial and series number of each bingo card/paper sold;

(D) Name and address of the purchaser; and,

(E) Texas eleven digit taxpayer number of the purchaser.

(2) Manufacturers and distributors must maintain standard accounting records that include but are not limited to:

(A) Sales invoice;

(B) Credit memos;

(C) Sales journal;

(D) Purchase records, and;

(E) Bank records.

(3) Licensed authorized organization.

(A) A licensed authorized organization must maintain a disposable bingo card/paper sales summary showing the organization's name, eleven digit taxpayer number, distributor's taxpayer number, invoice date, distributor's name, invoice number, serial number, and series number. Also, the disposable bingo card/paper sales summary must include the number of faces (ON), number of sheets (UP), and color of borders.

(B) A licensed authorized organization must show the date of the occasion on which the disposable bingo card/paper was sold, a beginning inventory, along with the number of disposable bingo card/paper sold.

(C) A licensed authorized organization must maintain a perpetual inventory of all disposable bingo card/paper.

(D) Disposable bingo card/paper marked for destruction cannot be destroyed until witnessed by the Commission, its authorized representative or designee. All destruction documentation must be retained by the licensed organization for a period of four years from the date of destruction.

(f) Braille cards. Visually impaired, legally blind, or persons with disabilities may use their own personal Braille cards when the authorized organization does not provide Braille Cards. Players using Braille cards shall pay the equivalent price to participate in the game. The authorized organization shall have the right to inspect, and to reject any personal Braille card(s). Braille cards are not required to be approved by the Commission. Prizes awarded on a Braille card must be in accordance with Occupations Code, §2001.420. Braille cards are not considered bingo equipment as defined by Occupations Code, §2001.002(5).

(g) Loteria. The symbols or pictures may be identified with Spanish subtitles and each of the 54 cards contains a separate and distinct symbol or picture. The 54 individual cards may be shuffled by the caller and then randomly drawn and announced to the players. The player uses a loteria card, which contains a minimum of sixteen squares and each square has one of the 54 symbols or pictures. There are no duplicate symbols or pictures on the loteria card. Prizes awarded on a loteria card must be in accordance with Occupations Code, §2001.420. Loteria cards are not considered bingo equipment as defined by Occupations Code, §2001.002(5).

(h) Style of play and minimum standards of play. Prizes awarded on any style of play must be in accordance with Occupations Code, §2001.420.

(1) Player pick ems. A game of bingo where a player selects his/her own numbers on a multi-part duplicated disposable bingo card/paper. One copy is retained by the player and used as a bingo card/paper while the other copy is provided to the organization for verification purposes.

(2) Progressive bingo. A game of bingo that either the established prize amount or number of bingo balls and/or objects may be increased from one session to the next scheduled session. If no player completes the required pattern within the specified number of bingo balls or objects drawn, the established prize amount may be increased but shall not exceed the prize amount authorized by the Bingo Enabling Act.

(3) Warm-up or early bird. A bingo game conducted at the beginning of a bingo occasion during the authorized organization's license times, in which prizes are awarded based upon a percentage of the sum of money received from the sale of the warm-up/early bird bingo card/paper.

(4) Shaded bingo. A bingo game where one or more squares on a bingo card/paper face are shaded. Each shaded square may be used as a free space or a pattern for a bingo game.

(5) Images bingo card/paper. Bingo card/paper that incorporates images that are shaded. Each shaded image conforms to a pattern that must be achieved to win a bingo game.

(6) Bingo bonus number(s). A bingo game that has additional identified number(s) in excess of the 24 numbers that appear on the bingo card/paper face that, when called, could result in an additional prize awarded. The first player who matches the numbers shown on the bonus number(s) line within the specified number(s) called wins the additional prize.

(7) Multi level or multi tier. Bingo card/paper that has one or more additional lines of number(s) aside from the normal five lines that when played could results in an additional prize. Therefore, a multi level or multi tiered game could be played on this bingo card/paper that provides more opportunities to win.

(8) Multi color bingo. A bingo game played on a bingo card/paper with a different color for each bingo card/paper face. Prizes are awarded based on the color on which the bingo card/paper face that had the bingo.

(9) Pre-marked. A bingo card/paper where one or more of the numbers are already marked or identified prior to the start of the game.

(10) Double number. A bingo game played on a bingo card/paper that has two numbers per square. A player has two chances to daub each square.

(11) Break-open bingo. A type of bingo game played on sealed disposable bingo card/paper, where the bingo card/paper face is concealed, that may be folded, and where the bingo game has been pre-called. The bingo game may not be pre-called prior to the authorized organization's license time.

(12) Regular bingo. A bingo game played on the standard card face of five rows by five columns with 24 pre-printed numbers between 1 and 75, symbols, or blank squares and a free space square where the winner is determined by a predetermined pattern.

(i) Promotional bingo. This rule shall not apply to bingo card/paper furnished for use in a promotional bingo game conducted in accordance the Occupations Code, §2001.551. The card/paper may not contain the Texas Lottery Commission seal.

(j) Exempt organization. This rule shall not apply to bingo card/paper furnished for use by an organization receiving an exemption from bingo licensing in accordance with the Occupations Code, §2001.551(b)(3)(A) and (B). The bingo card/paper may not contain the Texas Lottery Commission seal.

(k) House rules. A licensed authorized organization playing a style of bingo other than regular bingo must develop house rules on how the game is played. The house rules must be made available to the public.

(l) Card-minding devices. This rule shall be applicable only to bingo card/paper made of paper, cardboard or similar material approved by the Commission and shall not be applicable to the manufacture or use of card-minding devices addressed in administrative rule, §402.555, with the exception of style of play as defined by this rule and approved by the Commission.

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

Filed with the Office of the Secretary of State on September 13, 2002.

TRD-200205999
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
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For further information, please call: (512) 344-5113

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16 TAC §402.567

The Texas Lottery Commission proposes amendments to §402.567, relating to Bingo Advisory Committee. The proposed amendments clarify the purpose and duties of the Bingo Advisory Committee. The proposed amendments also clarify the nomination and appointment of persons to the Bingo Advisory Committee, including the requirements for nomination, as well as clarifies the at-will service to the Commission and the ability of the Commission to remove a member. The proposed amendments also set out the responsibilities of the Bingo Advisory Committee. Language is also proposed to help ensure that persons truly represent the category for which they were nominated. Proposed amendments also clarify that members can only be reimbursed for expenses if funds have been appropriated by the legislature for that purpose. Also, the proposed amendments implement Government Code, Chapter 2110 relating to advisory committees.

Bart Sanchez, Financial Administration Director, has determined for each year of the first five years the section is in effect there will be the following foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule. FY03, -$1,500; FY04, -$1,500; FY05, -$1,500; and, FY06, -$1,500. There is no anticipated impact on small businesses, micro businesses or local or state employment as a result of implementing the section.

William L. Atkins, Charitable Bingo Operations Director, Charitable Bingo Operations Division, has determined that for each of the first five years the amendments as proposed are in effect, the public benefit anticipated as a result of the proposed amendments is to clarify the duties and purpose of the Bingo Advisory Committee, nomination and appointment process, and eligibility requirements.

Written comments on the proposed amendment may be submitted to Kimberly L. Kiplin, General Counsel, Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630.

The amendments are proposed under Occupations Code, Section 2001.054 which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under Government Code, Section 467.102 which authorizes the Commission to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

The amendments implement Occupations Code, Chapter 2001.

§402.567. Bingo Advisory Committee.

(a) Purpose. The purpose of the bingo advisory committee (BAC) is to advise the Commission on the needs and problems of the state's bingo industry; report to the Commission on the committee's activities; and perform other duties as determined by the Commission. The BAC's sole duty is to advise the Commission. The BAC has no executive or administrative powers or duties with respect to the operations of the Charitable Bingo Division; all such powers and duties rest solely with the Commission.

(b) Composition. The following appointments shall be made representing a balance of interests: General Public--one; Charities that operate bingo games--three; Lessor, Charity--one; Lessor, Commercial--two; Distributor/Manufacturer--one; System Service Provider--one. [~~A total of nine members will be appointed by the Commission. Each member will be appointed for a one-year term and will serve at the pleasure of the Commission. Each member shall continue to perform the duties of the Bingo Advisory Committee until his/her successor has been appointed.~~]

(c) Nomination and Appointment.

(1) The nomination period will be specified by the Commission. Nominations must be submitted on a form prescribed by the Commission prior to the close of the nomination period. All information requested on the nomination form must be correct and complete.

(2) With the exception of a nominee to the "Lessor, Charity" position, a nominee may not be listed in the licensing information that is required to be filed with the Commission in any other category than the one for which the person is nominated.

(3) A nominee to the "General Public" category may not be listed in the licensing information that is required to be filed with the Commission.

(4) A total of nine members will be appointed by the Commission. Each member will be appointed for a three-year term or until his/her successor has been appointed and will serve at the pleasure of the Commission. Members hold office for staggered terms of three years so that three members' terms expire February 1 of each year.

(5) A person is ineligible to serve as a member of the BAC if he/she represents an organization licensed by the Commission that is delinquent in any liability to the state or if he/she represents an organization licensed by the Commission that has a license denied, revoked or suspended by the Commission.

(d) [~~(c)~~] Officers. Annually, the BAC shall select from among its members a presiding officer. [~~Annually, the Commission shall appoint a Chair. Also, the Commission will appoint a vice-chair.~~] The presiding officer [~~chair~~] will conduct meetings and general business. The presiding officer will designate a member of the BAC to [~~vice-~~

~~chair will~~] conduct meetings and general business in the absence of the presiding officer [~~chairperson~~].

(e) [~~(d)~~] Reports. The Committee will report, at a minimum, quarterly to the Commission on the BAC's [~~Committee's~~] activities, and more frequently as deemed appropriate and necessary by the BAC presiding officer [~~committee chairperson~~]. Annually, the BAC will report to the Commission with specific recommendations for improvement, the status of the following areas relating to charitable bingo in Texas:

(1) gross receipts;

(2) charitable distributions;

(3) expenses;

(4) attendance; and,

(5) any other area requested by the Commission.

(f) [~~(e)~~] Meetings. The BAC [~~committee~~] shall meet quarterly or at the call of the Commission. [~~All~~] BAC [~~committee~~] meetings shall be held at the Texas Lottery Commission headquarters in Austin, except one quarterly meeting per year shall be held at a location in Texas other Austin. The meetings shall [~~and~~] be open meetings in accordance with the Open Meetings Act, Texas Government Code, Chapter 551. The committee shall keep minutes of each meeting. The minutes shall be approved at the next following meeting, shall reflect all formal action taken by the committee, and shall be filed, upon approval, with the Charitable Bingo Operations Director[~~Executive Director, who is the custodian of all Commission records~~]. The BAC may consider a transcript prepared by a court reporter to be the minutes of the meeting.

(g) [~~(f)~~] Attendance. The failure by any BAC [~~committee~~] member to attend two consecutive regular quarterly meetings, for any reason, may be cause for removal by the Commission. No proxy voting shall be allowed. A member may not substitute another person in his/her absence.

(h) [~~(g)~~] Criminal History Review. All BAC [~~committee~~] members must meet the criminal history standards set out in Occupations Code, §§2001.105(b), 2001.154(a)(5), 2001.202(1), 2001.207(1), and 2001.252(1) [~~Texas Civil Statutes, Article 176d, §13(e)(2)~~] (Bingo Enabling Act) [~~to be qualified for appointment to the committee~~]. A member who fails to meet such criminal history standards will be disqualified from serving on the BAC [~~committee~~] and will be removed from the BAC [~~committee~~]. The decision by the commission to remove a member of the BAC is final.

(i) [~~(h)~~] Compensation and Travel Expenses. A member of the BAC [~~committee~~] is entitled to reimbursement for reasonable expenses. Reasonable expenses shall be limited to those expenses set out in the current Appropriations Act , [~~and~~] shall be reimbursed in accordance with the current Appropriations Act , and shall not exceed the maximum allowed amount as set out in the Comptroller of Public Accounts Travel Guidelines. BAC [~~Committee~~] members shall submit expenses on a form provided by the Commission and shall be accompanied by appropriate receipts. Expenses can be reimbursed to members only if the legislature has specifically appropriated funds for that purpose [~~, other than expenses incurred as a result of attending the four quarterly meetings, must be submitted to the Commission for prior approval~~].

(j) [~~(i)~~] Duration. The BAC [~~Bingo Advisory Committee~~] will automatically be abolished[~~abolish~~] and cease to exist on March 6, 2003. The BAC [~~Bingo Advisory Committee~~] shall only remain in existence beyond March 6, 2003, if the Commission affirmatively votes to continue the Bingo Advisory Committee in existence.

(k) Removal. A member of the BAC may be removed if he/she represents an organization licensed by the Commission that is delinquent in any liability to the state or if he/she represents an organization licensed by the Commission that has a license denied, revoked or suspended by the Commission. The decision by the Commission to remove a member of the BAC is final.

(l) Evaluation of BAC Costs and Effectiveness. The Commission shall evaluate annually:

(1) BAC's work;

(2) BAC's usefulness; and,

(3) the costs related to BAC's existence, including the cost of Commission staff time in support of BAC's activities.

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

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Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
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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 §153.1

The Texas Appraiser Licensing and Certification Board proposes amendments to §153.1, Definitions. These amendments would add the terms "appraisal process" and "workfile" to the TALCB rule definition. Concurrent proposed amendments to §153.15, Experience Required for Certification or Licensing, use the two terms in paragraph(f)(2).

Renil C. Liner, Commissioner, Texas Appraiser Licensing and Certification Board, has determined that for the first five-year period the amendment is in effect, there will be no fiscal implications for state or local government.

Mr. Liner also has determined that for each year of the first five years this amendment is in effect, the public benefit anticipated as a result of enforcing the amendment will be to inform licensees and the public as to the meaning of two new terms used in the TALCB rules. There will be no effect on small businesses. There is no additional economic cost to persons who are required to comply with the amendments as proposed.

Comments on the proposal may be submitted Renil C. Liner, Commissioner, Texas Appraiser Licensing and Certification Board, P.O. Box 12188, Austin, Texas 78711-2188.

The amendments are proposed under the Powers and Duties of the Board, Texas Appraiser Licensing and Certification Act, §5 (Vernon's Texas Civil Statutes, Article 6573a.2), which provides the board with authority to adopt rules.

Section 9, Licensing and Certification Requirements, of the Texas Appraiser Licensing and Certification Act (Vernon's Texas Civil Statutes, Article 6573a.2) may be affected by the proposed amendment.

§153.1. Definitions.

The following words and terms, when used in these rules, hall have the following meaning, unless the context clearly indicates otherwise.

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

(5) Appraisal process--the appraisal process consists of an analysis of factors that bear upon value; definition of the problem; gathering and analyzing data; applying the appropriate value approaches and methodology; arriving at an opinion of value and reporting the opinion of value.

(6) [~~(5)~~] Appraisal Standards Board--The Appraisal Standards Board (ASB) of the Appraisal Foundation or its successor.

(7) [~~(6)~~] Appraisal Subcommittee--The Appraisal Subcommittee (ASC) of the Federal Financial Institutions Examination Council or its successor.

(8) [~~(7)~~] Appraiser Qualifications Board--The Appraiser Qualifications Board (AQB) of the Appraisal Foundation or its successor.

(9) [~~(8)~~] Appraiser trainee--A person approved by the Texas Appraiser Licensing and Certification Board to perform appraisals or appraiser services under the active, personal and diligent supervision and direction of the sponsoring certified appraiser.

(10) [~~(9)~~] Board--The Texas Appraiser Licensing and Certification Board.

(11) [~~(10)~~] Classroom hour--Fifty minutes of actual classroom session time.

(12) [~~(11)~~] Client--Any party for whom an appraiser performs a service.

(13) [~~(12)~~] College--Junior or community college, senior college, university, or any other postsecondary educational institution established by the Texas Legislature, which is accredited by the Commission on Colleges of the Southern Association of Colleges and Schools or like commissions of other regional accrediting associations, or is a candidate for such accreditation.

(14) [~~(13)~~] Commissioner--The commissioner of the Texas Appraiser Licensing and Certification Board.

(15) [~~(14)~~] Complaining witness--Any person who has made a written complaint to the board against any person subject to the jurisdiction of the board.

(16) [~~(15)~~] Complete appraisal--An appraisal performed without invoking the departure rule.

(17) [~~(16)~~] Contested case--A proceeding in which the legal rights, duties or privileges of a party are to be determined by the board after an opportunity for adjudicative hearing.

(18) [~~(17)~~] Council--The Federal Financial Institutions Examination Council (FFIEC) or its successor.

(19) [~~(18)~~] Day--A calendar day unless clearly indicated otherwise.

(20) [~~(19)~~] Departure rule--A limited departure from a requirement of the Uniform Standards of Professional Appraisal Practice, as defined by the USPAP.

(21) [~~(20)~~] Distance education--Any educational process based on the geographical separation of learner and instructor (e.g., CD-ROM, online learning, correspondence courses, video conferencing, etc.), that provides interaction between the learner and instructor and includes testing.

(22) [~~(21)~~] Evaluation--An estimate of value that is not more than a limited appraisal, may be presented in a format that is less than a self-contained report, is prepared by a certified or licensed real estate appraiser or other lawfully authorized real estate professional, and includes an estimate of a property's market value, a certification and limiting conditions, and an analysis or the supporting information used in forming the estimate of value.

(23) [~~(22)~~] Feasibility analysis--A study of the cost-benefit relationship of an economic endeavor.

(24) [~~(23)~~] Federal financial institution regulatory agency--The Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the National Credit Union Administration, or the successors of any of those agencies.

(25) [~~(24)~~] Federally related transaction--Any real estate-related transaction engaged in, contracted for, or regulated by a federal financial institution regulatory agency, that requires the services of an appraiser.

(26) [~~(25)~~] Foundation--The Appraisal Foundation (TAF) or its successor.

(27) [~~(26)~~] Fundamental real estate appraisal course--Basic real estate appraisal courses which include the following topics, but are not limited to, principles of real estate appraisal, real estate appraisal practice, real estate appraisal procedures, highest and best use, report writing, rural appraisal, appraisal review, residential appraisal/valuation, agricultural property appraisal, sales comparison approach, cost approach, income capitalization, discounted cash flow analysis, real estate appraisal case studies, commercial appraisal, non- residential real estate appraisal, and other courses specifically determined by the board.

(28) [~~(27)~~] License--The whole or a part of any board permit, certificate, approval, registration or similar form of permission required by law.

(29) [~~(28)~~] Licensee--A person certified, licensed, approved, authorized or registered by the board under the Texas Appraiser Licensing and Certification Act.

(30) [~~(29)~~] Licensing--Includes the board processes respecting the granting, disapproval, denial, renewal, certification, revocation, suspension, annulment, withdrawal or amendment of a license.

(31) [~~(30)~~] Limited appraisal--An appraisal in which the departure rule is invoked.

(32) [~~(31)~~] Market analysis--A study of market conditions for a specific type of property.

(33) [~~(32)~~] Non-residential real estate appraisal course--A course with emphasis on the appraisal of non- residential real estate

properties which include, but are not limited to, income capitalization, income property, commercial appraisal, rural appraisal, agricultural property appraisal, discounted cash flow analysis, subdivision analysis and valuation, or other courses specifically determined by the board.

(34) [~~(33)~~] Nonresidential property--A property which does not conform to the definition of residential property.

(35) [~~(34)~~] Party--The board and each person or other entity named or admitted as a party.

(36) [~~(35)~~] Person--An individual.

(37) [~~(36)~~] Personal property--Identifiable tangible objects and chattels that are considered by the general public as being "personal," for example, furnishings, artwork, antiques, gems and jewelry collectibles, machinery and equipment ; all tangible property that is not classified as real estate.

(38) [~~(37)~~] Petitioner--The person or other entity seeking an advisory ruling, the person petitioning for the adoption of a rule, or the party seeking affirmative relief in a proceeding before the board.

(39) [~~(38)~~] Provisional license--A license issued under the Texas Appraiser Licensing and Certification Act, §9A, and §153.16 of this title (relating to Provisional License), to individuals who have met the educational and examination requirements for licensing but who have not met the experience requirements.

(40) [~~(39)~~] Real estate--An identified parcel or tract of land, including improvements, if any.

(41) [~~(40)~~] Real estate-related financial transaction--Any transaction involving: the sale, lease, purchase, investment in, or exchange of real property, including an interest in property or the financing of property; the financing of real property or an interest in real property; or the use of real property or an interest in real property as security for a loan or investment including a mortgage-backed security.

(42) [~~(41)~~] Real property--The interests, benefits, and rights inherent in the ownership of real estate.

(43) [~~(42)~~] Record--All notices, pleadings, motions and intermediate orders; questions and offers of proof; objections and rulings on them; any decision, opinion or report by the board; and all staff memoranda submitted to or considered by the board.

(44) [~~(43)~~] Report--Any communication, written or oral, of an appraisal, review, or analysis; the document that is transmitted to the client upon completion of an assignment.

(45) [~~(44)~~] Residential property--Property that consists of at least one but not more than four residential units.

(46) [~~(45)~~] Respondent--Any person or other entity subject to the jurisdiction of the board against whom any complaint has been made.

(47) [~~(46)~~] Restricted use appraisal report--A written report as defined by and prepared under the USPAP.

(48) [~~(47)~~] Review--The act or process of critically studying a report prepared by another.

(49) [~~(48)~~] Self-contained appraisal report--A written report as defined by and prepared under the USPAP.

(50) [~~(49)~~] State certified real estate appraiser--A person certified under the Texas Appraiser Licensing and Certification Act.

(51) [~~(50)~~] State licensed real estate appraiser--A person licensed under the Texas Appraiser Licensing and Certification Act.

(52) [~~(51)~~] Summary appraisal report--A written report as defined by and prepared under the USPAP.

(53) Workfile--documentation necessary to support an appraiser's analysis, opinions, and conclusions, and in compliance with the Records Keeping section of the Ethics Rule of USPAP.

This 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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Renil C. Liner
Commissioner
Texas Appraiser Licensing and Certification Board
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22 TAC §153.15

The Texas Appraiser Licensing and Certification Board proposes amendments to §153.15, Experience Required for Certification or Licensing. These amendments would bring the experience requirements into compliance with the current Appraisal Qualifications Board's Real Property Appraiser Qualifications Criteria and add additional specificity to acceptable real estate appraisal experience for certification or licensure. Concurrent proposed amendments to §153.1, Definitions, will add definitions for the terms "appraisal process" and "workfile," as used in this title.

Renil C. Liner, Commissioner, Texas Appraiser Licensing and Certification Board, has determined that for the first five-year period the amendment is in effect, there will be no fiscal implications for state or local government.

Mr. Liner also has determined that for each year of the first five years this amendment is in effect, the public benefit anticipated as a result of enforcing the amendment will be to have experience requirements consistant with the Appraisal Qualifications Board's Real Property Appraiser Qualifications Criteria as required by federal Title XI, FIRREA, and the Texas Appraiser Licensing and Certification Act (Art. 6573a.2, VTCS). Additionally the proposal will more clearly specify the type of real property appraisal experience acceptable for meeting the requirements for appraiser certification or licensure. There will be no effect on small businesses. There is no additional economic cost to persons who are required to comply with the amendments as proposed.

Comments on the proposal may be submitted Renil C. Liner, Commissioner, Texas Appraiser Licensing and Certification Board, P.O. Box 12188, Austin, Texas 78711-2188.

The amendments are proposed under the Powers and Duties of the Board, Texas Appraiser Licensing and Certification Act, §5 (Vernon's Texas Civil Statutes, Article 6573a.2), which provides the board with authority to adopt rules.

Section 9, Licensing and Certification Requirements, of the Texas Appraiser Licensing and Certification Act (Vernon's Texas Civil Statutes, Article 6573a.2) may be affected by the proposed amendment.

§153.15. Experience Required for Certification or Licensing.

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

(d) Experience credit shall be awarded by the board in accordance with current criteria established by the Appraiser Qualifications Board and in accordance with the provisions of the Act specifically relating to experience requirements. [~~Experience as a real estate lending officer of a financial institution or as a real estate broker is acceptable experience if the experience includes the actual performance or professional review of real estate appraisals.~~] An hour of experience means 60 minutes expended in one or more of the acceptable appraisal experience areas. Calculation of the hours of experience must be based solely on actual hours of experience. Any one or any combination of the following categories may be acceptable for the completion of 1,000 hours of credit each year. Experience credit may be awarded for:

(1) Fee [~~Experience credit may be awarded for a fee~~] or staff appraisal when it is performed in accordance with Standards 1 and 2 and other [~~the~~] provisions of the Uniform Standards of Professional Practice (USPAP) in effect at the time of the appraisal.

(2) Ad [~~Experience credit may be awarded for an ad~~] valorem tax appraisal which:

(A) conforms to USPAP Standard 6 [~~uses techniques to value properties similar to those used by appraisers~~] ; and

(B) demonstrates proficiency in appraisal principles, techniques, or skills used by appraisers practicing under USPAP Standard 1. [~~effectively uses the appraisal process. The components of the mass appraisal process which may be awarded experience credit are the highest and best use analysis, model specification (developing the model), and model calibration (developing adjustments to the model). Other components of the mass appraisal process, by themselves, are not eligible for experience credit. Mass appraisals must be performed in accordance with Standards Rule 6 of USPAP.~~]

(3) Condemnation appraisal.

(4) [~~(3)~~] Technical [~~Experience credit may be awarded for a~~] review appraisal to the extent that it demonstrates proficiency in appraisal principles, techniques, or skills used by appraisers practicing under USPAP Standard 1. [~~when the appraiser performs review(s) of appraisals prepared by either employees, associates or others, provided the appraisal report was not signed by the review appraiser. Review appraisal credit shall not be awarded when the report is signed as a review appraiser as this should appropriately be considered as appraisal experience. Review appraisals must be performed in accordance with Standards Rule 3 of USPAP.~~]

(5) [~~(4)~~] Appraisal [~~Experience credit may be awarded for appraisal~~] analysis. A market analysis typically performed by a real estate broker or salesman may be awarded experience credit when the analysis is prepared in conformity with USPAP Standards [~~Standards Rules~~] 1 and 2 [~~of USPAP , and the individual can demonstrate that he or she is using similar techniques as appraisers to value properties and is effectively utilizing the appraisal process~~].

(6) [~~(5)~~]Real property appraisal consulting [~~Experience credit may be granted for real estate counseling (consulting)~~] services, including market analysis, cash flow and/or investment analysis, highest and best use analysis, and feasibility analysis when it demonstrates proficiency in appraisal principles, techniques, or skills used by appraisers practicing under USPAP Standard 1 [~~when it is appraisal related~~] and performed in accordance with USPAP Standards [~~Standards Rules~~] 4 and 5 [~~of USPAP~~].

[~~(6) Experience credit may be granted for highest and best use analysis.~~]

[~~(7) Experience credit may be awarded for a feasibility analysis or feasibility study when it is performed in accordance with Standards Rules 4 and 5 of USPAP].~~

(7) [~~(8)~~] Experience credit may not be awarded for teaching appraisal courses.

(e) (No change.)

(f) An applicant may be granted experience credit only for real property appraisals which:

(1) comply with the Uniform Standards of Professional Appraisal Practice (USPAP) in effect at the time of the appraisal; and,

(2) are verifiable and supported by workfiles in which the applicant is identified as participating in the appraisal process [~~written reports or file memoranda~~]; and,

(3) were performed [~~by the applicant at a time~~] when the applicant had legal authority [~~to perform real property appraisals~~]; and,

(4) comply with the acceptable categories of experience as per the AQB experience criteria and stated in subsection (d) 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.

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22 TAC §153.17

The Texas Appraiser Licensing and Certification Board proposes amendments to §153.17, Renewal of Certification, License, or Trainee Approval. These amendments help facilitate on-line renewals through TexasOnline. Proposed amendments to §153.17(d) will clarify that renewals are acceptable for processing when received by the board, with proper fees, though the U.S. Postal Service, an overnight delivery service, or through TexasOnline. New subsection (e) provides that appraiser continuing education (ACE) may be submitted on an ACE Report form, provides for penalties for furnishing false or misleading information, requires licensee to keep copies of ACE transcripts or course completion certificates for five years, provides for verification audits of claimed education, and provides for penalties for non-compliance. Current subsections (e)-(g) will be renumbered (f)-(h).

Renil C. Liner, Commissioner, Texas Appraiser Licensing and Certification Board, has determined that for the first five-year period the amendment is in effect, there will be no fiscal implications for state or local government.

Mr. Liner also has determined that for each year of the first five years this amendment is in effect, the public benefit anticipated as a result of enforcing the amendment will be more efficient and convenient renewal of general and residential certifications through TexasOnline and the elimination of submitting course completion certificates or transcripts when renewing. There will be no effect on small businesses. There is no additional economic cost to persons who are required to comply with the amendments as proposed.

Comments on the proposal may be submitted Renil C. Liner, Commissioner, Texas Appraiser Licensing and Certification Board, P.O. Box 12188, Austin, Texas 78711-2188.

The amendments are proposed under the Powers and Duties of the Board, Texas Appraiser Licensing and Certification Act, §5 (Vernon's Texas Civil Statutes, Article 6573a.2), which provides the board with authority to adopt rules.

Section 14, Certification and License Renewal of the Texas Appraiser Licensing and Certification Act (Vernon's Texas Civil Statutes, Article 6573a.2) may be affected by the proposed amendment.

§153.17. Renewal of Certification, License or Trainee Approval.

(a) A license or certification issued by the board is valid for two years after the date of issuance. An appraiser trainee approval issued by the board is valid for one year after the date of issuance. A certified or licensed appraiser or appraiser trainee may renew the certification, license or trainee approval by timely filing the prescribed application for renewal, paying the appropriate fee to the board and satisfying continuing education requirements as provided by §153.18 of this title (relating to Appraiser Continuing Education).

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

(d) An appraiser [~~A~~] renewal application is acceptable for processing when it is received by the board, with proper fees, and postmarked by the U.S. Postal Service, an overnight delivery service, or entered electronically into the TexasOnline system, on or before the expiration date of the certification, license or authorization.

(e) An ACE Report, on a form prescribed by the board, must be submitted with each application for renewal. The ACE Report includes, but is not limited to, the course or seminar name, educational provider, date(s), location, number of hours and AQB topic(s). The ACE Report may be filed electronically by those who are renewing through the TexasOnline system.

(1) Knowingly or intentionally furnishing false or misleading information in connection with the ACE Report filed under this section is grounds for disciplinary action up to and including revocation of certification or licensure as provided by §153.20 (12) of this title (relating to Guidelines for Revocation, Suspension or Denial of Licensure or Certification).

(2) It is the appraiser's responsibility to maintain a record to document the ACE, which is claimed for the renewal, and the documentation must be kept the appraiser's file for 5 years. The documentation must contain all transcripts or course certificates or continuing education forms issued by the course provider(s).

(3) The board may require verification of acceptable ACE for any renewal application. The renewing appraiser must submit the documentation within 20 days after the date of notification. The verification may be obtained by:

(A) requiring copies of all transcripts or course certificates or continuing education forms that were issued by the course provider(s); and

(B) engaging in other investigative research determined to be appropriate by the board.

(4) Failure to comply with a request for verification of ACE documentation is a violation of these rules and may result revocation or suspension of certification or licensure and other disciplinary action.

(f) [~~(e)~~] Provisional licensees and appraiser trainees must provide a copy of an appraisal log, on a form prescribed by the board, for the period of license or authorization being renewed.

(g) [~~(f)~~] Renewal of Licenses or Certification for Servicemen on Active Duty Outside the State.

(1) A person previously licensed or certified by the board under this Act who is on active duty in the United States armed forces and serves in this capacity outside the State of Texas may renew an expired license or certification without being subject to any increase in fee imposed in his or her absence, or any additional education or experience requirements if the person:

(A) provides a copy of official orders or other documentation acceptable to the board showing that the person was on active duty outside the state during the person's last renewal period;

(B) applies for the renewal within 90 days after the person's active duty ends; and

(C) pays the renewal application fee in effect when the previous license or certification expired.

(2) Appraiser continuing education requirements as set out in §153.18 of this title, that would have been imposed for a timely renewal shall be deferred under this section to the next renewal of a license or certification.

(h) [~~(g)~~] Denial of Licensing and Certification of Persons who are in Default on Texas Guaranteed Student Loan Corporation (TGSLC) Loans.

(1) Renewals of licenses and certifications issued by the board are subject to the policies established by the Texas Education Code, §57.491.

(2) Before the board declines to renew a license or certification due to default on a loan guaranteed by the TGSLC, a default on a repayment agreement with TGSLC, or a failure to enter a repayment agreement with TGSLC, the board shall give notice and provide an opportunity for a hearing in accordance with the provisions of the Texas Government Code, §2001.051 et seq.

(3) The board shall advise those licensed or certified in renewal notices and shall advise those who apply for licensure or certification in application forms that default on a loan guaranteed by TGSLC may prevent subsequent renewal of a license or certification or prevent the approval of an initial application for license or certification.

This 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 September 11, 2002.

TRD-200205951

Renil C. Liner
Commissioner
Texas Appraiser Licensing and Certification Board
Earliest possible date of adoption: October 27, 2002
For further information, please call: (512) 465-3950

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22 TAC §153.18

The Texas Appraiser Licensing and Certification Board proposes an amendment to §153.18, Appraiser Continuing Education. This amendment would delete subparagraph (d)(2)(K) to remove unnecessary language which currently requires copies of transcripts of course completion certificates to be submitted in order to renew a certification or license. Concurrent proposed amendments to § 153.17 provide for an ACE Report form and acceptable ACE verification to facilitate renewals through TexasOnline.

Renil C. Liner, Commissioner, Texas Appraiser Licensing and Certification Board, has determined that for the first five-year period the amendment is in effect, there will be no fiscal implications for state or local government.

Mr. Liner also has determined that for each year of the first five years this amendment is in effect, the public benefit anticipated as a result of enforcing the amendment will be more efficient and convenient renewal of general and residential certifications through TexasOnline and the elimination of submitting course completion certificates or transcripts when renewing. There will be no effect on small businesses. There is no additional economic cost to persons who are required to comply with the amendments as proposed.

Comments on the proposal may be submitted Renil C. Liner, Commissioner, Texas Appraiser Licensing and Certification Board, P.O. Box 12188, Austin, Texas 78711-2188.

The amendments are proposed under the Powers and Duties of the Board, Texas Appraiser Licensing and Certification Act, §5 (Vernon's Texas Civil Statutes, Article 6573a.2), which provides the board with authority to adopt rules.

Section 14, Certification and License Renewal of the Texas Appraiser Licensing and Certification Act (Vernon's Texas Civil Statutes, Article 6573a.2) may be affected by the proposed amendment.

§153.18. Appraiser Continuing Education.

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

(d) In approving ACE courses, the board shall base its review and approval of appraiser continuing education courses upon the then current appraiser qualifications criteria of the Appraiser Qualifications Board (AQB).

(1) (No change.)

(2) The following types of educational offerings that may be accepted for meeting the ACE requirements are listed in subparagraphs (A)-(K) [~~(L)~~] of this paragraph:

(A)-(J) (No change.)

[~~(K) Copies of transcripts or course completion certificates from the course provider must accompany the Application for Renewal form.~~]

(K) [~~(L)~~] Appraiser continuing education credits may also be granted for participation, other than as a student, in real estate appraisal educational processes and programs. Examples of activities for which credit may be granted are teaching, educational program development, authorship of real estate appraisal textbooks, or similar activities that are determined by the board to be equivalent to obtaining appraiser continuing education. Appraisal experience may not be substituted for ACE.

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

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TRD-200205952
Renil C. Liner
Commissioner
Texas Appraiser Licensing and Certification Board
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For further information, please call: (512) 465-3950

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TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 91. CANCER
SUBCHAPTER B. PROSTATE CANCER ADVISORY COMMITTEE

25 TAC §91.21

The Texas Department of Health (department) proposes an amendment to §91.21 concerning the Prostate Cancer Advisory Committee (committee). The committee has provided advice to the Texas Board of Health (board) and the department on strategies for educating the public on the health benefits of the early detection, prevention, and treatment of prostate cancer. The committee is established under the Health and Safety Code, §11.016, which allows the board to establish advisory committees. The committee is governed by the Government Code, Chapter 2110, concerning state agency advisory committees.

Government Code, §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The department has reviewed §91.21 and has determined that reasons for adopting the section continue to exist; however, changes were necessary as described in this preamble.

The department published a Notice of Intention to Review §91.21 in the *Texas Register* on January 7, 2000 (25 TexReg 218). No comments were received due to publication of this notice.

In 1993, the Texas Legislature passed Senate Bill 383 (now codified in the Government Code, Chapter 2110) which requires that each state agency adopt rules on advisory committees. The rules must state the purpose of the committee, describe the tasks of the committee, describe the manner in which the committee will report to the agency, and establish a date on which the committee will be automatically abolished unless the governing body of the agency affirmatively votes to continue the committee's existence.

In 1996, the board established a rule relating to the Prostate Cancer Advisory Committee. A task force to advise the department is required by Health and Safety Code, §91.003. The rule states that the committee will automatically be abolished on September 1, 2002. The board has now reviewed and evaluated the committee and has determined that the committee should continue in existence until September 1, 2003.

This section amends provisions relating to the operation of the committee. Specifically, language is revised to: reflect the recodification in the applicable law from the Texas Civil Statutes to the Government Code; continue the committee until September 1, 2003; define one consumer position as representative of a high risk population; amend the committee's tasks to reflect current legislative goals for the program; require the committee to develop a statement of goals and objectives; include additional requirements regarding legislative activity by committee members; avoid or disclose potential conflicts of interest; and clarify the components that the committee must include in an annual report to the board. Though Health and Safety Code, §91.003, requires the commissioner to appoint the task force, the board has determined that it should continue to be the appointing authority to maintain consistency in the administration of advisory committees.

Jacquelyn McDonald, Director of the Office of the Board of Health, has determined that for each year of the first five years the section is in effect, there will be no fiscal implications for state and local government as a result of amending the section as proposed.

Ms. McDonald has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of amending the section will be to provide a continuance of the committee and continued advice to the department on this important issue. There will be no costs to small business or micro-business resulting from compliance with this section, as this section addresses only continuance of the committee and terms of office. There are no anticipated economic costs to persons who are required to comply with the section proposed. There is no anticipated impact on local employment.

Comments may be submitted to Jacquelyn McDonald, Director, Office of the Board of Health, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, 512-458-7484. Comments on the proposed section will be accepted for 30 days following publication in the *Texas Register*.

The amendment is proposed under Health and Safety Code, §12.001 which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner; §91.003 which requires the commissioner to appoint the committee; and Government Code, §2110.005 which requires the department to adopt rules stating the purpose and tasks of its advisory committees.

The amendment affects the Health and Safety Code, Chapters 11 and 91, and the Government Code, Chapter 2110, and implements Government Code, §2001.039.

§91.21. The Prostate Cancer Advisory Committee.

(a) (No change.)

(b) Applicable law. The committee is subject to Government Code, Chapter 2110, relating to [~~Texas Civil Statutes, Article 6252-33, concerning~~] state agency advisory committees.

(c) (No change.)

(d) Tasks.

(1) The committee shall make recommendation to [~~advise~~] the board on strategies for [~~concerning rules relating to~~] educating the public on the health benefits of the early detection, prevention, and treatment of prostate cancer.

(2) The committee shall recommend components designed to reach high-risk populations that reflect the nature of and trends in prostate cancer morbidity and mortality rates in high-risk groups in this state.

(3) By March 31, 2003, the committee shall develop, and submit to the board, a statement of the goals and objectives of the committee for the next three years.

(4) [~~(2)~~] The committee shall carry out any other tasks given to the committee by the board.

(e) Review and duration. By September 1, 2003 [~~2002~~], the board will initiate and complete a review of the committee to determine whether the committee should be continued, consolidated with another committee, or abolished. If the committee is not continued or consolidated, the committee shall be abolished on that date.

(f) Composition. The committee shall be composed of 11 members appointed by the board. The composition of the committee shall include:

(1) one representative from a population at high risk for prostate cancer morbidity and mortality;

(2) [~~(1)~~] four consumer representatives; and

(3) [~~(2)~~] six [~~seven~~] other representatives.

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

(i) Meetings. The committee shall meet only as necessary to conduct committee business.

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

(3) The committee is not a "governmental body" as defined in the Open Meetings Act. However, in order to promote public participation, each meeting of the committee shall be announced and conducted in accordance with the Open Meetings Act, Texas Government Code, Chapter 551, with the exception that the provisions allowing executive sessions shall not apply. [~~Each meeting of the committee shall be announced and conducted in accordance with the Open Meetings Act, Texas Government Code, Chapter 551.~~]

(4)-(7) (No change.)

(j)-(m) (No change.)

(n) Statement by members. [~~The board, the department, and the committee shall not be bound in any way by any statement or action on the part of any committee member except when a statement or action is in pursuit of specific instructions from the board, department, or committee.~~]

(1) The board, the department, and the committee shall not be bound in any way by any statement or action on the part of any committee member except when a statement or action is in pursuit of specific instructions from the board, department, or committee.

(2) The committee and its members may not participate in legislative activity in the name of the board, the department, or the committee except with approval through the department's legislative process. Committee members are not prohibited from representing themselves or other entities in the legislative process.

(3) Committee members must avoid any action that might result in or give the appearance of impropriety.

(4) Committee members must disclose to the department any business relationships, employment or activities that present actual or potential conflicts with the performance of their advisory committee responsibilities.

(o) Reports to board. The committee shall file an annual written report with the board.

(1) (No change.)

(2) The report shall identify the costs related to the committee's existence, including the cost of agency staff time spent in support of the committee's activities[,] and the source of funds used to support the committee's activities.

(3) (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 September 13, 2002.

TRD-200205996
Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: October 27, 2002
For further information, please call: (512) 458-7236

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 37. FINANCIAL ASSURANCE
SUBCHAPTER A. GENERAL FINANCIAL ASSURANCE REQUIREMENTS

30 TAC §37.11

The Texas Commission on Environmental Quality (commission) proposes an amendment to §37.11.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The purpose of the proposed rule is to implement House Bill (HB) 2912, Article 5, §5.06, and Article 9, §9.07, 77th Texas Legislature, 2001. HB 2912 amended Texas Health and Safety Code (THSC), §361.082 and Texas Water Code (TWC), §7.031. The commission now has the authority, consistent with federal law, to issue orders for "the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from a solid waste management unit at a solid waste processing, storage, or disposal facility." Until the change was made by the 77th Legislature, owners and operators of hazardous waste management facilities could only apply for, and the commission could only issue, post-closure permits. HB 2912 became effective on September 1, 2001.

The commission proposes to amend Chapter 37, Subchapter A, Financial Assurance Requirements. Section 37.11 is proposed to be amended to add the definition of a post-closure order. The proposed definition would state that a post-closure order is an order issued by the commission for post-closure care of interim status units, and/or alternative corrective action requirements for contamination commingled from RCRA and solid waste management units, and/or corrective action management units, unless authorized in a permit.

Corresponding amendments and new sections are proposed for 30 TAC Chapter 39, Public Notice; 30 TAC Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; 30 TAC Chapter 80, Contested Case Hearings; 30 TAC Chapter 305, Consolidated Permits; and 30 TAC Chapter 335, Industrial Solid Waste and Municipal Hazardous Waste, in this issue of the *Texas Register*. The proposed new sections in Chapter 39 add public participation requirements applicable to post-closure orders during three stages of the post-closure ordering process and when the orders are amended. The proposed amendment to Chapter 55 would specify how the executive director would prepare responses to public comments. An opportunity for a hearing would also be provided upon request by the executive director, the applicant, and the Public Interest Counsel in accordance with the amendment proposed in Chapter 80. Consistent with the October 22, 1998 federal regulations, the proposed amendment to §305.50 is intended to streamline the application process for post-closure orders and post-closure permits. The proposed amendments to Chapter 335 would allow the agency to issue an order in lieu of a permit for post-closure care of interim status units and give the agency the discretion to approve corrective action requirements as an alternative to current Resource Conservation Recovery Act (RCRA) closure requirements when certain environmental conditions are met. The proposed rulemaking would be consistent with federal regulations promulgated by the United States Environmental Protection Agency (EPA) in the October 22, 1998 issue of the *Federal Register* (63 FR 56509).

SECTION DISCUSSION

Proposed §37.11, Definitions, adds the definition of "Post-closure order" as new paragraph (20). The definition would state that a post-closure order is an order issued by the commission for post-closure care of interim status units at hazardous waste management facilities. Subsequent paragraphs would be renumbered to accommodate the added definition. An administrative correction has been made to renumbered paragraph (21) for "Post-closure plan" to add a hyphen.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined that for each year of the first five-year period the proposed rule is in effect, there will be no significant fiscal implications for the agency or any other unit of state or local government due to administration and enforcement of the proposed rule.

The proposed rule is intended to implement certain provisions of HB 2912, and federal regulations that were promulgated in the October 22, 1998 issue of the *Federal Register* (63 FR 56509). HB 2912 provided the commission with the authority, consistent with federal law, to issue orders for the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from a solid waste management unit at a solid

waste processing, storage, or disposal facility. The 1998 federal regulations allow the EPA and authorized states to: 1) issue an enforceable document in lieu of a post-closure permit for interim status units and facilities; and 2) substitute corrective action requirements (alternative standards) for closure requirements for regulated units in cases where there is a release and both a regulated unit and a solid waste management unit or area of concern have contributed to the release. An interim status unit or facility does not have a hazardous waste permit, but has submitted a Part A permit application and is compliant with groundwater monitoring requirements. Currently, the commission's rules only allow the issuance of post-closure permits, not orders, for post-closure care at hazardous waste management facilities.

In order to implement the provisions of HB 2912 and the 1998 federal regulations, the commission is proposing several concurrent rule changes. This proposed rule would update Chapter 37, by adding the definition of a post-closure order. The rule does not propose requirements that would result in additional fiscal implications for affected units of state and local government.

PUBLIC BENEFITS AND COSTS

Mr. Davis has also determined that for each of the first five years the proposed rule is in effect, the public benefit anticipated as a result of implementing the proposed rule will be implementation of provisions of HB 2912, and incorporation of rule updates to make commission rules consistent with federal regulations.

The proposed rule is intended to implement certain provisions of HB 2912, and federal regulations that were promulgated in the October 22, 1998 issue of the *Federal Register* (63 FR 56509). In order to implement the provisions of HB 2912 and the 1998 federal regulations, the commission is proposing several concurrent rule changes. This proposed rule would update Chapter 37 by adding the definition of a post-closure order. The rule does not propose requirements that would result in additional fiscal implications for affected individuals and businesses.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses due to implementation of the proposed rule, which is intended to implement certain provisions of HB 2912, and federal regulations that were promulgated in the October 22, 1998 issue of the *Federal Register* (63 FR 56509). This proposed rule would update Chapter 37 by adding the definition of a post-closure order. The rule does not propose requirements that would result in additional fiscal implications for affected small and micro-businesses.

LOCAL EMPLOYMENT IMPACT STATEMENT

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 reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rule does not meet the definition of a "major environmental rule" as defined in that statute. Major environmental rule means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendment to Chapter 37 is intended to protect the environment or reduce risks to human health from facilities that are required to obtain a post-closure permit but have failed to do so, by bringing them into compliance through an alternative regulatory mechanism. However, 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. The proposed rule would protect public health and safety by bringing into compliance those facilities that have not obtained a post-closure permit by providing an equally protective alternative. The proposed rule also allows the agency the discretion to use corrective action requirements, rather than closure requirements, to address regulated units that have released hazardous constituents.

Even if the rule was considered to be a major environmental rule, Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This proposed rule does not meet any of these four applicability requirements. This proposed rule does not exceed any standard set by federal law for interim status units or facilities, or regulated units with releases of hazardous constituents, and in fact implements a federal regulation authorized by federal law. This proposed rule does not exceed the requirements of state law under THSC, Chapter 361 or TWC, Chapter 7; those chapters specifically allow the type of orders proposed in this rulemaking. 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 specifically on post-closure orders; Texas' authorization, by the EPA, of the RCRA program does relate to post-closure activities, but the activities that would be authorized in accordance with this rule are authorized by EPA RCRA regulations. This rule is not proposed solely under the general powers of the agency, but specifically under THSC, §361.082 and TWC, §7.031, as well as the other general powers of the agency. 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 specific purpose of the proposed rule is to implement applicable requirements of HB 2912, which amended THSC, §361.082 and TWC, 7.031. The purpose of this proposed rule is to allow the commission to issue orders in lieu of permits for post-closure care at interim status facilities and to give the commission the discretion to approve corrective action requirements as an alternative to closure requirements when certain environmental conditions are met. The proposed rule substantially advances the stated purpose by incorporating the applicable requirements of HB 2912 and by amending the applicable provisions relating to corrective action requirements.

Promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed rule will not burden private real property, nor restrict or limit the owner's right to property, nor reduce its value by 25% or more beyond what would otherwise exist in the absence of these regulations. The proposed rule merely allows the commission to issue an order in place of a permit for post-closure care at interim status facilities. Under existing rules, the facilities affected by this proposed rule are already required to obtain a permit. Thus, the proposed rule provides an option for a new mechanism to provide post- closure care. The proposed rule also allows for corrective action requirements as an alternative to closure requirements. Therefore, this proposed rule will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the proposed rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule is not subject to the CMP.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Comments must be received by 5:00 p.m., October 28, 2002, and should reference Rule Log Number 2000-048-335-WS. For further information, please contact Michael Bame, Policy and Regulations Division, at (512) 239-5658.

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under this code and other laws of this state; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; §7.031, which authorizes the commission to issue an order for the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from a solid waste management unit at a solid waste processing, storage, or disposal facility; Solid Waste Disposal Act, THSC, §361.024, which authorizes the commission to adopt rules consistent with Chapter 361; and THSC, §361.082, which authorizes the commission to issue an order for the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from a solid waste management unit at a solid waste processing, storage, or disposal facility.

The proposed amendment implements TWC, §5.103 and §7.031 and THSC, §361.024 and §361.082.

§37.11. Definitions.

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

(1)-(19) (No change.)

(20) Post-closure order--An order issued by the commission for post-closure care of interim status units, or alternative corrective action requirements for contamination commingled from RCRA and solid waste management units, and/or corrective action management units unless authorized in a permit.

(21) [~~(20)~~] Post-closure [~~Post closure~~] plan--The plan for post-closure [~~post closure~~] care prepared in accordance with commission requirements.

(22) [~~(21)~~] Program area--Commission [~~Texas Natural Resource Conservation Commission~~] areas under which the facility is permitted, licensed, or registered to operate, including, but not limited to, Industrial and Hazardous Waste, Underground Injection Control, Municipal Solid Waste, or Petroleum Storage Tanks.

(23) [~~(22)~~] Standby trust--An unfunded trust established to meet the requirements of this chapter.

(24) [~~(23)~~] Substantial business relationship--A relationship where the guarantor is a corporation and owns at least 50% of the entity guaranteed.

(25) [~~(24)~~] Tangible net worth--The tangible assets that remain after deducting liabilities; such assets would not include intangibles such as goodwill and rights to patents or royalties.

This 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 September 13, 2002.

TRD-200205981
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 27, 2002
For further information, please call: (512) 239-4712

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CHAPTER 39. PUBLIC NOTICE

The Texas Commission on Environmental Quality (commission) proposes an amendment to §39.420. The commission also proposes new §§39.801 - 39.810.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The purpose of the proposed rules is to implement House Bill (HB) 2912, Article 5, §5.06 and Article 9, §9.07, 77th Texas Legislature, 2001. HB 2912 amended Texas Health and Safety Code (THSC), §361.082 and Texas Water Code (TWC), §7.031. The commission now has the authority, consistent with federal law, to issue orders for "the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from a solid waste management unit at a solid waste processing, storage, or disposal facility." Until the change made by the 77th Legislature, owners and operators of hazardous waste management facilities could only apply for, and the commission could only issue, post-closure permits. HB 2912 became effective on September 1, 2001.

The commission proposes to amend Chapter 39 by adding a new Subchapter N for post-closure orders. Subchapter N would assure the opportunity for meaningful public involvement, including public notice and an opportunity to comment, at three key stages: 1) when the agency declares an application for a post-closure order administratively complete; 2) prior to final approval of the

preferred response action and order; and 3) at the time of a proposed decision that remedial action is complete. Public involvement is also provided for if the order is amended. General requirements and procedures for public notice outlined in Subchapter H are again specified in Subchapter N for post- closure orders. The notice requirements for a post-closure contested case hearing, similar to §39.425, are also provided. An opportunity for a hearing would also be provided upon request by the executive director, applicant, and the Public Interest Counsel; however, like enforcement orders issued by the commission, affected persons would not be able to request a hearing. The ability to pursue an order can begin with the applicant; however, if the applicant fails to pursue the application for a post-closure order in good faith, the commission may issue an enforcement order, as with any violation of a rule or statute, to enforce closure and/or corrective action requirements.

The commission also proposes to amend §39.420 to reflect the requirements for response to comments under new Subchapter N.

Corresponding amendments are also proposed for 30 TAC Chapter 37, Financial Assurance; 30 TAC Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; 30 TAC Chapter 80, Contested Case Hearings; Chapter 305, Consolidated Permits; and Chapter 335, Industrial Solid Waste and Municipal Hazardous Waste, in this issue of the *Texas Register*. The amendment to Chapter 37 would entail the minor addition of a post-closure order definition. Chapter 55 would detail how the agency processes public comments. An opportunity for a hearing would be provided upon request by the executive director, the applicant, and the Public Interest Counsel, in accordance with the amendment proposed in Chapter 80. The financial assurance requirements for post-closure orders would be the same as for post-closure permits. The proposed amendments to Chapter 305 are intended to streamline the application process for post-closure orders and post-closure permits. Post-closure applications would be limited to that information pertinent to post-closure care.

The proposed amendments to Chapter 335 would allow greater flexibility for the agency and the regulated community in two areas. First, the proposed rulemaking would allow the agency to issue an order in lieu of a permit for post-closure care at interim status units or facilities. Second, the proposed rulemaking gives the agency the discretion to approve corrective action requirements as an alternative to the Resource Conservation Recovery Act (RCRA) closure requirements when certain environmental conditions are met.

Lastly, the proposed rulemaking would be consistent with federal regulations promulgated by the United States Environmental Protection Agency (EPA) in the October 22, 1998 issue of the *Federal Register* (63 FR 56509).

SECTION BY SECTION DISCUSSION

Subchapter H - Applicability and General Provisions

Proposed amended §39.420, Transmittal of the Executive Director's Response to Comments and Decision, adds new subsection (e) which lists the procedures for the chief clerk to transmit the executive director's response to comments to the appropriate parties for a post-closure order.

Subchapter N - Public Notice of Post-Closure Orders

Proposed new §39.801, Applicability, specifies that new Subchapter N applies to applications for a post-closure order, as defined in 30 TAC §335.2 concerning permit required.

Proposed new §39.802, Public Comment and Notice, subsection (a) states when public notice and opportunity to comment are required by this subchapter. Consistent with EPA's amendments to federal post-closure permit requirements promulgated in the October 22, 1998 issue of the *Federal Register* (63 FR 56509), the commission proposes public notice and comment for post-closure orders at three key stages: 1) when the authorized agency first becomes involved in the cleanup process as a regulatory or enforcement matter; 2) when the agency is ready to approve a remedy for the site; and 3) when the agency is ready to decide that remedial action is complete at a facility.

Proposed new §39.802(a)(1) states that the first stage when public notice and the opportunity to comment will be provided is when the agency declares an application for a post-closure order administratively complete. The agency recognizes that the timing of the first and second notice may be simultaneous if no time periods are waived and believes sufficient opportunity for public notice and comment is still provided. As with other opportunities for notice and comment, the agency would prepare a response that would be transmitted by the chief clerk to the applicant, any person who submitted comments during the public comment period, any person who requested to be on the mailing list for the order action, the Office of Public Interest Counsel, and the Office of Public Assistance.

Proposed new §39.802(a)(2) identifies the second stage when public notice and the opportunity to comment will be provided before final approval of the proposed post-closure order.

Proposed new §39.802(a)(3) states the third stage for public notice and comment. When the agency is ready to determine that remedial action is complete, notice and an opportunity to comment will be provided at that time. Remedial action would be complete when all monitoring is complete, at the end of the post-closure period. The agency recognizes that the notice of final decision required under 40 Code of Federal Regulations Part 124 could be combined with this third notice (remedial action complete). This would still allow for comment before termination of agency regulation while not requiring a fourth notice.

Proposed new §39.802(b) states that the comment periods for subsection (a) close 30 days after the last publication of the appropriate notice.

Proposed new §39.803, General Notice Provisions, generally mirrors the notice provisions for permits outlined in existing §39.405 with additions and deletions to reflect the unique requirements applicable to post-closure orders.

Proposed new §39.803(a) states the executive director's options if the applicant fails to publish notice in the specified time frame or fails to provide copies of notices or affidavits. The first option would allow the chief clerk to publish the notice and have the applicant reimburse the agency for the cost of publication. The second option would allow the executive director to suspend further processing or return the application. These options are intended to avoid undue delay in order application processing and would be consistent with §39.405(a).

Proposed new §39.803(b) - (f) includes instructions for post-closure order applicants for electronic mailing lists, delivery of the notice by hand or mail, filing copies of the published notice and publisher's affidavit with the chief clerk, publication of the notice,

and making copies of the application and proposed order available for public review.

Proposed new §39.804, Text of Public Notice, states the required text needed in a public notice for all three stages of notice and comment for a post-closure order. These requirements would parallel §39.411(a) and (b) with slight modifications.

Proposed new §39.805, Mailed Notice, lists the requirements for mailed notice when required by this subchapter. This proposed language would be consistent with the requirements for permits found in §39.413 and §39.418(b)(1) and (2).

Proposed new §39.806, Notice of Receipt of an Application and Intent to Obtain a Post- Closure Order, describes the requirements and procedures for an applicant to publish the notice of receipt of application and intent to obtain a post-closure order. More specifically, the applicant's notice would have to be published within 30 days after the executive director declares it administratively complete with the required text outlined in proposed new §39.804. These requirements and procedures match those prescribed for permits in §39.418.

Proposed new §39.807, Notice of Proposed Post-Closure Order and Preliminary Decision, describes the requirements for the notice of proposed post-closure order. Again, the requirements would be the same as those listed in proposed new §39.806.

Proposed new §39.808, Notice of a Proposed Decision that Remedial Action is Complete, describes the requirements for the notice of proposed decision that remedial action is complete and also parallels those found in proposed new §39.806.

Proposed new §39.809, Notice for Amendments to Post-Closure Orders, describes the notice requirements for when post-closure orders are amended. The requirements would mirror those proposed in new §39.806.

Proposed new §39.810, Notice of Post-Closure Order Contested Case Hearing, identifies the notice requirements for a post-closure order contested case hearing. The requirements match those outlined for contested enforcement case hearings in §39.425.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined that for each year of the first five-year period the proposed rules are in effect, there will be no significant fiscal implications for the agency or any other unit of state or local government due to administration and enforcement of the proposed rules. Units of government that own or operate a site affected by the proposed rules that are authorized to close hazardous waste management units via post-closure orders may experience cost savings, which would vary greatly depending on the type of facility closed. The cost savings would be due to a likely decrease in the number of contested case hearings on applications to close certain hazardous waste management units.

The proposed rules are intended to implement certain provisions of HB 2912, and federal regulations that were promulgated in the October 22, 1998 issue of the *Federal Register* (63 FR 56509). HB 2912 provided the commission with the authority, consistent with federal law, to issue orders for the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from a solid waste management unit at a solid waste processing, storage, or disposal facility. The 1998 federal regulations allow the EPA and authorized states to: 1) issue an enforceable document in lieu of a post-closure permit for interim status units and facilities; and 2) substitute corrective action requirements (alternative standards) for closure requirements for regulated units in cases where there is a release and both a regulated unit and a solid waste management unit or area of concern have contributed to the release. An interim status unit or facility does not have a hazardous waste permit, but has submitted a Part A permit application and is compliant with groundwater monitoring requirements. Currently, the commission's rules only allow the issuance of post-closure permits, not orders, for post-closure care at hazardous waste management facilities.

In order to implement the provisions of HB 2912 and the 1998 federal regulations, the commission is proposing several concurrent changes. These proposed rules would update Chapter 39 by adding public participation requirements applicable to post-closure orders, including public notice and an opportunity to comment on at least three occasions. An opportunity for a contested case hearing would be provided upon request by the executive director, the applicant, and the Public Interest Counsel.

The proposed rules would affect all applicants who voluntarily seek orders in lieu of permits for interim status land-based units that close with waste in place or request alternate corrective action requirements for commingled contaminant plumes. Examples of sites affected include a publicly- or privately-owned hazardous waste management facility consisting of hazardous waste processing, storage, or disposal units such as one or more landfills, surface impoundments, land treatment facilities, or a combination of units. The total number of applications for orders cannot be determined at this time. There are an estimated 28 facilities affected by the proposed rules, some of which may be owned and operated by units of government. Additional facilities may be affected by the proposed rules if and when they chose to implement alternative corrective action requirements under an order.

The commission anticipates there may be cost savings for sites affected by the proposed rules, due to a likely decrease in the number of contested case hearings. The proposed rules are voluntary in nature and are intended to provide regulated entities with post-closure regulatory alternatives. The proposed rules allowing for orders in lieu of permits would require applicants to achieve equivalent levels of environmental protection compared to existing procedures. No additional environmental controls are required by this rulemaking, beyond what is already required by existing regulations. The proposed rules would still require three separate public notice sessions during the application of a post-closure order; however, there would be no provision allowing the public to request a contested case hearing on the application as is currently allowed under existing post-closure permit rules. This change will likely result in cost savings, which cannot be estimated at this time, for the agency and other affected units of state and local government. Based on commission data, the cost for contested case hearings vary greatly, but can exceed $100,000.

PUBLIC BENEFITS AND COSTS

Mr. Davis has also determined for each of the first five years the proposed rules are in effect, the public benefit anticipated as a result of implementing the proposed rules will be implementation of provisions of HB 2912, and incorporation of rule updates to make commission rules consistent with federal regulations.

The proposed rules are intended to implement certain provisions of HB 2912, and federal regulations that were promulgated in the October 22, 1998 issue of the *Federal Register* (63 FR 56509). In order to implement the provisions of HB 2912 and the 1998 federal regulations, the commission is proposing several concurrent rule changes. These proposed rules would update Chapter 39 by adding public participation requirements applicable to post-closure orders, including public notice and an opportunity to comment on at least three occasions. An opportunity for a contested case hearing would be provided upon request by the executive director, the applicant, and the Public Interest Counsel, but not by the public as is currently allowed.

The commission anticipates there will be cost savings to affected individuals and businesses, due to potentially fewer contested case hearings. There are an estimated 28 facilities currently eligible for post-closure orders, the majority of which are operated by larger industrial businesses. It is unknown how many of these facilities will require post-closure care and conduct such care under a post-closure order in lieu of a post-closure permit. Additionally, it is unknown how many current and future applications for orders will be received by the agency that would have resulted in requests for contested case hearings under existing regulations. Based on commission data, the cost for contested case hearings vary greatly, but can exceed $100,000.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses due to implementation of the proposed rules, which are intended to implement certain provisions of HB 2912, and federal regulations that were promulgated in the October 22, 1998 issue of the *Federal Register* (63 FR 56509).

In order to implement the provisions of HB 2912 and the 1998 federal regulations, the commission is proposing several concurrent rule changes. This rulemaking would update Chapter 39 by adding public participation requirements applicable to post-closure orders, including public notice and an opportunity to comment on at least three occasions. An opportunity for a contested case hearing would be provided upon request by the executive director, the applicant, and the Public Interest Counsel, but not by the public as is currently allowed.

The commission anticipates there will be cost savings to affected small and micro-businesses, due to potentially fewer contested case hearings. There are an estimated 28 facilities currently eligible for post-closure orders, some of which may be owned and operated by small or micro-businesses. It is unknown how many of these facilities will require post-closure care and conduct such care under a post-closure order in lieu of a post-closure permit. It is unknown how many current and future applications for orders will be received by the agency that would have resulted in requests for contested case hearings under existing regulations. Based on commission data, the cost for contested case hearings vary greatly, but can exceed $100,000.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed these proposed rules and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rules do not meet the definition of a "major environmental rule" as defined in that statute. Major environmental rule means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendments to Chapter 39 are intended to protect the environment or reduce risks to human health from facilities that are required to obtain a post- closure permit, but have failed to do so, by bringing them into compliance through an alternative regulatory mechanism. However, they are 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. The proposed rules would protect public health and safety by bringing into compliance those facilities that have not obtained a post-closure permit by providing an equally protective alternative. The proposed rules also allow the agency the discretion to use corrective action requirements, rather than closure requirements, to address regulated units that have released hazardous constituents.

Even if the rules were considered to be a major environmental rule, Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. These proposed rules do not meet any of these four applicability requirements. These proposed rules do not exceed any standard set by federal law for interim status units or facilities, or regulated units with releases of hazardous constituents, and in fact, implement a federal regulation authorized by federal law. These proposed rules do not exceed the requirements of state law under THSC, Chapter 361 or TWC, Chapter 7; those chapters specifically allow the type of orders proposed in this rulemaking. 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 specifically on post-closure orders; Texas' authorization, by the EPA, of the RCRA program does relate to post-closure activities, but the activities that would be authorized in accordance with these rules are authorized by EPA RCRA regulations. These rules are not proposed solely under the general powers of the agency, but specifically under THSC, §361.082 and TWC, §7.031, as well as the other general powers of the agency. The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these proposed rules in accordance with Texas Government Code, §2007.043. The specific purpose of the proposed rules is to implement applicable requirements of HB 2912, which amended THSC, §361.082 and TWC, 7.031. The purpose of these proposed rules is to allow the commission to issue orders in lieu of permits for post-closure care at interim status facilities and to give the commission the discretion to approve corrective action requirements as an alternative to closure requirements

when certain environmental conditions are met. The proposed rules substantially advance the stated purpose by incorporating the applicable requirements of HB 2912 and by amending the applicable provisions relating to corrective action requirements.

Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed rules will not burden private real property, nor restrict or limit the owner's right to property, nor reduce its value by 25% or more beyond what would otherwise exist in the absence of these regulations. The proposed rules merely allow the commission to issue an order in place of a permit for post-closure care at interim status facilities. Under existing rules, the facilities affected by this rulemaking are already required to obtain a permit. Thus, the proposed rules provide an option for a new mechanism to provide post-closure care. The proposed rules also allow for corrective action requirements as an alternative to closure requirements. Therefore, these proposed rules will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the proposed rules and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the CMP.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Comments must be received by 5:00 p.m., October 28, 2002, and should reference Rule Log Number 2000-048-335-WS. For further information, please contact Michael Bame, Policy and Regulations Division, at (512) 239-5658.

SUBCHAPTER H. APPLICABILITY AND GENERAL PROVISIONS

30 TAC §39.420

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under this code and other laws of this state; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; §7.031, which authorizes the commission to issue an order for the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from a solid waste management unit at a solid waste processing, storage, or disposal facility; Solid Waste Disposal Act, THSC, §361.024, which authorizes the commission to adopt rules consistent with Chapter 361; and THSC, §361.082, which authorizes the commission to issue an order for the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from a solid waste management unit at a solid waste processing, storage, or disposal facility.

The proposed amendment implements TWC, §5.103 and §7.031 and THSC, §361.024 and §361.082.

§39.420. Transmittal of the Executive Director's Response to Comments and Decision.

(a)-(d) (No change.)

(e) For post-closure order applications under Subchapter N of this chapter (relating to Public Notice of Post-Closure Orders), the chief clerk shall transmit only items listed in subsection (a)(1) and (2) of this section to the people listed in subsection (b)(1) - (3), (5), and (6) 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 September 13, 2002.

TRD-200205982
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 27, 2002
For further information, please call: (512) 239-4712

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SUBCHAPTER N. PUBLIC NOTICE OF POST-CLOSURE ORDERS

30 TAC §§39.801 - 39.810

STATUTORY AUTHORITY

The new sections are proposed under TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under this code and other laws of this state; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; §7.031, which authorizes the commission to issue an order for the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from a solid waste management unit at a solid waste processing, storage, or disposal facility; Solid Waste Disposal Act, THSC, §361.024, which authorizes the commission to adopt rules consistent with Chapter 361; and THSC, §361.082, which authorizes the commission to issue an order for the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from a solid waste management unit at a solid waste processing, storage, or disposal facility.

The new sections implement TWC, §5.103 and §7.031 and THSC, §361.024 and §361.082.

§39.801. Applicability.

The requirements of this subchapter apply to applications for a post-closure order, as defined in §335.2 of this title (relating to Permit Required).

§39.802. Public Comment and Notice.

(a) Public notice and the opportunity to comment shall be provided:

(1) when the agency declares an application for a post-closure order administratively complete;

(2) prior to final approval of the proposed post-closure order; and

(3) at the time of a proposed decision that remedial action is complete at the facility.

(b) The public comment periods described in subsection (a) of this section shall end 30 days after the last publication of the appropriate notice.

(c) Public comments for post-closure orders shall be processed under §55.156 of this title (relating to Public Comment Processing).

§39.803. General Notice Provisions.

(a) Failure to publish notice. If the chief clerk prepares a newspaper notice that is required by this subchapter and the applicant does not cause the notice to be published within 30 days after the executive director has declared the application administratively complete, filed the proposed post- closure order or proposed decision that remedial action is complete with the chief clerk, or fails to submit the copies of notices or affidavit required in subsection (d) of this section, the executive director may cause one of the following actions to occur:

(1) the chief clerk may cause the notice to be published and the applicant shall reimburse the agency for the cost of publication; or

(2) the executive director may suspend further processing or return the application. If the application is resubmitted within six months of the date of the return of the application, it shall be exempt from any application fee requirements.

(b) Electronic mailing lists. The chief clerk may require the applicant to provide necessary mailing lists in electronic form.

(c) Mail or hand delivery. Notice by hand delivery may be substituted for mailed notice. Mailing is complete upon deposit of the document, enclosed in a prepaid, properly addressed wrapper, in a post office or official depository of the United States Postal Service. If hand delivery is by courier-receipted delivery, the delivery is complete upon the courier taking possession.

(d) Notice and affidavit. When this subchapter requires an applicant to publish notice, the applicant must file a copy of the published notice and a publisher's affidavit with the chief clerk certifying facts that constitute compliance with the requirement. The deadline to file a copy of the published notice, which shows the date of publication and the name of the newspaper, is ten business days after the last date of publication. The deadline to file the affidavit is 30 calendar days after the last date of publication for each notice. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with the requirement to publish notice. When the chief clerk publishes notice under subsection (a) of this section, the chief clerk shall file a copy of the published notice and a publisher's affidavit.

(e) Published notice. When notice is required to be published under §39.802 of this title (relating to Public Comment and Notice), the owner or operator shall publish notice in the newspaper of largest general circulation that is published in the county in which the facility is located or proposed to be located. If a newspaper is not published in the county, the notice must be published in a newspaper of general circulation in the county in which the facility is located or proposed to be located. The requirements of this subsection may be satisfied by one publication if the newspaper is both published in the county and is the newspaper of largest general circulation in the county.

(f) Copy availability. The owner or operator shall make a copy of the application, preferred response action and/or the proposed post-closure order, or proposed decision that remedial action is complete, available for review, and copying at a public place in the county in which the facility is located or proposed to be located. The copy of the document compelling public notice shall comply with the following.

(1) A copy of the application, proposed post-closure order, or proposed decision that remedial action is complete must be available for review and copying beginning on the first day of newspaper publication of notice of receipt of application and intent to obtain post-closure order and remain available for the publication's designated comment period.

(2) A copy of the complete application, proposed post-closure order, or proposed decision that remedial action is complete (including any subsequent revisions to the application) must be available for review and copying beginning on the first day of newspaper publication required by this section and remain available until the commission has taken action on the application or the commission refers issues to SOAH.

§39.804. Text of Public Notice.

(a) Applicants shall use notice text provided and approved by the agency. The executive director may approve changes to notice text before notice is given.

(b) When notice of receipt of application and intent to obtain post-closure order, notice of proposed order, or notice of proposed decision that remediation action is complete, by publication or by mail as required by this subchapter, the text of the notice must include the following information:

(1) the name, address, and telephone number of an agency contact from whom interested persons may obtain further information;

(2) the name, address, and telephone number of the applicant and a description of the manner in which a person may contact the applicant for further information;

(3) a brief description of the location and nature of the proposed activity;

(4) a brief description of public comment procedures including a statement that the executive director will respond to comments raising issues that are relevant and material or otherwise significant;

(5) the application, solid waste registration number, or post-closure order number;

(6) if applicable, a statement that the application or requested action is subject to the Texas Coastal Management Program (CMP) and must be consistent with the CMP goals and policies;

(7) the location, at a public place in the county in which the facility is located or proposed to be located, at which a copy of the application is available for review and copying;

(8) a description of the procedure by which a person may be placed on a mailing list in order to receive additional information about the application; and

(9) any additional information required by the executive director or needed to satisfy public notice requirements of any federally-authorized program.

§39.805. Mailed Notice.

When this subchapter requires mailed notice, the chief clerk shall mail notice to:

(1) the landowners named on the application map, supplemental map, or the sheet attached to the application map or supplemental map;

(2) the mayor and health authorities of the city or town in which the facility is or will be located or in which waste is or will be disposed of;

(3) the county judge and health authorities of the county in which the facility is or will be located or in which waste is or will be disposed of;

(4) the Texas Department of Health;

(5) the Texas Parks and Wildlife Department;

(6) the Texas Railroad Commission;

(7) if applicable, local, state, and federal agencies for which notice is required in 40 Code of Federal Regulations (CFR) §124.10(c), as amended and adopted in the May 2, 1989 issue of the *Federal Register* (54 FR 18786);

(8) if applicable, persons on a mailing list developed and maintained in accordance with 40 CFR §124.10(c)(1)(ix);

(9) the owner or operator of the facility;

(10) persons on a relevant mailing list kept under §39.407 of this title (relating to Mailing Lists);

(11) any other person the executive director or chief clerk may elect to include;

(12) if applicable, the secretary of the Coastal Coordination Council;

(13) persons who filed public comment or hearing requests on or before the deadline for filing public comment or hearing requests;

(14) the state senator and representative who represent the general area in which the facility is located or proposed to be located; and

(15) the river authority in which the facility is located or proposed to be located if the document compelling public notice and comment is under Texas Water Code, Chapter 26.

§39.806. Notice of Receipt of an Application and Intent to Obtain a Post-Closure Order.

(a) When the executive director determines that an application is administratively complete, the chief clerk shall mail the notice of receipt of an application and intent to obtain a post-closure order to the applicant.

(b) Not later than 30 days after the executive director declares an application administratively complete, the notice of receipt of an application and intent to obtain a post-closure order:

(1) the applicant shall publish the notice of receipt of an application and intent to obtain a post-closure order once under §39.803 of this title (relating to General Notice Provisions);

(2) the chief clerk shall mail the notice of receipt of an application and intent to obtain a post-closure order to those listed in §39.805 of this title (relating to Mailed Notice); and

(3) the notice must include the information required by §39.804 of this title (relating to Text of Public Notice).

§39.807. Notice of Proposed Post-Closure Order and Preliminary Decision.

(a) Prior to final approval of the proposed order, the executive director shall file the proposed post- closure order with the chief clerk.

(b) Not later than 30 days after the executive director files the proposed post-closure order with the chief clerk:

(1) the applicant shall publish the notice of the proposed order and preliminary decision once under §39.803 of this title (relating to General Notice Provisions);

(2) the chief clerk shall mail the notice of a proposed post-closure order to those listed in §39.805 of this title (relating to Mailed Notice); and

(3) the notice of a proposed post-closure order must include the applicable information required by §39.804 of this title (relating to Text of Public Notice), including the assumptions the response action was based on, in particular those related to land use characterization.

§39.808. Notice of a Proposed Decision that Remedial Action is Complete.

(a) Prior to the executive director's determination that the remedial action is complete, the executive director shall file the proposed decision that remedial action is complete with the chief clerk.

(b) Not later than 30 days after the executive director files the proposed decision that remedial action is complete with the chief clerk:

(1) the applicant shall publish notice of a proposed decision that remedial action is complete once under §39.803 of this title (relating to General Notice Provisions);

(2) the chief clerk shall mail the notice of a proposed decision that remedial action is complete to those listed in §39.805 of this title (relating to Mailed Notice); and

(3) the notice of a proposed decision that remedial action is complete must include the applicable information required by §39.804 of this title (relating to Text of Public Notice).

§39.809. Notice for Amendments to Post-Closure Orders.

(a) When the executive director determines that an application for an amendment to a post-closure order is technically complete, the chief clerk shall mail the notice of application and preliminary decision to the applicant.

(b) Not later than 30 days after the executive director declares an application technically complete the notice of application and preliminary decision:

(1) the applicant shall publish the notice of application and preliminary decision once under §39.803 of this title (relating to General Notice Provisions);

(2) the chief clerk shall mail the notice of receipt of an application and preliminary decision to those listed in §39.805 of this title (relating to Mailed Notice); and

(3) the notice must include the information required by §39.804 of this title (relating to Text of Public Notice).

§39.810. Notice of Post-Closure Order Contested Case Hearing.

For any post-closure order contested case hearing, the chief clerk shall mail notice to the statutory parties, applicant, and persons who have requested to be on a mailing list for the pleadings in the action no less than 13 days before a hearing in accordance with APA, §2001.052. In addition, public notice and opportunity for comment before the commission relating to a proposed action shall be given under Chapter 10 of this title (relating to Commission Meetings).

This 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 September 13, 2002.

TRD-200205983
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 27, 2002
For further information, please call: (512) 239-4712

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CHAPTER 55. REQUESTS FOR RECONSIDERATION AND CONTESTED CASE HEARINGS; PUBLIC COMMENT SUBCHAPTER E. PUBLIC COMMENT AND PUBLIC MEETINGS

30 TAC §55.156

The Texas Commission on Environmental Quality (commission) proposes an amendment to §55.156.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The purpose of the proposed rule is to implement House Bill (HB) 2912, Article 5, §5.06 and Article 9, §9.07, 77th Texas Legislature, 2001. HB 2912 amended Texas Health and Safety Code (THSC), §361.082 and Texas Water Code (TWC), §7.031. The commission now has the authority, consistent with federal law, to issue orders for "the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from a solid waste management unit at a solid waste processing, storage, or disposal facility." Until the change made by the 77th Legislature, owners and operators of hazardous waste management facilities could only apply for, and the commission could only issue, post-closure permits. HB 2912 became effective on September 1, 2001.

The commission proposes to amend §55.156 by adding new subsection (f). Section 55.156(f) would identify the subsections of §55.156 that apply to a post-closure order. The executive director would prepare a response to all timely, relevant and material, or significant public comment. The response would specify the provision of the draft order that has been changed in response to public comment and the reasons for the change. The chief clerk would mail the executive director's decision and response to public comment to the applicant, any person who submitted comments during the public comment period, any person who requested to be on the mailing list for the order action, the Office of Public Interest Counsel, and the Office of Public Assistance. Instructions on how to request a hearing would not be included for post-closure orders since only the applicant, executive director, and the Public Interest Counsel could request a hearing.

Corresponding amendments are also proposed for 30 TAC Chapter 37, Financial Assurance; 30 TAC Chapter 39, Public Notice; 30 TAC Chapter 80, Contested Case Hearings; 30 TAC Chapter 305, Consolidated Permits; and 30 TAC Chapter 335, Industrial Solid Waste and Municipal Hazardous Waste, in this issue of the *Texas Register*. The amendments to Chapter 37 would entail the minor addition of a post-closure order definition. The proposed new sections in Chapter 39 add public participation requirements applicable to post-closure orders during three stages of the post- closure ordering process and when the orders are amended. An opportunity for a hearing would be provided upon request by the executive director, the applicant, and the Public Interest Counsel in accordance with the amendment proposed in Chapter 80. The financial assurance requirements for post-closure orders would be the same as for post-closure permits. The proposed amendments to Chapter 305 are intended to streamline the application process for post-closure orders and post-closure permits. Post-closure applications would be limited to that information pertinent to post-closure care.

The proposed amendments to Chapter 335 would allow greater flexibility for the agency and the regulated community in two areas. First, the proposed rulemaking would allow the agency to issue an order in lieu of a permit for post-closure care at interim status units or facilities. Second, the proposed rulemaking gives the agency the discretion to approve corrective action requirements as an alternative to the Resource Conservation Recovery Act (RCRA) closure requirements when certain environmental conditions are met.

Last, the proposed rulemaking would be consistent with federal regulations promulgated by the United States Environmental Protection Agency (EPA) in the October 22, 1998 issue of the *Federal Register* (63 FR 56509).

SECTION DISCUSSION

Proposed §55.156, Public Comment Processing, adds a reference to §39.420(e) in subsection (c) as a transmittal in which instructions for requesting reconsideration of the executive director's decision or hold a contested case hearing would not required to be included. As with most other orders issued by the commission, only the applicant, executive director, and the Public Interest Counsel would be able to request a hearing.

Proposed new subsection (f) would list the subsections that apply to post-closure orders. Since only the applicant, executive director, and the Public Interest Counsel can request a hearing, the chief clerk would not be required to include instructions for requesting a hearing when sending out the executive director's response to comments for post-closure orders.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined that for each year of the first five-year period the proposed rule is in effect, there will be no significant fiscal implications for the agency or any other unit of state or local government due to administration and enforcement of the proposed rule.

The proposed rule is intended to implement certain provisions of HB 2912, and federal regulations that were promulgated in the October 22, 1998 issue of the *Federal Register* (63 FR 56509). HB 2912 provided the commission with the authority, consistent with federal law, to issue orders for the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from a solid waste management unit at a solid waste processing, storage, or disposal facility. The 1998 federal regulations allow the EPA and authorized states to: 1) issue an enforceable document in lieu of a post-closure permit for interim status units and facilities; and 2) substitute corrective action requirements (alternative standards) for closure requirements for regulated units in cases where there is a release and both a regulated unit and a solid waste management unit or area of concern have contributed to the release. An interim status unit or

facility does not have a hazardous waste permit, but has submitted a Part A permit application and is compliant with groundwater monitoring requirements. Currently, the commission's rules only allow the issuance of post-closure permits, not orders, for post-closure care at hazardous waste management facilities.

In order to implement the provisions of HB 2912 and the 1998 federal regulations, the commission is proposing several rulemakings. This proposed rule would update Chapter 55 by updating existing regulations to reflect that the commission would not have to provide directions to the public on how to request a hearing for a post-closure order, since only the applicant, executive director, and the Public Interest Counsel would be allowed to request a hearing on such an application. The rule does not propose requirements that would result in additional fiscal implications for affected units of state and local government.

PUBLIC BENEFITS AND COSTS

Mr. Davis has also determined that for each of the first five years the proposed rule is in effect, the public benefit anticipated as a result of implementing the proposed rule will be implementation of provisions of HB 2912, and incorporation of rule updates to make commission rules consistent with federal regulations.

The proposed rule is intended to implement certain provisions of HB 2912, and federal regulations that were promulgated in the October 22, 1998 issue of the *Federal Register* (63 FR 56509). In order to implement the provisions of HB 2912 and the 1998 federal regulations, the commission is proposing several concurrent rule changes. This proposed rule would update Chapter 55 by updating existing regulations to reflect that the commission would not have to provide directions to the public on how to request a hearing for a post-closure order, since only the applicant, executive director, and the Public Interest Counsel would be allowed to request a hearing on such an application. The rule does not propose requirements that would result in additional fiscal implications for affected individuals and businesses.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses due to implementation of the proposed rule, which is intended to implement certain provisions of HB 2912, and federal regulations that were promulgated in the October 22, 1998 issue of the *Federal Register* (63 FR 56509). This proposed rule would update Chapter 55 by updating existing regulations to reflect that the commission would not have to provide directions to the public on how to request a hearing for a post-closure order, since only the applicant, executive director, and the Public Interest Counsel would be allowed to request a hearing on such an application. The rule does not propose requirements that would result in additional fiscal implications for affected small and micro- businesses.

LOCAL EMPLOYMENT IMPACT STATEMENT

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 reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rule does not meet the definition of a "major environmental rule" as defined in that statute. Major environmental rule means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed rule is intended to protect the environment or reduce risks to human health from facilities that are required to obtain a post-closure permit, but have failed to do so, by bringing them into compliance through an alternative regulatory mechanism. However, 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. The proposed rule would protect public health and safety by bringing into compliance those facilities that have not obtained a post-closure permit by providing an equally protective alternative. The proposed rule also allows the agency the discretion to use corrective action requirements, rather than closure requirements, to address regulated units that have released hazardous constituents.

Even if the proposed rule was considered to be a major environmental rule, Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This proposed rule does not meet any of these four applicability requirements. This proposed rule does not exceed any standard set by federal law for interim status units or facilities, or regulated units with releases of hazardous constituents, and in fact implements a federal regulation authorized by federal law. This proposed rule does not exceed the requirements of state law under THSC, Chapter 361 or TWC, Chapter 7; those chapters specifically allow the type of orders proposed in this rulemaking. 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 specifically on post-closure orders; Texas' authorization, by the EPA, of the RCRA program does relate to post-closure activities, but the activities that would be authorized in accordance with this rule are authorized by EPA RCRA regulations. This rule is not proposed solely under the general powers of the agency, but specifically under THSC, §361.082 and TWC, §7.031, as well as the other general powers of the agency. 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 specific purpose of the proposed rule is to implement applicable requirements of HB 2912, which amended THSC, §361.082 and TWC, 7.031. The purpose of this proposed rule is to allow the commission to issue orders in lieu of permits for post-closure care at interim status facilities and to give the commission the discretion to approve corrective action requirements as an alternative to closure requirements when certain

environmental conditions are met. The proposed rule substantially advances the stated purpose by incorporating the applicable requirements of HB 2912 and by amending the applicable provisions relating to corrective action requirements.

Promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed rule will not burden private real property, nor restrict or limit the owner's right to property, nor reduce its value by 25% or more beyond what would otherwise exist in the absence of these regulations. The proposed rule merely allows the commission to issue an order in place of a permit for post-closure care at interim status facilities. Under existing rules, the facilities affected by this rulemaking are already required to obtain a permit. Thus, the proposed rule provides an option for a new mechanism to provide post-closure care. The proposed rule also allows for corrective action requirements as an alternative to closure requirements. Therefore, this proposed rule will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the proposed rule and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule is not subject to the CMP.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Comments must be received by 5:00 p.m., October 28, 2002, and should reference Rule Log Number 2000-048-335-WS. For further information, please contact Michael Bame, Policy and Regulations Division, at (512) 239-5658.

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under this code and other laws of this state; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; §7.031, which authorizes the commission to issue an order for the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from a solid waste management unit at a solid waste processing, storage, or disposal facility; Solid Waste Disposal Act, THSC, §361.024, which authorizes the commission to adopt rules consistent with Chapter 361; and THSC, §361.082, which authorizes the commission to issue an order for the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from a solid waste management unit at a solid waste processing, storage, or disposal facility.

The proposed amendment implements TWC, §5.103 and §7.031 and THSC, §361.024 and §361.082.

§55.156. Public Comment Processing.

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

(c) After the executive director files the response to comments, the chief clerk shall mail (or otherwise transmit) the executive director's decision, the executive director's response to public comments, and instructions for requesting that the commission reconsider the executive director's decision or hold a contested case hearing. Instructions for requesting reconsideration of the executive director's decision or requesting a contested case hearing are not required to be included in this transmittal for the applications listed in §39.420(c) - (e) [~~§39.420(c) and (d)~~] of this title (relating to Transmittal of the Executive Director's Response to Comments and Decision). The chief clerk shall provide the information required by this section to the following:

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

(d)-(e) (No change.)

(f) Subsection (d) of this section does not apply to post-closure order applications.

This 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 September 13, 2002.

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Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
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CHAPTER 80. CONTESTED CASE HEARINGS
SUBCHAPTER C. HEARING PROCEDURES

30 TAC §80.109

The Texas Commission on Environmental Quality (commission) proposes an amendment to §80.109.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The purpose of the proposed rule is to implement House Bill (HB) 2912, Article 5, §5.06 and Article 9, §9.07, 77th Texas Legislature, 2001. HB 2912 amended Texas Health and Safety Code (THSC), §361.082 and Texas Water Code (TWC), §7.031. The commission now has the authority, consistent with federal law, to issue orders for "the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from a solid waste management unit at a solid waste processing, storage, or disposal facility." Until the change made by the 77th Legislature, owners and operators of hazardous waste management facilities could only apply for, and the commission could only issue, post-closure permits. HB 2912 became effective on September 1, 2001.

The commission proposes an amendment to Chapter 80 to clarify who can request a hearing on a post-closure order by adding new §80.109(b)(11). New §80.109(b)(11) identifies the parties to a post-closure order contested case hearing. These requirements are similar to those in place for enforcement cases. In order to meet the public participation requirements promulgated by the United States Environmental Protection Agency (EPA) in the October 22, 1998 issue of the *Federal Register* (63 FR 56509),

the commission is providing three notice and comment periods. Since authority for this new rule comes in part from TWC, Chapter 7, the commission is also providing the applicant the opportunity to request a hearing, much like what is available in the enforcement context. New §80.109(b)(11) will limit the parties to the executive director, the applicant, and the Public Interest Counsel in a manner similar to a enforcement hearing, which is limited to the executive director, the respondent, and Public Interest Counsel.

Corresponding amendments are also proposed for 30 TAC Chapter 37, Financial Assurance; 30 TAC Chapter 39, Public Notice; 30 TAC Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; 30 TAC Chapter 305, Consolidated Permits; and 30 TAC Chapter 335, Industrial Solid Waste and Municipal Hazardous Waste, in this issue of the *Texas Register*. The amendment to Chapter 37 would entail the minor addition of a post-closure order definition. The financial assurance requirements for post-closure orders would be the same as for post- closure permits. The proposed amendments to Chapter 39 would add public participation requirements applicable to post-closure orders, during three stages of the post-closure ordering process and when the orders are amended. The proposed amendment to Chapter 55 would specify how the executive director would prepare responses to public comments. The proposed amendments to Chapter 305 are intended to streamline the application process for post-closure orders and post-closure permits. Post-closure applications would be limited to that information pertinent to post-closure care.

The proposed amendments to Chapter 335 would allow greater flexibility for the agency and the regulated community in two areas. First, the proposed rulemaking would allow the agency to issue an order in lieu of a permit for post-closure care for interim status units. Second, the proposed rulemaking gives the agency the discretion to approve corrective action requirements as an alternative to the Resource Conservation Recovery Act (RCRA) closure requirements when certain environmental conditions are met.

Last, the proposed rulemaking would be consistent with federal regulations promulgated by the EPA in the October 22, 1998 issue of the *Federal Register* (63 FR 56509).

SECTION DISCUSSION

Proposed §80.109, Designation of Parties, adds a new paragraph (11) in subsection (b). Section 80.109(b)(11) would identify the parties to a post-closure order contested case as the executive director and the applicant(s).

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined that for each year of the first five-year period the proposed rule is in effect, there will be no significant fiscal implications for the agency or any other unit of state or local government due to administration and enforcement of the proposed rule. Units of government affected by the proposed rule that are authorized to close hazardous waste management units via closure orders may experience cost savings, which would vary greatly depending on the type of facility closed. The cost savings would be due to a likely decrease in the number of contested case hearings on applications to close certain hazardous waste management units.

The proposed rule is intended to implement certain provisions of HB 2912, and federal regulations that were promulgated in the October 22, 1998 issue of the *Federal Register* (63 FR 56509). HB 2912 provided the commission with the authority, consistent with federal law, to issue orders for the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from a solid waste management unit at a solid waste processing, storage, or disposal facility. The 1998 federal regulations allow the EPA and authorized states to: 1) issue an enforceable document in lieu of a post-closure permit for interim status units and facilities; and 2) substitute corrective action requirements (alternative standards) for closure requirements for regulated units in cases where there is a release and both a regulated unit and a solid waste management unit or area of concern have contributed to the release. An interim status unit or facility does not have a hazardous waste permit, but has submitted a Part A permit application and is compliant with groundwater monitoring requirements. Currently, the commission's rules only allow the issuance of post-closure permits, not orders, for post-closure care at hazardous waste management facilities.

In order to implement the provisions of HB 2912 and the 1998 federal regulations, the commission is proposing several concurrent rule changes. This rulemaking would update Chapter 80 by specifying what parties would be allowed to request a hearing on a post-closure order.

The proposed rule would affect all applicants that voluntarily seek orders in lieu of permits at land-based sites that close with waste in place. Examples of sites affected include a publicly- or privately-owned hazardous waste management facility consisting of hazardous waste processing, storage, or disposal units such as one or more landfills, surface impoundments, land treatment facilities, or a combination of units. The total number of applications for orders cannot be determined at this time. There are an estimated 28 facilities affected by the proposed amendment, some of which may be owned and operated by units of government. Additional facilities may be affected by the proposed rule if and when they choose to implement alternative corrective action requirements for commingled contaminant plumes under an order.

The commission anticipates there may be cost savings, due to a likely decrease in the number of contested case hearings. The proposed rule is voluntary in nature and is intended to provide regulated entities with post-closure regulatory alternatives. The proposed rule allowing for orders in lieu of permits would require applicants to achieve equivalent levels of environmental protection compared to existing procedures. No additional environmental controls are required by this rulemaking, beyond what is already required by existing regulations. The proposed rule would not allow the public to request a contested case hearing on post-closure orders. This change will likely result in cost savings, which cannot be estimated at this time, for the agency and other affected units of state and local government. It is unknown how many future applications, from units of state or local government, for orders would have lead to requests for contested case hearings under existing regulations. Based on commission data, the costs for contested case hearings vary greatly, but can exceed $100,000.

PUBLIC BENEFITS AND COSTS

Mr. Davis has also determined that for each of the first five years the proposed rule is in effect, the public benefit anticipated as a result of implementing the proposed rule will be implementation

of provisions of HB 2912, and incorporation of rule updates to make commission rules consistent with federal regulations.

The proposed rulemaking is intended to implement certain provisions of HB 2912, and federal regulations that were promulgated in the October 22, 1998 issue of the *Federal Register* (63 FR 56509). In order to implement the provisions of HB 2912 and the 1998 federal regulations, the commission is proposing several concurrent rule changes. This proposed rule would update Chapter 80 by specifying what parties would be allowed to request a hearing on a post-closure order.

The commission anticipates there may be cost savings, due to a likely decrease in the number of contested case hearings. There are at least 28 facilities currently eligible for post-closure orders, the majority of which are operated by larger industrial businesses. It is unknown how many of these facilities will require post-closure care or implement alternate corrective action requirements and will choose to conduct such activities under a post-closure order in lieu of a post-closure permit. Additionally, it is unknown how many current and future applications for orders will be received by the agency that would have resulted in requests for contested case hearings under existing regulations. Based on commission data, the costs for contested case hearings vary greatly, but can exceed $100,000.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses due to implementation of the proposed rule, which is intended to implement certain provisions of HB 2912, and federal regulations that were promulgated in the October 22, 1998 issue of the *Federal Register* (63 FR 56509).

In order to implement the provisions of HB 2912 and the 1998 federal regulations, the commission is proposing several concurrent rule changes. This proposed rule would update Chapter 80 by specifying what parties would be allowed to request a hearing on a post-closure order.

The commission anticipates there may be cost savings, due to a likely decrease in the number of contested case hearings. There are at least 28 facilities currently eligible for post-closure orders, some of which may be owned and operated by small or micro-businesses. It is unknown how many of these units will require post-closure care or implement alternate corrective action requirements and will choose to conduct such activities under a post-closure order in lieu of a post-closure permit. Additionally, it is unknown how many current and future applications for orders will be received by the agency that would have resulted in requests for contested case hearings under existing regulations. Based on commission data, the costs for contested case hearings vary greatly, but can exceed $100,000.

LOCAL EMPLOYMENT IMPACT STATEMENT

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 reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a "major environmental rule" as defined in that statute. Major environmental rule means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendment to Chapter 80 is intended to protect the environment or reduce risks to human health from facilities that are required to obtain a post-closure permit, but have failed to do so, by bringing them into compliance through an alternative regulatory mechanism. However, 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. The proposed rule would protect public health and safety by bringing into compliance those facilities that have not obtained a post-closure permit by providing an equally protective alternative. The proposed rule also allows the agency the discretion to use corrective action requirements, rather than closure requirements, to address regulated units that have released hazardous constituents.

Even if the rule was considered to be a major environmental rule, Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This proposed rule does not meet any of these four applicability requirements. This proposed rule does not exceed any standard set by federal law for interim status units or facilities, or regulated units with releases of hazardous constituents, and in fact implements a federal regulation authorized by federal law. This proposed rule does not exceed the requirements of state law under THSC, Chapter 361 or TWC, Chapter 7; those chapters specifically allow the type of orders proposed in this rulemaking. 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 specifically on post-closure orders; Texas' authorization, by the EPA, of the RCRA program does relate to post-closure activities, but the activities that would be authorized in accordance with this rule are authorized by EPA RCRA regulations. This rule is not proposed solely under the general powers of the agency, but specifically under THSC, §361.082 and TWC, §7.031, as well as the other general powers of the agency. 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 specific purpose of the proposed rule is to implement applicable requirements of HB 2912, which amended THSC, §361.082 and TWC, 7.031. The purpose of this rulemaking is to allow the commission to issue orders in lieu of permits for post-closure care at interim status facilities and to give the commission the discretion to approve corrective action requirements as an alternative to closure requirements when certain environmental conditions are met. The proposed rule substantially advances the stated purpose by incorporating the applicable requirements of HB 2912 and by amending the applicable provisions relating to corrective action requirements.

Promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed rule will not burden private real property, nor restrict or limit the owner's right to property, nor reduce its value by 25% or more beyond what would otherwise exist in the absence of these regulations. The proposed rule merely allows the commission to issue an order in place of a permit for post-closure care at interim status facilities. Under existing rules, the facilities affected by this rulemaking are already required to obtain a permit. Thus, the proposed rule provides an option for a new mechanism to provide post-closure care. The proposed rule also allows for corrective action requirements as an alternative to closure requirements. Therefore, this proposed rule will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the proposed rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule is not subject to the CMP.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Comments must be received by 5:00 p.m., October 28, 2002, and should reference Rule Log Number 2000-048-335-WS. For further information, please contact Michael Bame, Policy and Regulations Division, at (512) 239-5658.

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under this code and other laws of this state; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; §7.031, which authorizes the commission to issue an order for the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from a solid waste management unit at a solid waste processing, storage, or disposal facility; Solid Waste Disposal Act, THSC, §361.024, which authorizes the commission to adopt rules consistent with Chapter 361; and THSC, §361.082, which authorizes the commission to issue an order for the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from a solid waste management unit at a solid waste processing, storage, or disposal facility.

The proposed amendment implements TWC, §5.103 and §7.031 and THSC, §361.024 and §361.082.

§80.109. Designation of Parties.

(a) (No change.)

(b) Parties.

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

(11) The parties to a post-closure order contested case are limited to:

(A) the executive director;

(B) the applicant(s); and

(C) the Public Interest Counsel.

(c)-(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 September 13, 2002.

TRD-200205985
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
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CHAPTER 114. CONTROL OF AIR POLLUTION FROM MOTOR VEHICLES

SUBCHAPTER C. INSPECTION AND MAINTENANCE AND LOW INCOME VEHICLE REPAIR ASSISTANCE, RETROFIT, AND ACCELERATED VEHICLE RETIREMENT PROGRAM

DIVISION 1. VEHICLE INSPECTION AND MAINTENANCE

30 TAC §114.50

The Texas Commission on Environmental Quality (commission) proposes an amendment to §114.50, Vehicle Inspection and Maintenance, and corresponding revisions to the Texas Inspection and Maintenance State Implementation Plan (Texas I/M SIP). The amendment is being proposed in Subchapter C, Vehicle Inspection and Maintenance and Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program; Division 1, Vehicle Inspection and Maintenance. The amendment and associated Texas I/M SIP will be submitted to the United States Environmental Protection Agency (EPA). The amendment and SIP revision are being proposed to revise the El Paso I/M program to make on-board diagnostic (OBD) testing a contingency measure of the El Paso ozone SIP in support of the maintenance of the ozone national ambient air quality standard (NAAQS).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The federal I/M regulations for ozone nonattainment areas ranked as serious, require that OBD testing be implemented beginning January 1, 2002. Those regulations also provide an option for an extension, up to 12 months, if a state can show good cause. In a prior I/M rulemaking effective November 20, 2001, the commission submitted a request for a one-year extension for the implementation of OBD testing requirements in the El Paso ozone nonattainment area. This action was taken based on the El Paso area having experienced five years with

no monitored violations of the ozone standard. At the time, the commission revised the I/M rule to delay implementation of the OBD testing requirement in the El Paso program area until January 1, 2003, to allow the commission time to explore any viable options and to take into consideration any changes in El Paso's attainment status.

The current rule requires El Paso to continue two-speed idle (TSI) testing through December 31, 2002. The current rule also requires, beginning January 1, 2003, that all 1996 and newer model year vehicles equipped with OBD systems be tested using EPA-approved OBD test procedures and all pre- 1996 model year vehicles be tested using TSI test procedures. In addition, the current rule requires all inspection stations to offer both TSI and OBD tests beginning January 1, 2003.

Based on ambient air monitoring data that shows that El Paso has experienced five years with no violations of the ozone standard, the commission is proposing amendments to the I/M rule to exclude the El Paso program area from OBD testing requirements. The five-year period with no ozone violations has been achieved though the implementation of a volatile organic compound control strategy which includes the TSI vehicle emissions testing program for all 2 - 24 year old gasoline-powered vehicles. Because El Paso, through monitoring, has demonstrated attainment prior to the EPA January 2002 deadline to commence OBD testing as part of the I/M program, and because OBD testing has not already been implemented, the commission concludes that the OBD testing program is not necessary for the El Paso area to maintain attainment of the ozone standard. Therefore, the commission proposes to remove the current requirement in the I/M rule for OBD testing to begin in the El Paso program area on January 1, 2003. The OBD requirement will be converted to a contingency measure in the maintenance plan being developed for the area. This plan will be submitted along with the request for redesignation to attainment for ozone.

In the event that the commission determines that implementation of the OBD program is necessary to maintain attainment of the ozone standard, for example if the El Paso area violates the ozone standard, either before the submittal of the redesignation request and the maintenance plan for El Paso or after redesignation takes place, the commission will publish notification in the *Texas Register* of its determination that the contingency measure will be implemented. The OBD testing will be required to begin 12 months after the notice is published in the *Texas Register*.

The amendments proposed in this rulemaking include the continuation of TSI testing in the El Paso program area; the removal of the requirements for OBD testing; the addition of a contingency measure that the El Paso program area will implement should the commission publish notice in the *Texas Register*; and the deletion of the requirement that all emissions inspection stations offer both TSI and OBD tests until the contingency measured is triggered. In addition, the proposed rule amendment includes a few editorial corrections to conform to *Texas Register* formatting and style requirements.

SECTION DISCUSSION

Section 114.50(a) is proposed to be amended by adding a reference to the location of the I/M program area definition. Section 114.50(a)(1) is proposed to be amended by deleting the requirement that El Paso continue TSI testing through December 31, 2002 because TSI testing is proposed to be continued past the date in the El Paso program area. Section 114.50(a)(5) would be amended by deleting subparagraphs (A), (B), and (C), which pertain to the initiation of OBD testing in the El Paso program area on January 1, 2003, and adding new subparagraphs (A) and (B). New subparagraph (A) will require all vehicles in the El Paso program area to be tested using the TSI test. New subparagraph (B) would be the OBD contingency measure for the El Paso program area that would become effective 12 months after the commission publishes notice in the *Texas Register* of its determination that this contingency measure is necessary in order to maintain attainment of the ozone NAAQS. The contingency measure, if triggered, would require that: all 1996 and newer model year vehicles equipped with OBD systems be tested using EPA-approved OBD test procedures; all pre-1996 model year vehicles be tested using TSI test procedures; and all vehicle emissions inspection stations in the El Paso program area offer both TSI and OBD testing.

The commission proposes an editorial change to §114.50(b)(1)(B) to replace the term "inspection and maintenance" with the acronym "I/M" because the acronym has been used previously in the section. The commission proposes an editorial change to §114.50(b)(2) to replace Federal Clean Air Act with the acronym FCAA because it is defined in 30 TAC Chapter 3, and to clarify that the FCAA is codified in 42 United States Code (USC), §§7401 *et seq*., by adding §§7401 to the citation. In addition, the commission proposes an editorial change to §114.50(b)(7) to add the correct citation to the reference to the Texas Motor Vehicle Commission Code." The correct citation should be "Texas Motor Vehicle Commission Code, Article 4413(36), §1.03. However, the 77th Legislature, 2001, repealed this code and moved the article into the Texas Occupations Code, §2301.002. These changes will be effective June 1, 2003. Finally, the commission proposes an editorial change to §114.50(d)(4) to delete the parentheses around the phrase "(as designated by DPS)" because the phrase is already set off by commas.

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 the agency or any other unit of state or local government due to administration and enforcement of the proposed amendments.

The proposed rulemaking is intended to revise the state's existing vehicle emission testing program in the El Paso program area by making OBD testing a contingency measure of the El Paso ozone SIP in support of the maintenance of the ozone NAAQS. This decision is based on the El Paso ozone nonattainment area having experienced five years with no monitored violations of the ozone standard. The current TSI vehicle emission testing will continue in the El Paso program area unless the ozone standard is violated in the region. If a violation occurs, the proposed amendments would require the agency to implement a contingency measure to require OBD testing of all 1996 and newer vehicles and TSI testing of all pre-1996 vehicles in El Paso within one year after the commission publishes notice of the violation in the *Texas Register*. The proposed rulemaking would also change the requirement, that all vehicle emissions inspection stations in the El Paso program area offer both TSI and OBD tests, into a contingency requirement.

The proposed amendments would affect all units of state and local government, individuals, and businesses that either conduct

vehicle emission testing, or that have vehicles that are required to submit to vehicle emissions tests.

The proposed amendments are not anticipated to result in significant fiscal implications for units of state and local government in the El Paso program area, because the current OBD requirements would not have affected units of government until January 1, 2003. The commission estimates there have been no expenditures by affected units of government to upgrade existing equipment or purchase new equipment in order to incorporate the OBD testing. The deletion of the OBD requirement would eliminate a potential cost of $7,000 to $16,000 for each new or upgraded emission test analyzer.

PUBLIC BENEFITS 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 amendments will be continued environmental protection using existing TSI testing in the El Paso program area, without having to broaden the scope of vehicle emissions testing by incorporating OBD testing.

The proposed rulemaking would modify the state's existing vehicle emission testing program in the El Paso program area by changing the requirement for OBD testing of all 1996 and newer model year vehicles, which was to begin January 1, 2003, into a contingency requirement. The proposed rulemaking would also change the requirement, that all vehicle emissions inspection stations in the El Paso program area offer both TSI and OBD tests, into a contingency requirement.

The proposed amendments are not anticipated to result in significant fiscal implications for individuals and businesses in the El Paso program area, because the current OBD requirements would not have become effective until January 1, 2003. The commission estimates there have been no expenditures by affected individuals and businesses to upgrade existing equipment or purchase new equipment in order to incorporate the OBD testing. The deletion of the OBD requirement would eliminate a potential cost of $7,000 to $16,000 for each new or upgraded emission test analyzer.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal implications to small and micro-businesses as a result of implementing the proposed amendments, which are intended to modify the state's existing vehicle emission testing program in El Paso by changing the requirement for OBD testing of all 1996 and newer model year vehicles, which was to begin January 1, 2003, into a contingency requirement. The proposed rulemaking would also change the requirement, that all vehicle emissions inspection stations in El Paso offer both TSI and OBD tests, into a contingency requirement.

The proposed amendments are not anticipated to result in significant fiscal implications for small and micro-businesses in the El Paso program area, because the current OBD requirements would not have become effective until January 1, 2003. The commission estimates there have been no expenditures by affected small and micro-businesses to upgrade existing equipment or purchase new equipment in order to incorporate the OBD testing. The deletion of the OBD requirement would eliminate a potential cost of $7,000 to $16,000 for each new or upgraded emission test analyzer.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking action and determined that a local employment impact statement is not required because the proposed rule does not adversely affect the 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 action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. "Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendment to Chapter 114 is intended to protect the environment or reduce risks to human health from environmental exposure to ozone. The proposed amendment is intended to change the OBD testing portion of the vehicle emission testing program in El Paso County into a contingency measure as part of the control strategy to maintain the ozone NAAQS in El Paso. While the OBD portion of the I/M program is mandatory for nonattainment counties, it may be a contingency measure for attainment counties. This change would delay or eliminate the need for inspection stations to invest in OBD testing equipment and therefore should provide a positive financial benefit to the regulated community. Additionally, the environment should not be negatively impacted because the contingency measure will be in place to ensure that the El Paso area maintains attainment of the NAAQS. Therefore, the proposed rule does not affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. As defined in Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements. Specifically, the emission testing program within this proposal was developed in order to meet the NAAQS for ozone set by the EPA under 42 USC, §7409, and therefore meets a federal requirement. States are primarily responsible for ensuring attainment and maintenance of NAAQS once EPA has established those standards. Under 42 USC, §7410 and related provisions, states must submit, for EPA approval, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. This proposal is not an express requirement of state law, but was developed specifically in order to maintain the air quality standards established under federal law as NAAQS. This proposal is intended to help the El Paso ozone nonattainment area maintain compliance with the ozone NAAQS without requiring more financial investment than necessary. The proposed amendment does not exceed a standard set by federal law, exceed an express requirement of state law unless specifically required by

federal law, nor exceed a requirement of a delegation agreement. The proposed amendment was not developed solely under the general powers of the agency, but was specifically developed under Texas Health and Safety Code (THSC), §§382.011, 382.012, 382.017, 382.019, 382.037, 382.039, and Subchapter G, §§382.201 - 382.216 to maintain the air quality standards established under federal law as NAAQS. The commission invites public comment on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this rule in accordance with Texas Government Code, §2007.043. The specific purpose of the rulemaking is to implement a revised I/M program in the El Paso ozone nonattainment area as part of the strategy to maintain attainment of the ozone NAAQS. Promulgation and enforcement of the proposed rule will not burden private, real property because this proposed rulemaking action does not require the installation of permanent equipment. This proposed rule amendment should temporarily or permanently reduce the amount of emission testing equipment required at a testing station. Although the proposed rule amendment does not directly prevent a nuisance or prevent an immediate threat to life or property, it does prevent a real and substantial threat to public health and safety and partially fulfill a federal mandate under 42 USC, §7410. Specifically, the emission limitations and control requirements within this proposal were developed in order to maintain the ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS once the EPA has established them. Under 42 USC, §7410 and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of the rule proposal is to implement a revised I/M program which is necessary for the El Paso ozone nonattainment area to maintain the air quality standards established under federal law as NAAQS. Consequently, the exemption which applies to this proposed rule is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, this revision will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has determined that the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq*.), and the commission's rules in 30 TAC Chapter 281, Subchapter B (Consistency with the Texas Coastal Management Program). As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3) relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission has reviewed this proposed action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and has determined that the proposed action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal in 31 TAC §501.12(l) to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. The CMP policy applicable to this rulemaking action is the policy in 31 TAC §501.14(q) that commission rules comply with federal regulations in 40 Code of Federal Regulations to protect and enhance air quality in the coastal area. This rulemaking proposal will not have a detrimental effect on SIP emission reduction obligations relating to maintenance of the ozone NAAQS by continuing the existing TSI testing portion of the I/M program and making the OBD testing requirements a contingency measure. Further, no new air contaminants will be authorized by the rule revisions. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking is consistent with CMP goals and policies.

Interested persons may submit comments on the consistency of the proposed rule with the CMP during the public comment period.

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal on October 16, 2002, at 2:00 p.m. and 7:00 p.m., at the commission's regional office at 401 East Franklin Avenue, 5th floor conference room, Suite 570, El Paso. Hearings are structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearings; however, agency staff members will be available to discuss the proposal 30 minutes prior to the hearings and will answer questions before and after the hearings.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend the hearing, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Joyce Spencer, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2002-068-114-AI. Comments must be received by 5:00 p.m., October 16, 2002, although written comments will be accepted at the 7:00 p.m. hearing in El Paso. For further information, please contact Alan Henderson, Policy and Regulations Division, at (512) 239- 1510 or Hazel Barbour, Technical Analysis Division, (512) 239-1440.

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorizes 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 Texas Clean Air Act (TCAA). The amendment is also proposed 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; §382.019, which provides the commission the authority to adopt rules to control and reduce emissions from engines used to propel land vehicles; §382.037, which provides the commission the authority

by rule to establish, implement, and administer a program requiring emissions-related inspections of motor vehicles to be performed at inspection facilities consistent with the requirements of the FCAA; §382.039, which provides the commission the authority to coordinate with federal, state, and local transportation planning agencies to develop and implement transportation programs and other measures necessary to demonstrate and maintain attainment of NAAQS and to protect the public from exposure to hazardous air contaminants from motor vehicles; and Subchapter G, §§382.201 - 382.216, which provides the commission the authority by rule to establish, implement, and administer a program requiring emissions-related inspections of motor vehicles to be performed at inspection facilities consistent with the requirements of the FCAA.

The proposed amendment implements THSC, §§382.002, 382.011, 382.012, 382.019, 382.037, 382.039, and 382.201 - 382.216.

§114.50. Vehicle Emissions Inspection Requirements.

(a) Applicability. The requirements of this section and those contained in the revised Texas Inspection and Maintenance (I/M) State Implementation Plan (SIP) shall be applied to all gasoline- powered motor vehicles 2-24 years old and subject to an annual emissions inspection, beginning with the first safety inspection. Currently, military tactical vehicles, motorcycles, diesel-powered vehicles, dual-fueled vehicles which cannot operate using gasoline, and antique vehicles registered with the Texas Department of Transportation are excluded from the program. Safety inspection facilities and inspectors certified by the Texas Department of Public Safety (DPS) shall inspect all subject vehicles, in the following program areas, as defined in §114.2 of this title (relating to Inspection and Maintenance (I/M) Definitions), in accordance with the following schedule.

(1) All vehicles registered and primarily operated in Dallas, Tarrant, and Harris Counties shall be tested using a two-speed idle (TSI) test through April 30, 2002. [~~All vehicles registered and primarily operated in El Paso County shall be tested using a TSI test through December 31, 2002.~~]

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

(4) This paragraph applies to all vehicles registered and primarily operated in the Houston/Galveston (HGA) program area.

(A) - (G) (No change.)

(H) If Chambers, Liberty, and Waller Counties and their respective largest municipality submit by May 1, 2002, individually or collectively, a resolution that is approved by the commission and EPA as an alternative air control plan, then subparagraphs (F) and (G) [~~(F) - (G)~~] of this paragraph are not required. The resolution should provide a control plan that will provide modeled reductions of volatile organic compounds and nitrogen oxides equivalent to the reductions that have been modeled for these counties through the implementation of the I/M program. In determining approvability of a plan, the commission will consider federal I/M program requirements.

(5) This paragraph applies to all vehicles registered and primarily operated in the El Paso program area.

(A) All [~~Beginning January 1, 2003, all 1996 and newer model year~~] vehicles [~~equipped with OBD systems~~] shall be tested using a TSI test, except as provided by subparagraph (B) of this paragraph [~~EPA-approved OBD test procedures~~].

(B) In the event that the commission publishes notification in the *Texas Register* of a determination that contingency measures are necessary in order to maintain attainment of the ozone national ambient air quality standard in the El Paso area, the following contingency measures will become effective 12 months after the notice is published.

(i) All 1996 and newer model year vehicles equipped with OBD systems shall be tested using EPA-approved OBD test procedures.

(ii) All pre-1996 model year vehicles shall be tested using a TSI test.

(iii) All vehicle emissions inspection stations in the El Paso program area shall offer both the TSI test and the OBD test.

[~~(B) Beginning January 1, 2003, all pre-1996 vehicles shall be tested using a TSI test.~~]

[~~(C) Beginning January 1, 2003, all vehicle emissions inspection stations in the El Paso program area shall offer both the TSI test and OBD test.~~]

(b) Control requirements.

(1) No person or entity may operate, or allow the operation of, a motor vehicle registered in the DFW, EDFW, HGA, and El Paso program areas which does not comply with:

(A) (No change.)

(B) the vehicle emissions I/M [~~inspection and maintenance~~] requirements contained in this subchapter.

(2) All federal government agencies shall require a motor vehicle operated by any federal government agency employee on any property or facility under the jurisdiction of the agency and located in a program area to comply with all vehicle emissions I/M requirements contained in the revised Texas I/M SIP. Commanding officers or directors of federal facilities shall certify annually to the executive director, or appointed designee, that all subject vehicles have been tested and are in compliance with the FCAA [~~Federal Clean Air Act~~] (42 United States Code, §§7401 *et seq.* [~~et seq.~~]). This requirement shall not apply to visiting agency, employee, or military personnel vehicles as long as such visits do not exceed 60 calendar days per year.

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

(5) A motorist whose vehicle has failed an emissions test and has not requested a challenge retest or has failed a challenge retest must have emissions-related repairs performed and must submit a properly completed vehicle repair form [~~Vehicle Repair Form~~] (VRF) in order to receive a retest. In order to receive a waiver or time extension, the motorist must submit a VRF or applicable documentation as deemed necessary by DPS.

(6) (No change.)

(7) A subject vehicle registered in a county without an I/M program which meets the applicability criteria of subsection (a) of this section and the ownership of which has changed through a retail sale as defined by Texas Motor Vehicle Commission Code, Article 4413(36), §1.03, (moved to Texas Occupations Code, §2301.002, effective June 1, 2003) is not eligible for title receipt or registration in a county with an I/M program unless proof is presented that the vehicle has passed an approved vehicle emissions inspection within 90 days before the title transfer. The evidence of proof required may be in the form of the vehicle inspection report [~~Vehicle Inspection Report~~] (VIR) or another proof of the program compliance as authorized by DPS. All 1996 and newer model year vehicles with less than 50,000 miles are exempt from the test-on-resale requirements of this paragraph.

(8) (No change.)

(c) (No change.)

(d) Prohibitions.

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

(3) No organization, business, person, or other entity may represent itself as an emissions inspector certified by the DPS, unless such certification has been issued under the certification requirements and procedures contained in [~~the~~] Texas Transportation Code, §§548.401 - 548.404.

(4) No person may act as or offer to perform services as a Recognized Emissions Repair Technician of Texas, [~~(~~] as designated by DPS [~~)~~], without first obtaining and maintaining DPS recognition.

This 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 September 13, 2002.

TRD-200205992
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 27, 2002
For further information, please call: (512) 239-5017

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CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION

SUBCHAPTER B. NEW SOURCE REVIEW PERMITS

DIVISION 1. PERMIT APPLICATION

30 TAC §116.112

The Texas Commission on Environmental Quality (commission) proposes an amendment to §116.112. The amended section is proposed to be submitted to the United States Environmental Protection Agency as a revision to the state implementation plan.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The proposed amendment will implement House Bill (HB) 2912, §5.07, 77th Legislature, 2001. HB 2912, §5.07 amended Texas Health and Safety Code (THSC) to add a new §382.065, which requires the commission to restrict the location of or operation of new concrete crushing facilities.

SECTION DISCUSSION

The proposed amendment to §116.112, Distance Limitations, adds a new paragraph (3) to require all equipment and stockpiles associated with a concrete crushing facility to be located or operated at least 440 yards from any building used as a single or multi-family residence, school, or place of worship. The rule is meant to prohibit location or operation. If the crusher is subject to this rule, it cannot be located within 440 yards of a single or multi-family residence, school, or place of worship, regardless of whether the crusher is operating. The distance limitation does not apply to existing concrete crushing facilities. An existing facility is one which was authorized as of September 1, 2001 (the effective date of the legislation), and actually located or operating at the site as of that date. An existing facility does not include a concrete crushing facility authorized as of September 1, 2001, but not located or operating at the site as of that date. On November 2, 2001, the commission requested an opinion from the attorney general concerning the interpretation of the term "existing facility" in THSC, §382.065(b). The opinion (Attorney General Opinion No. JC-0493) states that " an 'existing' facility is a facility actually located at a site on September 1, 2001, and not merely a proposed facility that has not become a tangible entity." The opinion further states that the dictionary definition of "existing" is consistent with the use of "existing" elsewhere in THSC, Chapter 382 . The opinion notes that under THSC, §382.051(a)(1), the commission may issue a permit "to construct a new facility or modify an existing facility. The distinction between construction of a 'new facility' and modification of an 'existing facility' shows that an 'existing facility' is to be contrasted with one that has not yet been built." The rule's definition of "existing" is consistent with the Attorney General Opinion.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for each year of the first five-year period the proposed amendment is in effect, there will be no significant fiscal implications for the agency or any other unit of state or local government due to administration and enforcement of the proposed amendment.

The proposed rulemaking is intended to make changes to the commission's new source review (NSR) rules in order to implement HB 2912, §5.07. The bill requires the agency to restrict the location of or operation of new concrete crushing facilities to at least 440 yards from any building used as a single or multi-family residence, school, or place of worship.

The commission does not anticipate any significant fiscal implications due to the implementation of the proposed amendment, because the location or operation restriction for concrete crushing equipment would only affect new operations authorized after September 1, 2001. Concrete crushing operations existing as of September 1, 2001, would not be affected by the proposed amendment. This proposal only addresses location or operation and would not require installation of additional controls to the new facilities.

PUBLIC BENEFITS AND COSTS

Mr. Davis also determined that for each of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of implementing the proposed amendment will be potentially increased environmental protection through the establishment of a minimum distance between concrete crushers and single or multi-family residences, schools, or places of worship.

The proposed rulemaking is intended to make changes to the commission's NSR rules in order to implement HB 2912, §5.07. The bill requires the agency to restrict the location or operation of new concrete crushing facilities to at least 440 yards from any building used as a single or multi-family residence, school, or place of worship.

The commission does not anticipate any significant fiscal implications due to the implementation of the proposed amendment,

because the location or operation restriction for concrete crushing equipment would only affect new operations authorized after September 1, 2001. Concrete crushing operations existing as of September 1, 2001, would not be affected by the proposed amendment. This proposal only addresses location or operation and would not require installation of additional controls to the new facilities.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses due to implementation of the proposed amendment, which is intended to make changes to the commission's NSR rules in order to implement HB 2912, §5.07. The bill requires the agency to restrict the location or operation of new concrete crushing facilities to at least 440 yards from any building used as a single or multi-family residence, school, or place of worship.

The commission does not anticipate any significant fiscal implications due to the implementation of the proposed amendment, because the location or operation restriction for concrete crushing equipment would only affect new operations authorized after September 1, 2001. Concrete crushing operations existing as of September 1, 2001, would not be affected by the proposed amendment. This proposal only addresses location or operation and would not require installation of additional controls to the new facilities.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rule does not meet the definition of a "major environmental rule." Major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendment would establish a minimum separation distance between concrete crushers and any building used as a single or multi-family residence, school, or place of worship. The proposed rule does not impose any other restriction or control on any facility.

In addition, Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The proposed amendment to §116.112 is not subject to the regulatory analysis provisions of §2001.0225(b), because the proposed rule does not meet any of the four applicability requirements. Specifically, the amended section would implement the requirements of THSC, Texas Clean Air Act (TCAA), §382.065. The commission invites public comment regarding the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for the proposed rule. Promulgation and enforcement of the rule will not burden private real property. The amended section will 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. The amendment to §116.112 is specifically proposed to implement the requirements of TCAA, §382.065. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal is a rulemaking identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and therefore, will require that applicable goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission's preliminary consistency determination for the proposed rule in accordance with 31 TAC §505.22 found that the proposed 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 proposed amendment would establish a minimum separation distance between concrete crushing facilities and any building used as a single or multi-family residence, school, or place of worship. The proposed rulemaking does not authorize any new air emissions and will potentially increase environmental protection through the establishment of a minimum distance between concrete crushers and any building used as a single or multi-family residence, school, or place of worship. Therefore, the rulemaking is consistent with the CMP. The commission invites public comment regarding the consistency of the proposed rule with the CMP.

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 permit to include the revised Chapter 116 requirements for each emission unit affected by the revisions to Chapter 116 at their site.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on October 21, 2002 at 2:00 p.m. in Building F, Room 2210, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes before the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the

hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, MC 205, Texas Commission on Environmental Quality, Office of Environmental Policy, Analysis, and Assessment, P.O. Box 13087, Austin, Texas 78711-3087, or by fax to (512) 239-4808. All comments should reference Rule Log Number 2001- 077-116-AI. Comments must be received by 5:00 p.m., October 28, 2002. Copies of the proposed rules can be obtained from the commission's website at *http://www.tceq.state.tx.us/oprd*. For further information, please contact Clifton Wise, Policy and Regulations Division, (512) 239-2263.

STATUTORY AUTHORITY

The amendment is proposed 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 TWC; TCAA, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; TCAA, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a comprehensive plan for proper control of the state's air; and TCAA, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also proposed under TCAA, §382.065, concerning Certain Locations for Concrete Crushing Facility Prohibited, which requires the commission to prohibit by rule the location of or operation of a new concrete crushing facility within 440 yards of any residence, school, or place of worship.

The amendment implements TWC, §5.103 and TCAA, §§382.011, 382.012, 382.017, and 382.065.

§116.112. Distance Limitations.

The following facilities must satisfy the following distance criteria.

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

(3) Concrete crushing facilities. All equipment and stockpiles associated with a concrete crushing facility must not be located or operated within 440 yards of any building used as a single or multi-family residence, school, or place of worship. This paragraph does not apply to existing concrete crushing facilities, which are those facilities that were authorized and actually located or operating at the site as of September 1, 2001.

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

Filed with the Office of the Secretary of State on September 13, 2002.

TRD-200205979
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 27, 2002
For further information, please call: (512) 239-4712

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CHAPTER 305. CONSOLIDATED PERMITS

The Texas Commission on Environmental Quality (commission) proposes amendments to §§305.2, 305.41 - 305.44, 305.47, 305.49, and 305.50.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The purpose of the proposed rules is to implement House Bill (HB) 2912, Article 5, §5.06, and Article 9, §9.07, 77th Texas Legislature, 2001. HB 2912 amended Texas Health and Safety Code (THSC), §361.082 and Texas Water Code (TWC), §7.031. The commission now has the authority, consistent with federal law, to issue orders for "the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from a solid waste management unit at a solid waste processing, storage, or disposal facility." Until the change made by the 77th Legislature, owners and operators of hazardous waste management facilities could only apply for, and the commission could only issue, post-closure permits. HB 2912 became effective on September 1, 2001.

The commission proposes to amend Chapter 305 to provide streamlined applications specific to post-closure orders and post-closure permits. These proposed amendments would support the commission's efforts to provide greater regulatory flexibility by identifying the specific information required for post-closure applications.

Corresponding amendments are also proposed for 30 TAC Chapter 37, Financial Assurance; 30 TAC Chapter 39, Public Notice; 30 TAC Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; 30 TAC Chapter 80, Contested Case Hearings; and 30 TAC Chapter 335, Industrial Solid Waste and Municipal Hazardous Waste in this issue of the *Texas Register*. The proposed amendment to Chapter 37 would simply add the definition of a post- closure order to that chapter. The proposed amendments to Chapter 39 would add public participation requirements applicable to post-closure orders, during three stages of the post-closure ordering process and when the orders are amended. Chapter 55 would detail how the agency processes public comments. An opportunity for a hearing would also be provided upon request by the executive director, the applicant, and Public Interest Counsel, in accordance with the amendment proposed in Chapter 80. The proposed amendments to Chapter 335 would adopt certain requirements of the October 22, 1998 federal regulations and provide greater flexibility for the commission and the regulated community while at the same time ensuring that environmental risk at such facilities is adequately addressed.

Finally, the proposed rules would allow the commission to issue an order in lieu of a permit for post-closure care of interim status units and give the commission the discretion to approve corrective action requirements as an alternative to closure requirements when certain environmental conditions are met. The proposed rules would be consistent with federal regulations promulgated by the United States Environmental Protection Agency (EPA) in the October 22, 1998 issue of the *Federal Register* (63 FR 56509).

SECTION BY SECTION DISCUSSION

Administrative changes have been made throughout the sections for consistency with other commission rules and *Texas Register* requirements.

Subchapter A - General Provisions

Proposed §305.2, Definitions, includes post-closure orders in the definition of "Application" in paragraph (1). Paragraph (15) is proposed to be deleted because EPA is defined in 30 TAC Chapter 3. The definition of a "Post-closure order" is added as a new paragraph (29).

Subchapter C - Application for Permit

The title of this subchapter is proposed to be amended from Application for Permit to Application for Permit or Post-Closure Order to reference post-closure orders with permits.

Proposed §305.41, Applicability, applies the provisions of Subchapter C to post-closure orders issued under the authority of THSC, §361.082 and TWC, §7.031.

Proposed §305.42, Application Required, requires persons seeking a post-closure order to submit a signed and completed application.

Proposed §305.43, Who Applies, designates the owner/operator as the applicant for post- closure orders. This is the current requirement for permit applications.

Proposed §305.44, Signatories to Applications, designates the same signatories for post- closure orders as are required for permits.

Proposed §305.47, Retention of Application Data, requires that the recipient of a post- closure order keep records of the data and any supplemental information used for the application as is required by a permittee.

Proposed §305.49, Additional Contents of Application for an Injection Well Permit, corrects the cross-reference in subsection (c) from §305.50(4)(B) to §305.50(a)(4)(B). The amended reference would reflect the proposed reorganization of §305.50 into two subsections discussed in this portion of the preamble.

Proposed §305.50, Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit, is reorganized into subsections (a) and (b) and the title is renamed to add "and for a Post-Closure Order" after the word "Permit." Subsection (a) contains the original unaltered requirements for permit applications. New subsection (b) provides the additional requirements specific to post-closure permits and orders. In order to streamline the post-closure application process, the applicant would only need to submit that information from the Resource Conservation Recovery Act (RCRA) Part B permit contained in 40 Code of Federal Regulations (CFR) Chapter 270 that is pertinent to post-closure care. Specifically, 40 CFR §270.28 requires the owner or operator to submit information specified in 40 CFR §270.14(b)(1), (4) - (6), (11), (13), (14), (18), and (19), (c), and (d). This information is required for post-closure permits and post-closure orders. The specific items required in post-closure permit applications are: a general description of the facility; a description of security procedures and equipment; a copy of the general inspection schedule; justification for any request for waiver of preparedness and prevention requirements; facility location information; a copy of the post-closure plan; documentation that required post-closure notices have been filed; the post-closure cost estimate for the facility; proof of financial assurance; a topographic map; information regarding protection of groundwater; and information regarding solid waste management units at the facility. Similar to the permitting process, once a RCRA facility assessment is completed, certain portions of the property could be removed from the permit or the order. The executive director would be allowed to require additional general Part B information from 40 CFR §270.14, as well as information about specific units, from 40 CFR §270.16, concerning tank systems; 40 CFR §270.17, concerning surface impoundments; 40 CFR §270.18, concerning waste piles; 40 CFR §270.20, concerning land treatment facilities; or 40 CFR §270.21, concerning landfills.

Proposed §305.50(b)(1) also requires that closure cost estimates for post-closure order and post-closure permit applications be prepared in a fashion similar to those for a regular permit application, with the exception that the requirements for estimating closure costs for interim status facilities in §335.127 would be added. Like permit applications, post-closure applications would be linked to the financial assurance requirements of 40 CFR §264.142(a)(1), (3), and (4) and Chapter 37, Subchapter P. References to those links are contained in §305.50(b)(2) and (3).

Proposed §305.50(b)(4) requires an applicant for a post-closure order to submit information in order to establish conditions under §305.127(4)(A).

Proposed §305.50(b)(5) allows the executive director to require that a post-closure application also contain the information listed in §305.45(a)(1).

Proposed §305.50(b)(6) requires that engineering plans and specifications submitted as part of an application be prepared and sealed by a registered professional engineer who is currently registered by the Texas Engineering Practices Act.

Proposed §305.50(b)(7) requires that one original and three copies of a post-closure application be submitted on forms provided by, or approved by, the executive director and that they would be accompanied by a like number of originals and copies of all required exhibits.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined that for each year of the first five-year period the proposed amendments are in effect, there will be no significant fiscal implications for the agency or any other unit of state or local government due to administration and enforcement of the proposed amendments. The proposed amendments would affect all units of state and local government with interim status land-based hazardous waste management units that close with waste in place.

The proposed amendments are intended to implement certain provisions of HB 2912, and federal regulations that were promulgated in the October 22, 1998 issue of the *Federal Register* (63 FR 56509). HB 2912 provided the commission with the authority, consistent with federal law, to issue orders for the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from a solid waste management unit at a solid waste processing, storage, or disposal facility. The 1998 federal regulations allow the EPA and authorized states to: 1) issue an enforceable document in lieu of a post-closure permit for interim status units and facilities; and 2) substitute corrective action requirements (alternative standards) for closure requirements for regulated units in cases where there is a release and both a regulated unit and a solid waste management unit or area of concern have contributed to the release. An interim status unit or facility does not have a hazardous waste permit, but has submitted a Part A permit application and is compliant with groundwater monitoring requirements. Currently, the commission's rules only allow the issuance of post-closure permits, not

orders, for post-closure care at hazardous waste management facilities.

The proposed amendments would affect all existing and future applicants who voluntarily seek orders in lieu of hazardous waste permits at interim status land-based units that close with waste in place and facilities that have regulated and nonregulated units with commingled contaminant plumes. Examples of sites affected include a publicly- or privately-owned hazardous waste management facility consisting of hazardous waste processing, storage, or disposal units such as one or more landfills, surface impoundments, land treatment facilities, or a combination of units. The total number of applications for orders cannot be determined at this time.

In order to implement the provisions of HB 2912 and the 1998 federal regulations, the commission is proposing several rulemakings. These proposed amendments update Chapter 305 by reformatting §305.50, updating definitions, and outlining less exhaustive application requirements for post-closure orders and post-closure permits. The amendments do not include requirements that would result in additional fiscal implications for affected units of state and local government. The commission estimates a cost savings for affected units of government, which are not anticipated to be significant, due to less information required in the post-closure applications compared to regular permit applications.

PUBLIC BENEFITS AND COSTS

Mr. Davis has also determined that for each of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of implementing the proposed amendments will be implementation of provisions of HB 2912, and incorporation of rule updates to make commission rules consistent with federal regulations.

The proposed amendments are intended to implement certain provisions of HB 2912, and federal regulations that were promulgated in the October 22, 1998 issue of the *Federal Register* (63 FR 56509). In order to implement the provisions of HB 2912 and the 1998 federal regulations, the commission is proposing several concurrent rule changes or amendments. These proposed amendments update Chapter 305 by reformatting §305.50, updating definitions, and outlining less exhaustive application requirements for post-closure orders and post-closure permits. The amendments do not include requirements that would result in additional fiscal implications for affected individuals and businesses. The commission estimates a cost savings for affected individuals and businesses, which are not anticipated to be significant, due to less information required in the post-closure applications compared to regular permit applications.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses due to implementation of the proposed amendments, which are intended to implement certain provisions of HB 2912, and federal regulations that were promulgated in the October 22, 1998 issue of the *Federal Register* (63 FR 56509). These proposed amendments update Chapter 305 by reformatting §305.50, updating definitions, and outlining less exhaustive application requirements for post-closure orders and post-closure permits. The amendments do not include requirements that would result in additional fiscal implications for affected small and micro-businesses. The commission estimates a cost savings for affected small and micro-businesses, which are not anticipated to be significant, due to less information required in the post-closure applications compared to regular permit applications.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed these proposed amendments and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rules do not meet the definition of a "major environmental rule" as defined in that statute. Major environmental rule means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendments to Chapter 305 are intended to protect the environment or reduce risks to human health from facilities that are required to obtain a post-closure permit, but have failed to do so, by bringing them into compliance through an alternative regulatory mechanism. However, they are 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. The proposed amendments would protect public health and safety by bringing into compliance those facilities that have not obtained a post-closure permit by providing an equally protective alternative. These proposed amendments also allow the agency the discretion to use corrective action requirements, rather than closure requirements, to address regulated units that have released hazardous constituents.

Even if the rules were considered to be a major environmental rule, Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. These proposed rules do not meet any of these four applicability requirements. These proposed rules do not exceed any standard set by federal law for interim status units or facilities, or regulated units with releases of hazardous constituents, and in fact implement a federal regulation authorized by federal law. These proposed rules do not exceed the requirements of state law under THSC, Chapter 361 or TWC, Chapter 7; those chapters specifically allow the type of orders proposed in this rulemaking. 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 specifically on post-closure orders; Texas' authorization, by the EPA, of the RCRA program does relate to post-closure activities, but the activities that would be authorized in accordance with these rules are authorized by EPA RCRA regulations. These rules are not proposed solely under the general powers of the agency, but specifically under THSC, §361.082 and TWC, §7.031, as well as the other general powers of the

agency. The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these proposed amendments in accordance with Texas Government Code, §2007.043. The specific purpose of the proposed amendments is to implement applicable requirements of HB 2912, which amended THSC, §361.082 and TWC, §7.031. The purpose of this rulemaking is to allow the commission to issue orders in lieu of permits for post-closure care at interim status facilities and to give the commission the discretion to approve corrective action requirements as an alternative to closure requirements when certain environmental conditions are met. The proposed amendments substantially advance the stated purpose by incorporating the applicable requirements of HB 2912 and by amending the applicable provisions relating to corrective action requirements.

Promulgation and enforcement of these proposed amendments would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed rules will not burden private real property, nor restrict or limit the owner's right to property, nor reduce its value by 25% or more beyond what would otherwise exist in the absence of these regulations. The proposed rules merely allow the commission to issue an order in place of a permit for post-closure care at interim status facilities. Under existing rules, the facilities affected by these proposed rules are already required to obtain a permit. Thus, the proposed rules provide an option for a new mechanism to provide post- closure care. The proposed rules also allow for corrective action requirements as an alternative to closure requirements. Therefore, this rulemaking will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the proposed rules and found that the rules are identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), or they will affect an action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6), and will therefore, require that applicable goals and policies of the CMP be considered during the rulemaking process.

The commission has prepared a consistency determination for the proposed rules in accordance with 31 TAC §505.22, and has found that the proposed rules are consistent with the applicable CMP goals and policies. The proposed 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. The proposed 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 seeks public comment on the consistency of the proposed rules with the CMP.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Comments must be received by 5:00 p.m., October 28, 2002, and should reference Rule Log Number 2000-048-335-WS. For further information, please contact Michael Bame, Policy and Regulations Division, at (512) 239-5658.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §305.2

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under this code and other laws of this state; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; §7.031, which authorizes the commission to issue an order for the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from a solid waste management unit at a solid waste processing, storage, or disposal facility; Solid Waste Disposal Act, THSC, §361.024, which authorizes the commission to adopt rules consistent with Chapter 361; and THSC, §361.082, which authorizes the commission to issue an order for the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from a solid waste management unit at a solid waste processing, storage, or disposal facility.

The proposed amendment implements TWC, §5.103 and §7.031 and THSC, §361.024 and §361.082.

§305.2. Definitions.

The definitions contained in [~~the~~] Texas Water Code, §§26.001, 27.002, and 28.001, and [~~the~~] Texas Health and Safety Code, §§361.003, 401.003, and 401.004, shall apply to this chapter. The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Application - A formal written request for commission action relative to a permit or a post- closure order, either on commission forms or other approved writing, together with all materials and documents submitted to complete the application.

(2) (No change.)

(3) Class I sludge management facility - Any publicly-owned [~~publicly owned~~] treatment works [~~(POTW)~~] identified under 40 Code of Federal Regulations [~~(CFR),~~] §403.10(a), as being required to have an approved pretreatment program and any other treatment works treating domestic sewage classified as a Class I sludge management facility by the regional administrator in conjunction with the executive director because of the potential for its sludge use or disposal practices to adversely affect public health and the environment.

(4) - (5) (No change.)

(6) Corrective action management unit (CAMU) - An area within a facility that is designated by the commission under 40 Code of Federal Regulations [~~CFR,~~] Part 264, Subpart S, for the purpose of implementing corrective action requirements under §335.167 of this title (relating to Corrective Action for Solid Waste Management Units) and Texas Water Code, §7.031 (relating to Corrective Action Relating to Hazardous Waste). A CAMU shall only be used for the management of remediation wastes while implementing such corrective action requirements at the facility.

(7) - (14) (No change.)

[~~(15) Environmental Protection Agency (EPA) - The United States Environmental Protection Agency.~~]

(15) [~~(16)~~] Facility - Includes:

(A) all contiguous land and fixtures, structures, or appurtenances used for storing, processing, treating, or disposing of waste, or for injection activities. A facility may consist of several storage, processing, treatment, disposal, or injection operational units;

(B) for the purpose of implementing corrective action under §335.167 of this title (relating to Corrective Action for Solid Waste Management Units), all contiguous property under the control of the owner or operator seeking a permit for the storage, processing, and/or disposal of hazardous waste. This definition also applies to facilities implementing corrective action under [~~the~~] Texas Water Code, §7.031 (relating to Corrective Action Relating to Hazardous Waste);

(16) [~~(17)~~] Facility mailing list - The mailing list for a facility maintained by the commission in accordance with 40 Code of Federal Regulations (CFR) [~~CFR,~~] §124.10(c)(1)(ix) and §39.7 of this title (relating to Public Notice). For Class I injection well underground injection control [~~(UIC)~~] permits, the mailing list also includes the agencies described in 40 CFR §124.10(c)(1)(viii).

(17) [~~(18)~~] Functionally equivalent component - A component which performs the same function or measurement and which meets or exceeds the performance specifications of another component.

(18) [~~(19)~~] Indirect discharger - A nondomestic discharger introducing pollutants to a publicly-owned treatment works [~~POTW~~].

(19) [~~(20)~~] Injection well permit - A permit issued in accordance with [~~pursuant to~~] Texas Water Code, Chapter 27.

(20) [~~(21)~~] Land disposal facility - Includes landfills, waste piles, surface impoundments, land farms, and injection wells.

(21) [~~(22)~~] National Pollutant Discharge Elimination System (NPDES) - The national program for issuing, amending, terminating, monitoring, and enforcing permits, and imposing and enforcing pretreatment requirements, under CWA, §§307, 402, 318, and 405. The term includes an approved program.

(22) [~~(23)~~] New discharger -

(A) Any building, structure, facility, or installation:

(i) from which there is or may be a discharge of pollutants;

(ii) that did not commence the discharge of pollutants at a particular site prior to August 13, 1979;

(iii) which is not a new source; and

(iv) which has never received a finally effective National Pollutant Discharge Elimination System [~~NPDES~~] permit for discharges at that site.

(B) This definition includes an indirect discharger which commences discharging into water of the United States after August 13, 1979. It also includes any existing mobile point source (other than an offshore or coastal oil and gas exploratory drilling rig or a coastal oil and gas developmental drilling rig) such as a seafood processing rig, seafood processing vessel, or aggregate plant, that begins discharging at a site for which it does not have a permit.

(23) [~~(24)~~] New source - Any building structure, facility, or installation from which there is or may be a discharge of pollutants, the construction of which commenced:

(A) after promulgation of standards of performance under CWA, §306; or

(B) after proposal of standards of performance in accordance with CWA, §306, which are applicable to such source, but only if the standards are promulgated in accordance with §306 within 120 days of their proposal.

(24) [~~(25)~~] Operator - The person responsible for the overall operation of a facility.

(25) [~~(26)~~] Outfall - The point or location where waterborne waste is discharged from a sewer system, treatment facility, or disposal system into or adjacent to water in this state.

(26) [~~(27)~~] Owner - The person who owns a facility or part of a facility.

(27) [~~(28)~~] Permit - A written document issued by the commission which, by its conditions, may authorize the permittee to construct, install, modify, or operate, in accordance with stated limitations, a specified facility for waste discharge, for solid waste storage, processing, or disposal, for radioactive material disposal, or for underground injection, and includes a wastewater discharge permit, a solid waste permit, a radioactive material disposal license, and an injection well permit.

(28) [~~(29)~~] Person - An individual, corporation, organization, government, governmental subdivision or agency, business trust, estate, partnership, or any other legal entity or association.

(29) Post-closure order - An order issued by the commission for post-closure care of interim status units, or alternative corrective action requirements for contamination commingled from RCRA and solid waste management units, and/or corrective action management units unless authorized in a permit.

(30) Primary industry category - Any industry category listed in 40 Code of Federal Regulations [~~CFR,~~] Part 122, Appendix A, adopted by reference by §305.532(d) of this title (relating to Adoption of Appendices by Reference).

(31) - (32) (No change.)

(33) Publicly-owned [~~Publicly owned~~] treatment works (POTW) - Any device or system used in the treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature which is owned by the state or a municipality. This definition includes sewers, pipes, or other conveyances only if they convey wastewater to a POTW providing treatment.

(34) - (35) (No change.)

(36) Regional administrator - Except when used in conjunction with the words "state director," or when referring to EPA approval of a state program, where there is a reference in the EPA regulations adopted by reference in this chapter to the "regional administrator" or to the "director," the reference is more properly made, for purposes of state law, to the executive director of the Texas Commission on Environmental Quality [~~Texas Natural Resource Conservation Commission~~], or to the Texas Commission on Environmental Quality [~~Texas Natural Resource Conservation Commission~~], consistent with the organization of the agency as set forth in [~~the~~] Texas Water Code, Chapter 5, Subchapter B. When used in conjunction with the words "state director" in such regulations, regional administrator means the regional administrator for the Region VI office of the EPA or his or her authorized representative. A copy of 40 Code of Federal Regulations [~~CFR,~~] Part 122, is available for inspection at the library of the Texas Commission on Environmental Quality [~~Texas Natural Resource Conservation Commission~~], located on the first floor of Building A at 12100 Park 35 Circle, Austin, Texas.

(37) Remediation waste - All solid and hazardous wastes, and all media (including groundwater, surface water, soils, and sediments) and debris, which contain listed hazardous wastes or which themselves exhibit a hazardous waste characteristic, that are managed for the purpose of implementing corrective action requirements under §335.167 of this title (relating to Corrective Action for Solid Waste Management Units) and Texas Water Code, §7.031 (relating to Corrective Action Relating to Hazardous Waste). For a given facility, remediation wastes may originate only from within the facility boundary, but may include waste managed in implementing corrective action for releases beyond the facility boundary under [~~the~~] Texas Water Code, §7.031; [~~,~~] §335.166(5) of this title (relating to Corrective Action Program); [~~,~~] or §335.167(c) of this title.

(38) - (44) (No change.)

(45) Toxic pollutant - Any pollutant listed as toxic under [~~the~~] CWA, §307(a) or, in the case of sludge use or disposal practices, any pollutant identified in regulations implementing CWA, §405(d).

(46) Treatment works treating domestic sewage - A publicly-owned treatment works [~~POTW~~] or any other sewage sludge or wastewater treatment devices or systems, regardless of ownership (including federal facilities), used in the storage, treatment, recycling, and reclamation of sewage or municipal waste, including land dedicated for the disposal of sewage sludge. This definition does not include septic tanks or similar devices.

(47) - (49) (No change.)

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

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Stephanie Bergeron
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SUBCHAPTER C. APPLICATION FOR PERMIT OR POST-CLOSURE ORDER

30 TAC §§305.41 - 305.44, 305.47, 305.49, 305.50

STATUTORY AUTHORITY

The amendments are proposed under TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under this code and other laws of this state; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; §7.031, which authorizes the commission to issue an order for the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from a solid waste management unit at a solid waste processing, storage, or disposal facility; THSC, §361.024, which authorizes the commission to adopt rules consistent with Chapter 361; and THSC, §361.082, which authorizes the commission to issue an order for the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from a solid waste management unit at a solid waste processing, storage, or disposal facility.

The proposed amendments implement TWC, §5.103 and §7.031 and THSC, §361.024 and §361.082.

§305.41. Applicability.

The sections of this subchapter apply to permit applications required to be filed with the commission for authorization under Texas Water Code (TWC), Chapters 26 - 28 [~~26, 27 and 28~~], and Texas Health and Safety Code (THSC), Chapters 361 and 401. The sections of this subchapter also apply to post-closure orders issued under the authority of THSC, §361.082 and TWC, §7.031.

§305.42. Application Required.

(a) Any person who is required to obtain a permit, or who requests an amendment, modification, or renewal of a permit, or who requests a post-closure order, or who is required to obtain a post- closure order shall complete, sign, and submit an application to the executive director, according to the provisions of this chapter.

(b) For applications involving hazardous waste, persons currently authorized to continue hazardous waste management under interim status in compliance with §335.2(c) of this title (relating to Permit Required) and Texas Health and Safety Code (THSC), §361.082(e), shall apply for permits when required by the executive director. Owners or operators shall be allowed at least six months from the date of request to submit a Part B permit application. Owners or operators of existing hazardous waste management facilities may voluntarily submit Part B of the application at any time. However, owners or operators of existing hazardous waste management facilities must submit Part B permit applications in accordance with the dates specified in 40 Code of Federal Regulations (CFR) §270.73. Owners or operators of land disposal facilities in existence on the effective date of statutory or regulatory amendments under THSC [~~Texas Health and Safety Code~~], Chapter 361, or the Resource Conservation and Recovery Act of l976, as amended, 42 United States Code, §§6901 *et seq*., that render the facility subject to the requirement to have a hazardous waste permit must submit a Part B permit application in accordance with the dates specified in 40 CFR [~~Code of Federal Regulations,~~] §270.73 and certify that such a facility is in compliance with all applicable groundwater monitoring and financial responsibility requirements.

(c) (No change.)

(d) For applications involving hazardous waste management facilities for which the owner or operator has submitted Part A of the permit application and has not yet filed Part B, the owner or operator is subject to the requirements for updating the Part A application under 40 CFR [~~Code of Federal Regulations~~] §270.10(g), as amended and adopted in the CFR [~~Code of Federal Regulations~~] through June 29, 1995, as published in the *Federal Register*(60 FR 33911) [~~(see 60 FedReg 33911)~~].

(e) (No change.)

§305.43. Who Applies.

(a) It is the duty of the owner of a facility to submit an application for a permit or a post- closure order; however, if the facility is owned by one person and operated by another and the executive director determines that special circumstances exist where the operator or the operator and the owner should both apply for a permit or a post-closure order, and for all Texas Pollutant Discharge Elimination System [~~pollutant discharge elimination system (TPDES)~~] permits, it is the duty of the operator and the owner to submit an application for a permit.

(b) For solid waste and hazardous waste permit applications, it is the duty of the owner of a facility to submit an application for a permit or a post-closure order, unless a facility is owned by one person and operated by another, in which case it is the duty of the operator to submit an application for a permit or a post-closure order.

§305.44. Signatories to Applications.

(a) All applications shall be signed as follows.

(1) For a corporation, the application shall be signed by a responsible corporate officer. For purposes of this paragraph, a responsible corporate officer means a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation; or the manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding $25 million (in second-quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures. Corporate procedures governing authority to sign permit or post-closure order applications may provide for assignment or delegation to applicable corporate positions rather than to specific individuals.

(2) (No change.)

(3) For a municipality, state, federal, or other public agency, the application shall be signed by either a principal executive officer or a ranking elected official. For purposes of this paragraph, a principal executive officer of a federal agency includes the chief executive officer of the agency, or a senior executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., regional administrator of the EPA [~~United States Environmental Protection Agency~~]).

(b) (No change.)

(c) For a hazardous solid waste permit or a post-closure order, the application must be signed by the owner and operator of the facility [~~applications, the owner and operator of a facility must sign the application~~].

(d) (No change.)

§305.47. Retention of Application Data.

A permittee or a recipient of a post-closure order shall keep records, throughout the term of the permit or order, of data used to complete the final application and any supplemental information.

§305.49. Additional Contents of Application for an Injection Well Permit.

(a) The following shall be included in an application for an injection well permit:

(1) (No change.)

(2) for Class III wells, as defined in Chapter 331 of this title [~~(relating to Underground Injection Control)~~], the information listed in §331.122 of this title (relating to Class III wells);

(3) - (9) (No change.)

(10) any other information reasonably required by the executive director to evaluate the proposed injection well or project, including, but not limited to, the information set forth in [~~the~~] Texas Water Code, §27.051(a).

(b) (No change.)

(c) An application under this section shall comply with the requirements of §305.50(a)(4)(B) [~~§305.50(4)(B)~~] of this title (relating to Additional Requirements for an Application for a Solid Waste Permit and for a Post-Closure Order).

§305.50. Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit and for a Post-Closure Order.

(a) Unless otherwise stated, an application for a permit to store, process, or dispose of solid waste shall meet the following requirements.

(1) - (11) (No change.)

(12) In the case of an application for a permit to store, process, or dispose of hazardous waste at a new commercial hazardous management facility, the application shall also contain the following:

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

(C) evidence sufficient to demonstrate that:

(i) emergency response capabilities are available or will be available before the facility first receives waste, in the area in which the facility is located or proposed to be located, that has the ability to manage a reasonable worst-case emergency condition associated with the operation of the facility; such evidence may include, but is not limited to, the following:

(I) - (VIII) (No change.)

(IX) a mechanism for notifying all applicable government agencies when an incident occurs (i.e., Texas Commission on Environmental Quality [~~Texas Natural Resource Conservation Commission~~], Texas Parks and Wildlife, General Land Office, Texas Department of Health, and Texas Railroad Commission);

(X) - (XI) (No change.)

(ii) (No change.)

(D) - (F) (No change.)

(13) - (14) (No change.)

(b) An application specifically for a post-closure permit or for a post-closure order for post- closure care shall meet the following requirements, as applicable.

(1) An application for a post-closure permit or a post-closure order shall contain information required by 40 CFR §270.14(b)(1), (4) - (6), (11), (13), (14), (18), and (19), (c), and (d), and any additional information that the executive director determines is necessary from 40 CFR §§270.14, 270.16 - 270.18, 270.20, or 270.21, except that closure cost estimates shall be prepared in accordance with 40 CFR §264.142(a)(1), (3), and (4), as well as §§37.131, 37.141, 335.127, and 335.178 of this title.

(2) An application for a post-closure order shall also contain financial information sufficient to demonstrate to the satisfaction of the executive director that the applicant has sufficient financial resources to operate the facility in a safe manner and in compliance with the post-closure order and all applicable rules. Financial information submitted to satisfy this paragraph shall meet the requirements of Chapter 37, Subchapter P of this title.

(3) An application for a post-closure order or for a post-closure permit shall also contain any other information as the executive director may deem necessary to determine whether the facility and the operation thereof will comply with the requirements of the Texas Solid Waste Disposal Act and Chapter 335 of this title including, but not limited to, the information set forth in the Texas Solid Waste Disposal Act, §4(e)(13).

(4) The executive director may require an applicant for a post-closure order to submit information in order to establish conditions under §305.127(4)(A) of this title.

(5) An application for a post-closure order or for a post-closure permit shall also contain the information listed in

§305.45(a)(1) of this title (relating to Contents of Application for Permit).

(6) Engineering plans and specifications submitted as part of an application for a post-closure order or for a post-closure permit shall be prepared and sealed by a registered professional engineer who is currently registered, as required by the Texas Engineering Practices Act.

(7) One original and three copies of an application for a post-closure permit or for a post- closure order shall be submitted on forms provided by, or approved by, the executive director and shall be accompanied by a like number of originals and copies of all required exhibits.

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

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CHAPTER 335. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE

The Texas Commission on Environmental Quality (commission) proposes amendments to §§335.1, 335.2, 335.7, 335.111, 335.112, 335.116, 335.118, 335.119, 335.151, 335.152, 335.156, 335.167, and 335.179.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The purpose of the proposed rules is to implement House Bill (HB) 2912, Article 5, §5.06, and Article 9, §9.07, 77th Legislature, 2001. HB 2912 amended Texas Health and Safety Code (THSC), §361.082 and Texas Water Code (TWC), §7.031. The commission now has the authority, consistent with federal law, to issue orders for "the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from a solid waste management unit at a solid waste processing, storage, or disposal facility." Until the change made by the 77th legislature, owners and operators of hazardous waste management facilities could only apply for, and the commission could only issue, post-closure permits. HB 2912 became effective on September 1, 2001.

In accordance with the 2001 amendments to THSC, §361.082 and TWC, §7.031, and consistent with federal law, the commission proposes to amend Chapter 335 to adopt certain requirements of the United States Environmental Protection Agency (EPA) amendments to 40 Code of Federal Regulations (CFR) Parts 264, 265, 270, and 271 as published in the October 22, 1998 issue of the *Federal Register* (63 FR 56509). The October 22, 1998 federal regulations allow EPA and authorized states to: 1) issue an enforceable document in lieu of a post-closure permit for interim status units or facilities; and 2) substitute corrective action requirements (alternative standards) for closure requirements for regulated units in cases where there is a release and both a regulated unit and a solid waste management unit (SWMU) or area of concern have contributed to the release. An area of concern is any area of a facility under the control or ownership of an owner or operator where a release to the environment of hazardous waste(s) or hazardous constituent(s) has occurred, is suspected to have occurred, or may occur, regardless of the frequency or duration as published in the October 22, 1998 issue of the *Federal Register* (63 FR 56715).

The proposed rules would adopt certain requirements of the October 22, 1998 federal regulations. First, the proposed rules would allow the commission to issue an order or permit for post-closure care for interim status units or facilities. Second, the proposed rules give the commission the discretion to approve corrective action requirements as an alternative to closure requirements when certain environmental conditions are met. The proposed rules also specify the public's involvement during three stages of the ordering process. Corresponding amendments are also proposed for 30 TAC Chapter 37, Financial Assurance; 30 TAC Chapter 39, Public Notice; 30 TAC Chapter 55, Request for Reconsideration and Contested Case Hearings; Public Comment; 30 TAC Chapter 80, Contested Case Hearings; and 30 TAC Chapter 305, Consolidated Permits in this issue of the *Texas Register*.

Prior to the October 22, 1998 federal regulations, EPA and states were required to issue post- closure permits at interim status facilities even where the environmental risks associated with the facility were addressed through other authorities. According to EPA, the regions and states have encountered two major difficulties when issuing post-closure permits at interim status facilities: 1) some facilities could not obtain post-closure permits because they could not comply with 40 CFR Part 265 standards, particularly groundwater monitoring and financial assurance; and 2) owners and operators of closed interim status facilities often had little incentive to seek a post-closure permit. Hoping to address these interim status facilities and to prescribe actions to address the most significant environmental risks, EPA allowed post-closure care requirements to be imposed for interim status units or facilities by either permit or an approved alternate authority in the October 22, 1998 amendments.

The October 22, 1998 federal regulations would impose the following requirements when post- closure care is approved under an alternate authority: 1) the requirements of new 40 CFR §265.121(a)(1), which imposes information requirements that are relevant to closed facilities needing permits only for post-closure care; 2) the requirements of new 40 CFR §265.121(a)(3), which applies 40 CFR Part 264 groundwater standards to the regulated unit; and 3) the requirements of new 40 CFR §265.121(a)(2), which imposes facility-wide corrective action consistent with 40 CFR §264.101.

The 77th Legislature granted the commission the authority, consistent with federal law, to issue orders for the closure, post-closure care, or other remediation of SWMUs. The purpose of this rulemaking is to allow the use of alternate "enforceable documents" to authorize post-closure care and alternative corrective action requirements, consistent with federal law, i.e., the 1998 EPA federal regulations.

In addition to adopting changes made by the 77th Legislature and the October 22, 1998 federal regulations, the proposed rules would allow corrective action management units (CAMUs) authorized under a CAMU order to be eligible for a post-closure

order and allow new CAMUs to be authorized under a post-closure order. CAMUs authorized under a post-closure order must comply with the requirements of §335.167.

A CAMU is defined as an area within a facility that is designated by the commission under 40 CFR Part 264, Subpart S, for the purpose of implementing corrective action requirements under §335.167 and TWC, §7.031 (Corrective Action related to Hazardous Waste). A CAMU may only be used for the management of remediation wastes in accordance with implementing such corrective action requirements at the facility.

Authorization of post-closure activities under a post-closure order would be restricted to interim status land-based units at permitted and non-permitted (interim status) facilities. A facility is in interim status if its owners or operators have submitted their Part A hazardous waste permit application and remain compliant with the standards outlined in Chapter 335, Subchapter E.

Authorization to substitute corrective action requirements for closure requirements under a post- closure order would occur at the agency's discretion when releases from regulated units are commingled with releases from SWMUs or areas of concern. The alternative corrective action requirements would have to be protective of human health and the environment in accordance with the corrective action requirements outlined in §335.167 for SWMUs. Currently, the Resource Conservation Recovery Act (RCRA) provides for only two methods of closure: remove and/or decontaminate the waste; or leave the waste in place. If waste is left in place, then a final cover and post-closure care with groundwater monitoring and maintenance are required. Corrective action alternatives, however, provide greater flexibility with more varied technologies than existing closure requirements while still protecting human health and the environment. The Texas Risk Reduction Program provided in 30 TAC Chapter 350 or, in cases where applicable, the commission's risk reduction rules provided in Chapter 335, Subchapter S provide written criteria to define what is protective of human health and the environment. These alternatives would be available for a post- closure order or a permit.

In addition to relieving the facility from having to comply with two closure standards at the same remediation site, the alternative requirements would simplify response actions and reduce costs while still focusing on environmental results. Use of the alternative corrective action requirements would have to be set out in a permit and/or a post-closure order.

Post-closure activities for permitted units and SWMUs that are identified in a permit for corrective action would not be eligible for post-closure orders unless they have contaminant plumes that are commingled. Post-closure activities at these permitted sites would be authorized under a post- closure permit rather than an order. Like post-closure permits, post-closure orders would be required to address facility-wide corrective action and implement the more comprehensive groundwater monitoring requirements established for permitted facilities under Chapter 335, Subchapter F. This would ensure that post-closure orders meet the same substantive technical requirements as those implemented under post-closure permits. However, if a post-closure order is issued to authorize alternative corrective action requirements for commingled contaminant plumes at a permitted facility, then the permit would simply reference the post-closure order, which contains the alternate corrective action requirements.

Facility-wide corrective action provisions require that the owner or operator institute corrective action for all releases of hazardous waste or constituents regardless of whether the release occurred from a regulated hazardous waste management unit or an SWMU. Groundwater monitoring systems for permitted units outlined in §§335.156 - 335.166 are typically more extensive and better able to immediately detect releases than those required for interim status facilities outlined in §335.116 and 40 CFR §§265.90 - 265.94. In accordance with 40 CFR §265.92, interim status groundwater monitoring is limited to a set of indicator parameters that are sampled at a prescribed frequency. Under post-closure orders, the facility would have to upgrade to a groundwater monitoring program prescribed for permitted units that evaluates site-specific constituents at a sampling frequency that is more responsive to site conditions. Groundwater monitoring programs for permitted facilities also stipulate response actions should a release be detected.

The proposed amendment to Chapter 37 would entail the minor addition of a post-closure order definition. The proposed amendments to Chapter 39 would add public participation requirements applicable to post-closure orders, including public notice, and an opportunity to comment on at least three occasions: 1) when the agency declares an application for a post-closure order administratively complete; 2) prior to final approval of the proposed post-closure order; and 3) at the time of a proposed decision that remedial action is complete. The proposed amendment to Chapter 55 would specify how the executive director would prepare responses to public comments. An opportunity for a hearing would also be provided upon request by the executive director, the applicant, and the Public Interest Counsel, in accordance with the amendment proposed in Chapter 80. Like enforcement orders issued by the commission, affected persons would not be able to request a hearing. Consistent with the October 22, 1998 federal regulations, the proposed amendments to §305.50 are intended to streamline the application process for post-closure orders and post-closure permits. The financial assurance requirements for post-closure orders would be the same as for post-closure permits.

Post-closure orders would contain many of the components already in commission orders, including, but not limited to, jurisdiction, parties, statement of purpose, legal description of the facility, findings of fact, conclusions of law, technical requirements, dispute resolution, procedures for modifications and deadline extensions, order termination and renewal, commission remedies for noncompliance, reservation of rights, force majeure, statement of severability, and the effective date. In addition, while applicants may voluntarily apply for post-closure orders, nothing in this proposed rulemaking limits the commission's existing authority to issue an enforcement order containing post- closure technical requirements under the commission's authority in TWC, Chapter 7. However, the commission wishes to make a clear distinction between enforcement orders dealing with noncompliant operations and post-closure orders designed to authorize the post-closure care of hazardous waste management facilities. If a facility's noncompliance with post-closure requirements is an issue, then the commission intends that the noncompliance be corrected under an enforcement order, which in turn would require the owner or operator to apply for and receive a post-closure order or permit. As such, the receipt of a post-closure order should not adversely impact a facility's compliance history.

The commission is not proposing to limit the authority of the commission to impose a post- closure order on a facility.

SECTION BY SECTION DISCUSSION

Administrative changes have been made throughout the sections for consistency with other commission rules and *Texas Register* requirements.

Subchapter A - Industrial Solid Waste and Municipal Hazardous Waste Management in General

Proposed §335.1, Definitions, adds the definition of "Post-closure order" in new paragraph (110). A post-closure order is an order issued by the commission for post-closure care of interim status unit; and/or alternative corrective action requirements for contamination commingled from RCRA and solid waste management units; and/or and corrective action management units unless authorized in a permit. Subsequent paragraphs would be renumbered to accommodate the new definition.

Proposed §335.2, Permit Required, allows the owners or operators the option of closure by decontamination in subsection (i), in addition to the closure by removal already provided in the rule. This new language would make this subsection consistent with the corresponding federal regulations in 40 CFR §270.1(c). Subsection (i) is also proposed to be amended to relieve owners or operators from obtaining a post-closure permit if they have already obtained a post-closure order.

Proposed new §335.2(m) is added so that an owner or operator may, at the discretion of the commission, obtain an order in lieu of a post-closure permit. The option to obtain a post-closure order would apply only to interim status units at hazardous waste management facilities, CAMUs not authorized under a permit and regulated units and SWMUs whose contaminant plumes are commingled. For post-closure issues, waste management units already addressed in a permit would remain under the permit and not transferred to orders. The order would have to address the facility- wide corrective action requirements of §335.167 and the groundwater monitoring requirements of §335.156.The alternative groundwater monitoring requirements would have to be set out in the order.

Proposed §335.7, Financial Assurance Required, extends the requirement for financial assurance provided in Chapter 37, Subchapter P, to post-closure orders.

Subchapter E - Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities

Proposed §335.111, Purpose, Scope, and Applicability, adds new subsection (d) to identify specific requirements applicable to owners and operators who obtain a post-closure order in lieu of a post-closure permit. These requirements would include the submittal of the streamlined application outlined in §305.50(b), implementation of facility-wide corrective action in accordance with §335.167, compliance with groundwater monitoring programs described in §§335.156 - 335.166, and adherence to the financial assurance requirements of Chapter 37, Subchapter P. The submittal of the application would be addressed in new subsection (d)(1). The requirement for facility- wide corrective action would be referred to in new subsection (d)(2). Compliance with groundwater monitoring requirements would be contained in new subsection (d)(3). Financial assurance requirements would be referred to in new subsection (d)(4).

New §335.111(e) proposes that the commission be given the discretion to substitute corrective action requirements for closure and post-closure requirements when releases from a regulated hazardous waste management unit are commingled with releases from SWMUs or areas of concern. The closure requirements for interim status facilities are adopted from 40 CFR Subpart G, except for the closure requirements of land treatment units provided in §335.123. The alternative corrective action requirements would have to be protective of human health and the environment and meet the corrective action requirements outlined in §335.167 for SWMUs. The Texas Risk Reduction Program provided in Chapter 350 or, in cases where applicable, the commission's risk reduction rules provided in Chapter 335, Subchapter S, provide written criteria to define what is protective of human health and the environment.

Proposed §335.112, Standards, updates references in subsection (a)(5) and (6) to the more recent amendments to 40 CFR Part 265 as published in the October 22, 1998 issue of the *Federal Register* (63 FR 56609).

Proposed §335.116, Applicability of Groundwater Monitoring Requirements, adds a reference to new subsection (g). Proposed new subsection (g) would allow the use of alternative groundwater monitoring requirements at regulated units when groundwater contaminant plumes from these units are commingled with contamination from an SWMU or area of concern. The alternative groundwater monitoring requirements would have to be protective of human health and the environment and meet the corrective action requirements for SWMUs outlined in §335.167 and §335.8.

Proposed §335.118, Closure Plan; Submission and Approval of Plan, clarifies that post- closure plans submitted in a post-closure order application would follow the public notice and comment requirements of Chapter 39, Subchapter N, Public Notice of Post-Closure Orders, rather than the requirements of this section. More specifically, an exception would be added to subsection (b) that directs the reader to new subsection (c) and the public notice and comment requirements specified in Chapter 39, Subchapter N.

Section 335.119, Post-Closure Plan; Submission and Approved of Plan, clarifies that post-closure plans submitted in a post-closure order application follow the public notice and comment requirements of Chapter 39, Subchapter N, rather than the requirements of this section. These amendments would include an exception in subsection (b) that directs the reader to new subsection (c) and the public notice and comment requirements specified in Chapter 39, Subchapter N. The title of this section would also be amended to correct a typographical error.

Subchapter F - Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities

Proposed §335.151, Purpose, Scope, and Applicability, adds new subsections (d) - (f). New subsection (d) would clarify that references made to permits in Subchapter F also apply to post-closure orders. New subsection (e) is proposed to allow facilities the use of alternative corrective action requirements when releases from regulated units are commingled with SWMUs or areas of concern. New subsection (f) would require that a facility's permit reference any alternative groundwater monitoring and corrective action requirements that may be set out in an order.

The alternative requirements would have to be protective of human health and the environment. The intention would be to relieve the facility from having to comply with two sets of requirements in areas where releases from regulated units are commingled with SWMUs or areas of concern. It would not be the intention of the agency to cancel or revoke a permit in favor of

a post-closure order. If a facility has a permit, the alternative corrective action requirements could be addressed in the post-closure order which would be referenced in the permit. The commission recognizes that once a RCRA facility assessment has been completed, portions of a facility could be carved out of the permit or order.

Proposed §335.152, Standards, updates references in subsection (a)(5) to the more recent amendments to 40 CFR Part 264 as published in the October 22, 1998 issue of the *Federal Register* (63 FR 56709). The amendments to 40 CFR Part 264, Subpart G, include the corrective action alternatives to closure requirements.

Proposed §335.156, Applicability of Groundwater Monitoring and Response, adds new subsection (a)(3) and (4). Proposed new subsection (a)(3) would give the commission the discretion to replace the language specified in §§335.157 - 335.166 with alternative requirements when releases from regulated units are commingled with releases from SWMUs. The alternative groundwater monitoring requirements would have to be memorialized in a permit or post-closure order and must be protective of human health and the environment.

Corresponding amendments to subsection (a)(1) and (2) would reference the alternative requirements in subsection (a)(3) and identify the alternative groundwater monitoring requirements as an exception to the monitoring requirements specified in subsection (a)(2).

Proposed new subsection (a)(4) requires that a facility's permit reference any alternative groundwater monitoring and corrective action requirements that may be set out in an order.

Proposed §335.167, Corrective Action for Solid Waste Management Units, specifies that a facility-wide corrective action would also be required for facilities under a post-closure order. The requirement to conduct facility-wide corrective action under post-closure orders would be inserted in new proposed subsection (c). Existing subsection (c) would be relettered to subsection (d).

Proposed §335.179, Financial Assurance, references post-closure orders. The added reference would subject facilities under post-closure orders to the same financial assurance requirements as permitted facilities.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined that for each year of the first five-year period the proposed rules are in effect, there will be no significant additional costs for the agency or any other unit of state or local government due to administration and enforcement of the proposed rules. Units of government affected by the proposed rules that are authorized to close hazardous waste management units via closure orders and corrective action may experience cost savings, which would vary greatly depending on the type of facility closed. The cost savings would be due to a likely decrease in the number of contested case hearings on applications to close certain hazardous waste management units, and because no fees would be collected for closure orders.

The proposed rules are intended to implement certain provisions of HB 2912 and federal regulations that were promulgated in the October 22, 1998 issue of the *Federal Register* (63 FR 56509). HB 2912 provided the commission with the authority, consistent with federal law, to issue orders for the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from an SWMU at a solid waste processing, storage, or disposal facility. The 1998 federal regulations allow the EPA and authorized states to: 1) issue an enforceable document in lieu of a post-closure permit for interim status units and facilities; and 2) substitute corrective action requirements (alternative standards) for closure requirements for regulated units in cases where there is a release and both a regulated unit and an SWMU or area of concern have contributed to the release. An interim status unit or facility does not have a hazardous waste permit, but has submitted a Part A permit application and is compliant with groundwater monitoring requirements. Currently, the commission's rules only allow the issuance of post-closure permits, not orders, for post-closure care at hazardous waste management facilities.

In order to implement the provisions of HB 2912 and the 1998 federal regulations, the commission is proposing several concurrent rule changes. These proposed rules would update Chapter 335 by providing the commission the flexibility to use post-closure orders as an alternative to post- closure permits. Additionally, the proposed rules would allow the commission to use alternative corrective action requirements when environmental releases from regulated hazardous waste management units are mixed with SWMUs.

The proposed rules allowing applicants to voluntarily seek orders in lieu of permits would affect all interim status land-based units that close with waste in place. The voluntary provisions regarding corrective action would apply to land-based regulated and SWMUs, at permitted and non-permitted interim status hazardous waste management facilities, that meet certain conditions of these rules. Examples of sites affected include a publicly- or privately-owned hazardous waste management facility consisting of hazardous waste processing, storage, or disposal units, such as one or more landfills, surface impoundments, land treatment facilities, or a combination of units. The total number of applications for orders and corrective action cannot be determined at this time. There are an estimated 28 facilities affected by the proposed rules, some of which may be owned and operated by units of government. Additional facilities may be affected by the proposed rules if and when they choose to implement alternative corrective action requirements for commingled contaminant plumes under an order.

The commission anticipates there may be cost savings due to a likely decrease in the number of contested case hearings, and the lack of a fee for closure orders. The proposed rules are voluntary in nature and are intended to provide regulated entities with post-closure regulatory alternatives. Both actions (applying for an order in lieu of a permit, and utilizing corrective action instead of RCRA closure requirements) require applicants to achieve equivalent levels of environmental protection compared to existing procedures. No additional environmental controls are required by this rulemaking beyond what is already required by existing regulations. The proposed rules would still require three separate public notice sessions during the application of a post-closure order; however, there would be no provision allowing the public to request a contested case hearing on the application as is currently allowed under existing post-closure permit rules. This change will likely result in cost savings, which cannot be estimated at this time, for the agency and other affected units of state and local government. It is unknown how many future applications for orders from units of state or local government would have lead to requests for contested case hearings under existing regulations. Based on commission data, the costs for contested case hearings vary greatly, but can exceed $100,000.

Currently, applicants are required to pay a post-closure permit fee. The minimum fee is $2,000 per facility, plus an additional $100 per acre covered by the facility, and an additional $500 per individual unit on the site. Assuming a site operates on one acre with one affected hazardous waste management unit, the total cost savings per site, due to a lack of a permit fee, would be approximately $2,600.

PUBLIC BENEFITS AND COSTS

Mr. Davis has also determined that for each of the first five years the proposed rules are in effect, the public benefit anticipated as a result of implementing the proposed rules will be potentially increased environmental protection through the closing and regulation of additional hazardous waste management units.

The proposed rules are intended to implement certain provisions of HB 2912 and federal regulations that were promulgated in the October 22, 1998 issue of the *Federal Register* (63 FR 56509). These proposed rules would update Chapter 335 by providing the commission the flexibility to use post-closure orders as an alternative to post-closure permits. Additionally, the proposed rules would allow the commission to use alternative corrective action requirements when environmental releases from regulated hazardous waste management units are mixed with SWMUs.

The commission anticipates there will be cost savings to affected individuals and businesses, due to fewer contested case hearings and the lack of a fee for closure orders. There are at least 28 facilities currently eligible for post-closure orders, the majority of which are owned and operated by larger industrial businesses. It is unknown how many of these facilities will require post-closure care or implement alternate corrective action requirements and will choose to conduct such activities under a post-closure order in lieu of a post-closure permit. Additionally, it is unknown how many current or future applications for orders would have resulted in requests for contested case hearings under existing regulations. Based on commission data, the costs for contested case hearings vary greatly, but can exceed $100,000.

Currently, applicants are required to pay a post-closure permit fee. The minimum fee is $2,000 per facility, plus an additional $100 per acre covered by the facility, and an additional $500 per individual unit on the site. Assuming a site operates on one acre with one affected hazardous waste management unit, the total cost savings per site, due to a lack of a permit fee, would be approximately $2,600.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses due to implementation of the proposed rules, which are intended to implement certain provisions of HB 2912 and federal regulations that were promulgated in the October 22, 1998 issue of the *Federal Register* (63 FR 56509). These proposed rules would update Chapter 335 by providing the commission the flexibility to use post-closure orders as an alternative to post-closure permits. Additionally, the proposed rules would allow the commission to use alternative corrective action requirements when environmental releases from regulated hazardous waste management units are mixed with SWMUs.

The commission anticipates there will be cost savings to affected small and micro-businesses due to fewer contested case hearings and the lack of a fee for closure orders. There are at least 28 facilities currently eligible for post-closure orders, some of which may be owned and operated by small or micro-businesses. It is unknown how many future applications for orders from small or micro- businesses would have lead to requests for contested case hearings under existing regulations. Based on commission data, the costs for contested case hearings vary greatly, but can exceed $100,000.

Currently, applicants are required to pay a post-closure permit fee. The minimum fee is $2,000 per facility, plus an additional $100 per acre covered by the facility, and an additional $500 per individual unit on the site. Assuming a site operates on one acre with one affected hazardous waste management unit, the total cost savings per site, due to a lack of a permit fee, would be approximately $2,600.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed these proposed rules and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rules do not meet the definition of a "major environmental rule" as defined in that statute. Major environmental rule means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed rules are intended to protect the environment or reduce risks to human health from facilities that are required to obtain a post-closure permit, but have failed to do so, by bringing them into compliance through an alternative regulatory mechanism. However, they are 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. The proposed rules would protect public health and safety by bringing into compliance those facilities that have not obtained a post-closure permit by providing an equally protective alternative. The proposed rules also allow the agency the discretion to use corrective action requirements, rather than closure requirements, to address regulated units that have released hazardous constituents.

Even if the rules were considered to be a major environmental rule, Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. These proposed rules do not meet any of these four applicability requirements. These proposed rules do not exceed any standard set by federal law for interim status units or facilities, or regulated units with releases of hazardous constituents, and in fact implement a federal regulation authorized by federal law. These proposed rules do not exceed the requirements of state law under THSC, Chapter 361

or TWC, Chapter 7; those chapters specifically allow the type of orders proposed in this rulemaking. 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 specifically on post-closure orders; Texas' authorization, by the EPA, of the RCRA program does relate to post-closure activities, but the activities that would be authorized in accordance with these rules are authorized by EPA RCRA regulations. These rules are not proposed solely under the general powers of the agency, but specifically under THSC, §361.082 and TWC, §7.031, as well as the other general powers of the agency. The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these proposed rules in accordance with Texas Government Code, §2007.043. The specific purpose of the proposed rules is to implement applicable requirements of HB 2912, which amended THSC, §361.082 and TWC, §7.031. The purpose of these proposed rules is to allow the commission to issue orders in lieu of permits for post-closure care at interim status facilities and to give the commission the discretion to approve corrective action requirements as an alternative to closure requirements when certain environmental conditions are met. The proposed rules substantially advance the stated purpose by incorporating the applicable requirements of HB 2912 and by amending the applicable provisions relating to corrective action requirements.

Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed rules will not burden private real property, nor restrict or limit the owner's right to property, nor reduce its value by 25% or more beyond what would otherwise exist in the absence of these regulations. The rules merely allow the commission to issue an order in place of a permit for post-closure care at interim status facilities. Under existing rules, the facilities affected by this rulemaking are already required to obtain a permit. Thus, the proposed rules provide an option for a new mechanism to provide post-closure care. The proposed rules also allow for corrective action requirements as an alternative to closure requirements. Therefore, these proposed rules will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the proposed rules and found that the rules are identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), or will affect an action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6), and will therefore, require that applicable goals and policies of the CMP be considered during the rulemaking process.

The commission has prepared a consistency determination for the proposed rules in accordance with 31 TAC §505.22, and has found that the proposed rules are consistent with the applicable CMP goals and policies. The proposed 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. The proposed 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 seeks public comment on the consistency of the proposed rules with the CMP.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Comments must be received by 5:00 p.m., October 28, 2002, and should reference Rule Log Number 2000-048-335-WS. For further information, please contact Michael Bame, Policy and Regulations Division, at (512) 239-5658.

SUBCHAPTER A. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE IN GENERAL

30 TAC §§335.1, 335.2, 335.7

STATUTORY AUTHORITY

The amendments are proposed under TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under this code and other laws of this state; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; §7.031, which authorizes the commission to issue an order for the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from an SWMU at a solid waste processing, storage, or disposal facility; Solid Waste Disposal Act, THSC, §361.024, which authorizes the commission to adopt rules consistent with Chapter 361; and THSC, §361.082, which authorizes the commission to issue an order for the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from an SWMU at a solid waste processing, storage, or disposal facility.

The proposed amendments implement TWC, §5.103 and §7.031 and THSC, §361.024 and §361.082.

§335.1. Definitions.

In addition to the terms defined in Chapter 3 of this title (relating to Definitions), the [~~The~~] following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly requires otherwise.

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

(5) Activities associated with the exploration, development, and protection of oil or gas or geothermal resources--Activities associated with:

(A) - (C) (No change.)

(D) the discharge, storage, handling, transportation, reclamation, or disposal of waste or any other substance or material associated with any activity listed in subparagraphs (A) - (C) of this paragraph, except for waste generated in connection with activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants if that waste is a hazardous waste as defined by the administrator of the EPA in accordance with [~~United States Environmental Protection Agency (EPA) pursuant to~~] the Federal Solid Waste Disposal Act, as amended (42 United States Code, §§6901 *et seq*.).

(6) Administrator -- The administrator of the EPA [~~United States Environmental Protection Agency~~] or his designee.

(7) - (8) (No change.)

(9) Area of concern -- Any area of a facility under the control or ownership of an owner or operator where a release to the environment of hazardous wastes or hazardous constituents has occurred, is suspected to have occurred, or may occur, regardless of the frequency or duration.

(10) [~~(9)~~] Authorized representative -- The person responsible for the overall operation of a facility or an operation unit (i.e., part of a facility), e.g., the plant manager, superintendent, or person of equivalent responsibility.

(11) [~~(10)~~] Battery -- Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(12) [~~(11)~~] Boiler -- An enclosed device using controlled flame combustion and having the following characteristics:

(A) the unit must have physical provisions for recovering and exporting thermal energy in the form of steam, heated fluids, or heated gases;

(B) the unit's combustion chamber and primary energy recovery section(s) must be of integral design. To be of integral design, the combustion chamber and the primary energy recovery section(s) (such as waterwalls and superheaters) must be physically formed into one manufactured or assembled unit. A unit in which the combustion chamber and the primary energy recovery section(s) are joined only by ducts or connections carrying flue gas is not integrally designed; however, secondary energy recovery equipment (such as economizers or air preheaters) need not be physically formed into the same unit as the combustion chamber and the primary energy recovery section. The following units are not precluded from being boilers solely because they are not of integral design:

(i) process heaters (units that transfer energy directly to a process stream), and

(ii) fluidized bed combustion units; [~~and~~]

(C) while in operation, the unit must maintain a thermal energy recovery efficiency of at least 60%, calculated in terms of the recovered energy compared with the thermal value of the fuel; and

(D) the unit must export and utilize at least 75% of the recovered energy, calculated on an annual basis. In this calculation, no credit shall be given for recovered heat used internally in the same unit. (Examples of internal use are the preheating of fuel or combustion air, and the driving of induced or forced draft fans or feedwater pumps); or

(E) the unit is one which the executive director has determined, on a case-by-case basis, to be a boiler, after considering the standards in §335.20 of this title (relating to Variance to be Classified as a Boiler).

(13) [~~(12)~~] Carbon regeneration unit -- Any enclosed thermal treatment device used to regenerate spent activated carbon.

(14) [~~(13)~~] Certification -- A statement of professional opinion based upon knowledge and belief.

(15) [~~(14)~~] Class 1 wastes -- Any industrial solid waste or mixture of industrial solid wastes which because of its concentration, or physical or chemical characteristics, is toxic, corrosive, flammable, a strong sensitizer or irritant, a generator of sudden pressure by decomposition, heat, or other means, or may pose a substantial present or potential danger to human health or the environment when improperly processed, stored, transported, or disposed of or otherwise managed, as further defined in §335.505 of this title (relating to Class 1 Waste Determination).

(16) [~~(15)~~] Class 2 wastes -- Any individual solid waste or combination of industrial solid waste which cannot be described as Hazardous, Class 1 or Class 3 as defined in §335.506 of this title (relating to Class 2 Waste Determination).

(17) [~~(16)~~] Class 3 wastes -- Inert and essentially insoluble industrial solid waste, usually including, but not limited to, materials such as rock, brick, glass, dirt, and certain plastics and rubber, etc., that are not readily decomposable, as further defined in §335.507 of this title (relating to Class 3 Waste Determination).

(18) [~~(17)~~] Closed portion -- That portion of a facility which an owner or operator has closed in accordance with the approved facility closure plan and all applicable closure requirements. (See also "active portion" and "inactive portion.")

(19) [~~(18)~~] Closure -- The act of permanently taking a waste management unit or facility out of service.

(20) [~~(19)~~] 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 or a facility that accepts waste only from other facilities owned or effectively controlled by the same person, where "captured facility" means a manufacturing or production facility that generates an industrial solid waste or hazardous waste that is routinely stored, processed, or disposed of on a shared basis in an integrated waste management unit owned, operated by, and located within a contiguous manufacturing complex.

(21) [~~(20)~~] Component -- Either the tank or ancillary equipment of a tank system.

(22) [~~(21)~~] Confined aquifer -- An aquifer bounded above and below by impermeable beds or by beds of distinctly lower permeability than that of the aquifer itself; an aquifer containing confined groundwater.

(23) [~~(22)~~] Consignee -- The ultimate treatment, storage, or disposal facility in a receiving country to which the hazardous waste will be sent.

(24) [~~(23)~~] Container -- Any portable device in which a material is stored, transported, processed, or disposed of, or otherwise handled.

(25) [~~(24)~~] Containment building -- A hazardous waste management unit that is used to store or treat hazardous waste under the provisions of §335.152(a)(19) or §335.112(a)(21) of this title (relating to Standards).

(26) [~~(25)~~] Contaminant -- Includes, but is not limited to, "solid waste," "hazardous waste," and "hazardous waste constituent" as defined in this subchapter, "pollutant" as defined in [~~the~~] Texas Water Code (TWC), §26.001, and Texas Health and Safety Code (THSC), §361.431, "hazardous substance" as defined in THSC [~~the Texas Health and Safety Code~~], §361.003, and other substances that are subject to the Texas Hazardous Substances Spill Prevention and Control Act, TWC [~~Texas Water Code~~], §§26.261 - 26.268.

(27) [~~(26)~~] Contaminated medium/media -- A portion or portions of the physical environment to include soil, sediment, surface water, ground water or air, that contain contaminants at levels that pose a substantial present or future threat to human health and the environment.

(28) [~~(27)~~] Contingency plan -- A document setting out an organized, planned, and coordinated course of action to be followed in case of a fire, explosion, or release of hazardous waste or hazardous

waste constituents which could threaten human health or the environment.

(29) [~~(28)~~] Control -- To apply engineering measures such as capping or reversible treatment methods and/or institutional measures such as deed restrictions to facilities or areas with wastes or contaminated media which result in remedies that are protective of human health and the environment when combined with appropriate maintenance, monitoring, and any necessary further corrective action.

(30) [~~(29)~~] Corrective action management unit (CAMU) -- An area within a facility that is designated by the commission under 40 Code of Federal Regulations [~~(CFR)~~] Part 264, Subpart S, for the purpose of implementing corrective action requirements under §335.167 of this title (relating to Corrective Action for Solid Waste Management Units) and [~~the~~] Texas Water Code, §7.031 (Corrective Action related to Hazardous Waste). A CAMU shall only be used for the management of remediation wastes in accordance with [~~pursuant to~~] implementing such corrective action requirements at the facility.

(31) [~~(30)~~] Corrosion expert -- A person who, by reason of his knowledge of the physical sciences and the principles of engineering and mathematics, acquired by a professional education and related practical experience, is qualified to engage in the practice of corrosion control on buried or submerged metal piping systems and metal tanks. Such a person must be certified as being qualified by the National Association of Corrosion Engineers [~~(NACE)~~] or be a registered professional engineer who has certification or licensing that includes education and experience in corrosion control on buried or submerged metal piping systems and metal tanks.

(32) [~~(31)~~] Decontaminate -- To apply a treatment process(es) to wastes or contaminated media whereby the substantial present or future threat to human health and the environment is eliminated.

(33) [~~(32)~~] Designated facility -- A Class 1 or hazardous waste storage, processing, or disposal facility which has received an EPA permit (or a facility with interim status) in accordance with the requirements of 40 Code of Federal Regulations (CFR) [~~CFR~~] Parts 270 and 124; a permit from a state authorized in accordance with 40 CFR Part 271 (in the case of hazardous waste); a permit issued pursuant to §335.2 of this title (relating to Permit Required) (in the case of nonhazardous waste); or that is regulated under §335.24(f), (g), or (h) of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials) or §335.241 of this title (relating to Applicability and Requirements) and that has been designated on the manifest by the generator in accordance with [~~pursuant to~~] §335.10 of this title (relating to Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste). If a waste is destined to a facility in an authorized state which has not yet obtained authorization to regulate that particular waste as hazardous, then the designated facility must be a facility allowed by the receiving state to accept such waste.

(34) [~~(33)~~] Destination facility -- Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(35) [~~(34)~~] Dike -- An embankment or ridge of either natural or man-made materials used to prevent the movement of liquids, sludges, solids, or other materials.

(36) [~~(35)~~] Dioxins and furans (D/F) -- Tetra, penta, hexa, hepta, and octa-chlorinated dibenzo dioxins and furans.

(37) [~~(36)~~] Discharge or hazardous waste discharge -- The accidental or intentional spilling, leaking, pumping, pouring, emitting, emptying, or dumping of waste into or on any land or water.

(38) [~~(37)~~] Disposal -- The discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste (whether containerized or uncontainerized) into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwaters.

(39) [~~(38)~~] Disposal facility -- A facility or part of a facility at which solid waste is intentionally placed into or on any land or water, and at which waste will remain after closure. The term "disposal facility" does not include a corrective action management unit into which remediation wastes are placed.

(40) [~~(39)~~] Drip pad -- An engineered structure consisting of a curbed, free-draining base, constructed of a non-earthen materials and designed to convey preservative kick-back or drippage from treated wood, precipitation, and surface water run-on to an associated collection system at wood preserving plants.

(41) [~~(40)~~] Elementary neutralization unit -- A device which:

(A) is used for neutralizing wastes which are hazardous only because they exhibit the corrosivity characteristic defined in 40 Code of Federal Regulations (CFR) [~~CFR~~] §261.22, or are listed in 40 CFR Part 261, Subpart D, only for this reason; or is used for neutralizing the pH of non-hazardous industrial solid waste; and

(B) meets the definition of tank, tank system, container, transport vehicle, or vessel as defined in this section.

(42) [~~(41)~~] Environmental Protection Agency acknowledgment of consent -- The cable sent to EPA from the United States Embassy in a receiving country that acknowledges the written consent of the receiving country to accept the hazardous waste and describes the terms and conditions of the receiving country's consent to the shipment.

(43) [~~(42)~~] Environmental Protection Agency hazardous waste number - The number assigned by the EPA to each hazardous waste listed in 40 Code of Federal Regulations (CFR) [~~CFR~~] Part 261, Subpart D and to each characteristic identified in 40 CFR Part 261, Subpart C.

(44) [~~(43)~~] Environmental Protection Agency identification number -- The number assigned by the EPA or the commission to each generator, transporter, and processing, storage, or disposal facility.

(45) [~~(44)~~] Essentially insoluble -- Any material, which if representatively sampled and placed in static or dynamic contact with deionized water at ambient temperature for seven days, will not leach any quantity of any constituent of the material into the water in excess of current United States Public Health Service or EPA limits for drinking water as published in the *Federal Register* [~~Federal Register~~].

(46) [~~(45)~~] Equivalent method -- Any testing or analytical method approved by the administrator under 40 Code of Federal Regulations [~~CFR~~] §260.20 and §260.21.

(47) [~~(46)~~] Existing portion -- That land surface area of an existing waste management unit, included in the original Part A permit application, on which wastes have been placed prior to the issuance of a permit.

(48) [~~(47)~~] Existing tank system or existing component -- A tank system or component that is used for the storage or processing of hazardous waste and that is in operation, or for which installation has commenced on or prior to July 14, 1986. Installation will be considered to have commenced if the owner or operator has obtained all federal,

state, and local approvals or permits necessary to begin physical construction of the site or installation of the tank system and if either:

(A) a continuous on-site physical construction or installation program has begun; or

(B) the owner or operator has entered into contractual obligations - which cannot be canceled or modified without substantial loss - for physical construction of the site or installation of the tank system to be completed within a reasonable time.

(49) [~~(48)~~] Explosives or munitions emergency -- A situation involving the suspected or detected presence of unexploded ordnance [~~(UXO)~~], damaged or deteriorated explosives or munitions, an improvised explosive device [~~(IED)~~], other potentially explosive material or device, or other potentially harmful military chemical munitions or device, that creates an actual or potential imminent threat to human health, including safety, or the environment, including property, as determined by an explosives or munitions emergency response specialist. These situations may require immediate and expeditious action by an explosives or munitions emergency response specialist to control, mitigate, or eliminate the threat.

(50) [~~(49)~~] Explosives or munitions emergency response -- All immediate response activities by an explosives and munitions emergency response specialist to control, mitigate, or eliminate the actual or potential threat encountered during an explosives or munitions emergency, subject to the following:

(A) an explosives or munitions emergency response includes in-place render-safe procedures, treatment or destruction of the explosives or munitions and/or transporting those items to another location to be rendered safe, treated, or destroyed;

(B) any reasonable delay in the completion of an explosives or munitions emergency response caused by a necessary, unforeseen, or uncontrollable circumstance will not terminate the explosives or munitions emergency; and

(C) explosives and munitions emergency responses can occur on either public or private lands and are not limited to responses at hazardous waste facilities.

(51) [~~(50)~~] Explosives or munitions emergency response specialist -- An individual trained in chemical or conventional munitions or explosives handling, transportation, render-safe procedures, or destruction techniques, including United States Department of Defense (DOD) emergency explosive ordnance disposal [~~(EOD)~~], technical escort unit [~~(TEU)~~], and DOD-certified civilian or contractor personnel; and, other federal, state, or local government, or civilian personnel similarly trained in explosives or munitions emergency responses.

(52) [~~(51)~~] Extrusion -- A process using pressure to force ground poultry carcasses through a decreasing-diameter barrel or nozzle, causing the generation of heat sufficient to kill pathogens, and resulting in an extruded product acceptable as a feed ingredient.

(53) [~~(52)~~] Facility -- Includes:

(A) all contiguous land, and structures, other appurtenances, and improvements on the land, used for storing, processing, or disposing of municipal hazardous waste or industrial solid waste. A facility may consist of several storage, processing, or disposal operational units (e.g., one or more landfills, surface impoundments, or combinations of them);

(B) for the purpose of implementing corrective action under §335.167 of this title (relating to Corrective Action for Solid Waste Management Units), all contiguous property under the control of the owner or operator seeking a permit for the storage, processing, and/or disposal of hazardous waste. This definition also applies to facilities implementing corrective action under Texas Water Code, §7.031 (Corrective Action Relating to Hazardous Waste).

(54) [~~(53)~~] Final closure -- The closure of all hazardous waste management units at the facility in accordance with all applicable closure requirements so that hazardous waste management activities under Subchapter E of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities) and Subchapter F of this chapter (relating to Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities) are no longer conducted at the facility unless subject to the provisions in §335.69 of this title (relating to Accumulation Time).

(55) [~~(54)~~] Food-chain crops -- Tobacco, crops grown for human consumption, and crops grown for feed for animals whose products are consumed by humans.

(56) [~~(55)~~] Freeboard -- The vertical distance between the top of a tank or surface impoundment dike, and the surface of the waste contained therein.

(57) [~~(56)~~] Free liquids -- Liquids which readily separate from the solid portion of a waste under ambient temperature and pressure.

(58) [~~(57)~~] Generator -- Any person, by site, who produces municipal hazardous waste or industrial solid waste; any person who possesses municipal hazardous waste or industrial solid waste to be shipped to any other person; or any person whose act first causes the solid waste to become subject to regulation under this chapter. For the purposes of this regulation, a person who generates or possesses Class 3 wastes only shall not be considered a generator.

(59) [~~(58)~~] Groundwater -- Water below the land surface in a zone of saturation.

(60) [~~(59)~~] Hazardous industrial waste -- Any industrial solid waste or combination of industrial solid wastes identified or listed as a hazardous waste by the administrator of the EPA in accordance with [~~pursuant to~~] the RCRA [~~Resource Conservation and Recovery Act~~] of 1976, §3001. The administrator has identified the characteristics of hazardous wastes and listed certain wastes as hazardous in 40 Code of Federal Regulations [~~CFR~~] Part 261. The executive director will maintain in the offices of the commission a current list of hazardous wastes, a current set of characteristics of hazardous waste, and applicable appendices, as promulgated by the administrator.

(61) [~~(60)~~] Hazardous substance -- Any substance designated as a hazardous substance under the CERCLA [~~Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)~~], 40 Code of Federal Regulations [~~CFR~~] Part 302.

(62) [~~(61)~~] Hazardous waste -- Any solid waste identified or listed as a hazardous waste by the administrator of the EPA in accordance with [~~pursuant to~~] the federal Solid Waste Disposal Act, as amended by the RCRA [~~Resource Conservation and Recovery Act~~], 42 United States Code §§6901 *et seq*., as amended.

(63) [~~(62)~~] Hazardous waste constituent -- A constituent that caused the administrator to list the hazardous waste in 40 Code of Federal Regulations (CFR) [~~CFR~~] Part 261, Subpart D or a constituent listed in Table 1 of 40 CFR §261.24.

(64) [~~(63)~~] 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- [~~publicly~~] or privately-owned [~~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.

(65) [~~(64)~~] Hazardous waste management unit -- A landfill, surface impoundment, waste pile, industrial furnace, incinerator, cement kiln, injection well, container, drum, salt dome waste containment cavern, or land treatment unit, or any other structure, vessel, appurtenance, or other improvement on land used to manage hazardous waste.

(66) [~~(65)~~] In operation -- Refers to a facility which is processing, storing, or disposing of solid waste or hazardous waste.

(67) [~~(66)~~] Inactive portion -- That portion of a facility which is not operated after November 19, 1980. (See also "active portion" and "closed portion.")

(68) [~~(67)~~] Incinerator -- Any enclosed device that:

(A) uses controlled flame combustion and neither meets the criteria for classification as a boiler, sludge dryer, or carbon regeneration unit, nor is listed as an industrial furnace; or

(B) meets the definition of infrared incinerator or plasma arc incinerator.

(69) [~~(68)~~] Incompatible waste -- A hazardous waste which is unsuitable for:

(A) placement in a particular device or facility because it may cause corrosion or decay of containment materials (e.g., container inner liners or tank walls); or

(B) commingling with another waste or material under uncontrolled conditions because the commingling might produce heat or pressure, fire or explosion, violent reaction, toxic dusts, mists, fumes, or gases, or flammable fumes or gases.

(70) [~~(69)~~] Individual generation site -- The contiguous site at or on which one or more solid waste or hazardous wastes are generated. An individual generation site, such as a large manufacturing plant, may have one or more sources of solid waste or hazardous waste, but is considered a single or individual generation site if the site or property is contiguous.

(71) [~~(70)~~] Industrial furnace -- Includes any of the following enclosed devices that use thermal treatment to accomplish recovery of materials or energy:

(A) cement kilns;

(B) lime kilns;

(C) aggregate kilns;

(D) phosphate kilns;

(E) coke ovens;

(F) blast furnaces;

(G) smelting, melting, and refining furnaces (including pyrometallurgical devices such as cupolas, reverberator furnaces, sintering machines, roasters, and foundry furnaces);

(H) titanium dioxide chloride process oxidation reactors;

(I) methane reforming furnaces;

(J) pulping liquor recovery furnaces;

(K) combustion devices used in the recovery of sulfur values from spent sulfuric acid;

(L) halogen acid furnaces [~~(HAFs)~~] for the production of acid from halogenated hazardous waste generated by chemical production facilities where the furnace is located on the site of a chemical production facility, the acid product has a halogen acid content of at least 3.0%, the acid product is used in a manufacturing process, and, except for hazardous waste burned as fuel, hazardous waste fed to the furnace has a minimum halogen content of 20% as generated; and

(M) other devices the commission may list, after the opportunity for notice and comment is afforded to the public.

(72) [~~(71)~~] Industrial solid waste -- Solid waste resulting from or incidental to any process of industry or manufacturing, or mining or agricultural operation, which may include hazardous waste as defined in this section.

(73) [~~(72)~~] Infrared incinerator -- Any enclosed device that uses electric powered resistance heaters as a source of radiant heat followed by an afterburner using controlled flame combustion and which is not listed as an industrial furnace.

(74) [~~(73)~~] Inground tank -- A device meeting the definition of tank in this section whereby a portion of the tank wall is situated to any degree within the ground, thereby preventing visual inspection of that external surface area of the tank that is in the ground.

(75) [~~(74)~~] Injection well -- A well into which fluids are injected. (See also "underground injection.")

(76) [~~(75)~~] Inner liner -- A continuous layer of material placed inside a tank or container which protects the construction materials of the tank or container from the contained waste or reagents used to treat the waste.

(77) [~~(76)~~] Installation inspector - A person who, by reason of his knowledge of the physical sciences and the principles of engineering, acquired by a professional education and related practical experience, is qualified to supervise the installation of tank systems.

(78) [~~(77)~~] International shipment -- The transportation of hazardous waste into or out of the jurisdiction of the United States.

(79) [~~(78)~~] Lamp -- Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(80) [~~(79)~~] Land treatment facility -- A facility or part of a facility at which solid waste or hazardous waste is applied onto or incorporated into the soil surface and that is not a corrective action management unit; such facilities are disposal facilities if the waste will remain after closure.

(81) [~~(80)~~] Landfill -- A disposal facility or part of a facility where solid waste or hazardous waste is placed in or on land and which is not a pile, a land treatment facility, a surface impoundment, an injection well, a salt dome formation, a salt bed formation, an underground mine, a cave, or a corrective action management unit.

(82) [~~(81)~~] Landfill cell -- A discrete volume of a solid waste or hazardous waste landfill which uses a liner to provide isolation of wastes from adjacent cells or wastes. Examples of landfill cells are trenches and pits.

(83) [~~(82)~~] Leachate -- Any liquid, including any suspended components in the liquid, that has percolated through or drained from solid waste or hazardous waste.

(84) [~~(83)~~] Leak-detection system -- A system capable of detecting the failure of either the primary or secondary containment structure or the presence of a release of solid waste or hazardous waste or accumulated liquid in the secondary containment structure. Such a system must employ operational controls (e.g., daily visual inspections for releases into the secondary containment system of aboveground tanks) or consist of an interstitial monitoring device designed to detect continuously and automatically the failure of the primary or secondary containment structure or the presence of a release of solid waste or hazardous waste into the secondary containment structure.

(85) [~~(84)~~] Liner -- A continuous layer of natural or man-made materials, beneath or on the sides of a surface impoundment, landfill, or landfill cell, which restricts the downward or lateral escape of solid waste or hazardous waste, hazardous waste constituents, or leachate.

(86) [~~(85)~~] Management or hazardous waste management -- The systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of solid waste or hazardous waste.

(87) [~~(86)~~] Manifest -- The waste shipping document which accompanies and is used for tracking the transportation, disposal, treatment, storage, or recycling of shipments of hazardous wastes or Class 1 industrial solid wastes. The form used for this purpose is TNRCC-0311 (Uniform Hazardous Waste Manifest) which is furnished by the executive director or may be printed through the agency's "Print Your Own Manifest Program."

(88) [~~(87)~~] Manifest document number -- A number assigned to the manifest by the commission for reporting and recordkeeping purposes.

(89) [~~(88)~~] Military munitions -- All ammunition products and components produced or used by or for the Department of Defense (DOD) [~~DOD~~] or the United States Armed Services for national defense and security, including military munitions under the control of the DOD, the United States Coast Guard, the United States Department of Energy (DOE), and National Guard personnel. The term "military munitions":

(A) includes confined gaseous, liquid, and solid propellants, explosives, pyrotechnics, chemical and riot control agents, smokes, and incendiaries used by DOD components, including bulk explosives and chemical warfare agents, chemical munitions, rockets, guided and ballistic missiles, bombs, warheads, mortar rounds, artillery ammunition, small arms ammunition, grenades, mines, torpedoes, depth charges, cluster munitions and dispensers, demolition charges, and devices and components thereof; and

(B) includes non-nuclear components of nuclear devices, managed under DOE's nuclear weapons program after all required sanitization operations under the Atomic Energy Act of 1954, as amended, have been completed; but

(C) does not include wholly inert items, improvised explosive devices, and nuclear weapons, nuclear devices, and nuclear components thereof.

(90) [~~(89)~~] Miscellaneous unit -- A hazardous waste management unit where hazardous waste is stored, processed, or disposed of and that is not a container, tank, surface impoundment, pile, land treatment unit, landfill, incinerator, boiler, industrial furnace, underground injection well with appropriate technical standards under Chapter 331 of this title (relating to Underground Injection Control), corrective action management unit, containment building, staging pile, or unit eligible for a research, development, and demonstration permit or under Chapter 305, Subchapter K of this title (relating to Research Development and Demonstration Permits).

(91) [~~(90)~~] Movement -- That solid waste or hazardous waste transported to a facility in an individual vehicle.

(92) [~~(91)~~] Municipal hazardous waste -- A municipal solid waste or mixture of municipal solid wastes which has been identified or listed as a hazardous waste by the administrator of the EPA [~~United States Environmental Protection Agency~~].

(93) [~~(92)~~] Municipal solid waste -- Solid waste resulting from or incidental to municipal, community, commercial, institutional, and recreational activities; including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste other than industrial waste.

(94) [~~(93)~~] New tank system or new tank component -- A tank system or component that will be used for the storage or processing of hazardous waste and for which installation has commenced after July 14, 1986; except, however, for purposes of 40 Code of Federal Regulations (CFR) [~~CFR~~] §264.193(g)(2) (incorporated by reference at §335.152(a)(8) of this title (relating to Standards)) and 40 CFR §265.193(g)(2) (incorporated by reference at §335.112(a)(9) of this title (relating to Standards)), a new tank system is one for which construction commences after July 14, 1986. (See [~~see~~] also "existing tank system.")

(95) [~~(94)~~] Off-site -- Property which cannot be characterized as on-site.

(96) [~~(95)~~] Onground tank -- A device meeting the definition of tank in this section and that is situated in such a way that the bottom of the tank is on the same level as the adjacent surrounding surface so that the external tank bottom cannot be visually inspected.

(97) [~~(96)~~] On-site -- The same or geographically contiguous property which may be divided by public or private rights-of-way, provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing, as opposed to going along, the right-of-way. Noncontiguous properties owned by the same person but connected by a right-of-way which he controls and to which the public does not have access, is also considered on-site property.

(98) [~~(97)~~] Open burning -- The combustion of any material without the following characteristics:

(A) control of combustion air to maintain adequate temperature for efficient combustion;

(B) containment of the combustion-reaction in an enclosed device to provide sufficient residence time and mixing for complete combustion; and

(C) control of emission of the gaseous combustion products. (See also "incineration" and "thermal treatment.")

(99) [~~(98)~~] Operator -- The person responsible for the overall operation of a facility.

(100) [~~(99)~~] Owner -- The person who owns a facility or part of a facility.

(101) [~~(100)~~] Partial closure -- The closure of a hazardous waste management unit in accordance with the applicable closure requirements of Subchapters E and F of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities; and Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities) at a facility that contains other active hazardous waste management units. For example, partial closure may include the closure

of a tank (including its associated piping and underlying containment systems), landfill cell, surface impoundment, waste pile, or other hazardous waste management unit, while other units of the same facility continue to operate.

(102) [~~(101)~~] PCBs or polychlorinated biphenyl compounds -- Compounds subject to 40 Code of Federal Regulations [~~Title 40, CFR~~] Part 761.

(103) [~~(102)~~] Permit -- A written permit issued by the commission which, by its conditions, may authorize the permittee to construct, install, modify, or operate a specified municipal hazardous waste or industrial solid waste storage, processing, or disposal facility in accordance with specified limitations.

(104) [~~(103)~~] Person -- Any individual, corporation, organization, government, or governmental subdivision or agency, business trust, partnership, association, or any other legal entity.

(105) [~~(104)~~] Personnel or facility personnel -- All persons who work at, or oversee the operations of, a solid waste or hazardous waste facility, and whose actions or failure to act may result in noncompliance with the requirements of this chapter.

(106) [~~(105)~~] Pesticide -- Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(107) [~~(106)~~] Petroleum substance -- A crude oil or any refined or unrefined fraction or derivative of crude oil which is a liquid at standard conditions of temperature and pressure.

(A) Except as provided in subparagraph (C) of this paragraph for the purposes of this chapter, a "petroleum substance" shall be limited to a substance in or a combination or mixture of substances within the following list (except for any listed substance regulated as a hazardous waste under the federal Solid Waste Disposal Act, Subtitle C (42 United States Code §§6921, *et seq*.)) and which is liquid at standard conditions of temperature (20 degrees Centigrade) and pressure (1 atmosphere):

(i) basic petroleum substances - i.e., crude oils, crude oil fractions, petroleum feedstocks, and petroleum fractions;

(ii) motor fuels - a petroleum substance which is typically used for the operation of internal combustion engines and/or motors (which includes, but is not limited to, stationary engines and engines used in transportation vehicles and marine vessels);

(iii) aviation gasolines - i.e., Grade 80, Grade 100, and Grade 100-LL;

(iv) aviation jet fuels - i.e., Jet A, Jet A-1, Jet B, JP-4, JP-5, and JP-8;

(v) distillate fuel oils - i.e., Number 1-D, Number 1, Number 2-D, and Number 2;

(vi) residual fuel oils - i.e., Number 4-D, Number 4-light, Number 4, Number 5-light, Number 5- heavy, and Number 6;

(vii) gas-turbine fuel oils - i.e., Grade O-GT, Grade 1-GT, Grade 2-GT, Grade 3-GT, and Grade 4- GT;

(viii) illuminating oils - i.e., kerosene, mineral seal oil, long-time burning oils, 300 oil, and mineral colza oil;

(ix) lubricants - i.e., automotive and industrial lubricants;

(x) building materials - i.e., liquid asphalt and dust-laying oils;

(xi) insulating and waterproofing materials - i.e., transformer oils and cable oils; and

(xii) used oils - [~~(~~] See definition for "used oil" in this section. [~~);~~ ~~and~~]

(B) For the purposes of this chapter, a "petroleum substance" shall include solvents or a combination or mixture of solvents (except for any listed substance regulated as a hazardous waste under the federal Solid Waste Disposal Act, Subtitle C (42 United States Code §§6921, *et seq*.)) and which is liquid at standard conditions of temperature (20 degrees Centigrade) and pressure (1 atmosphere) i.e., Stoddard solvent, petroleum spirits, mineral spirits, petroleum ether, varnish makers' and painters' naphthas, petroleum extender oils, and commercial hexane.

(C) The following materials are not considered petroleum substances:

(i) polymerized materials, i.e., plastics, synthetic rubber, polystyrene, high and low density polyethylene;

(ii) animal, microbial, and vegetable fats;

(iii) food grade oils;

(iv) hardened asphalt and solid asphaltic materials - i.e., roofing shingles, roofing felt, hot mix (and cold mix); and

(v) cosmetics.

(108) [~~(107)~~] Pile -- Any noncontainerized accumulation of solid, nonflowing solid waste or hazardous waste that is used for processing or storage, and that is not a corrective action management unit or a containment building.

(109) [~~(108)~~] Plasma arc incinerator -- Any enclosed device using a high intensity electrical discharge or arc as a source of heat followed by an afterburner using controlled flame combustion and which is not listed as an industrial furnace.

(110) Post-closure order -- An order issued by the commission for post-closure care of interim status units, or alternative corrective action requirements for contamination commingled from RCRA and solid waste management units, and/or corrective action management units unless authorized in a permit.

(111) [~~(109)~~] Poultry -- Chickens or ducks being raised or kept on any premises in the state for profit.

(112) [~~(110)~~] Poultry carcass -- The carcass, or part of a carcass, of poultry that died as a result of a cause other than intentional slaughter for use for human consumption.

(113) [~~(111)~~] Poultry facility -- A facility that:

(A) is used to raise, grow, feed, or otherwise produce poultry for commercial purposes; or

(B) is a commercial poultry hatchery that is used to produce chicks or ducklings.

(114) [~~(112)~~] Primary exporter -- Any person who is required to originate the manifest for a shipment of hazardous waste in accordance with the regulations contained in 40 Code of Federal Regulations [~~CFR~~] Part 262, Subpart B, which are in effect as of November 8, 1986, or equivalent state provision, which specifies a treatment, storage, or disposal facility in a receiving country as the facility to which the hazardous waste will be sent and any intermediary arranging for the export.

(115) [~~(113)~~] Processing -- The extraction of materials, transfer, volume reduction, conversion to energy, or other separation

and preparation of solid waste for reuse or disposal, including the treatment or neutralization of solid waste or hazardous waste, designed to change the physical, chemical, or biological character or composition of any solid waste or hazardous waste so as to neutralize such waste, or so as to recover energy or material from the waste or so as to render such waste nonhazardous, or less hazardous; safer to transport, store or dispose of; or amenable for recovery, amenable for storage, or reduced in volume. The transfer of solid waste for reuse or disposal as used in this definition does not include the actions of a transporter in conveying or transporting solid waste by truck, ship, pipeline, or other means. Unless the executive director determines that regulation of such activity is necessary to protect human health or the environment, the definition of processing does not include activities relating to those materials exempted by the administrator of the EPA in accordance with [~~Environmental Protection Agency pursuant to~~] the federal Solid Waste Disposal Act, as amended by the RCRA [~~Resource Conservation and Recovery Act~~], 42 United States Code, §§6901 *et seq*., as amended.

(116) [~~(114)~~] Publicly-owned treatment works (POTW) -- Any device or system used in the treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature which is owned by a state or municipality (as defined by the Clean Water Act, §502(4)). The definition includes sewers, pipes, or other conveyances only if they convey wastewater to a POTW providing treatment.

(117) [~~(115)~~] Qualified groundwater scientist -- A scientist or engineer who has received a baccalaureate or post-graduate degree in the natural sciences or engineering, and has sufficient training and experience in groundwater hydrology and related fields as may be demonstrated by state registration, professional certifications, or completion of accredited university courses that enable that individual to make sound professional judgments regarding groundwater monitoring and contaminant fate and transport.

(118) [~~(116)~~] Receiving country -- A foreign country to which a hazardous waste is sent for the purpose of treatment, storage, or disposal (except short-term storage incidental to transportation).

(119) [~~(117)~~] Regional administrator -- The regional administrator for the EPA [~~Environmental Protection Agency~~] region in which the facility is located, or his designee.

(120) [~~(118)~~] Remediation -- The act of eliminating or reducing the concentration of contaminants in contaminated media.

(121) [~~(119)~~] Remediation waste -- All solid and hazardous wastes, and all media (including groundwater, surface water, soils, and sediments) and debris, which contain listed hazardous wastes or which themselves exhibit a hazardous waste characteristic, that are managed for the purpose of implementing corrective action requirements under §335.167 of this title (relating to Corrective Action for Solid Waste Management Units) and [~~the~~] Texas Water Code, §7.031 (Corrective Action Relating to Hazardous Waste). For a given facility, remediation wastes may originate only from within the facility boundary, but may include waste managed in implementing corrective action for releases beyond the facility boundary under TSWDA [~~the Texas Solid Waste Disposal Act, Texas Health and Safety Code Annotated (Vernon Pamphlet 1993)~~], §361.303 (Corrective Action), §335.166(5) of this title (relating to Corrective Action Program), or §335.167(c) of this title [~~(relating to Corrective Action for Solid Waste Management Units)~~].

(122) [~~(120)~~] Remove -- To take waste, contaminated design or operating system components, or contaminated media away from a waste management unit, facility, or area to another location for storage, processing, or disposal.

(123) [~~(121)~~] Replacement unit -- A landfill, surface impoundment, or waste pile unit:

(A) from which all or substantially all the waste is removed; and

(B) that is subsequently reused to treat, store, or dispose of hazardous waste. "Replacement unit" does not apply to a unit from which waste is removed during closure, if the subsequent reuse solely involves the disposal of waste from that unit and other closing units or corrective action areas at the facility, in accordance with an approved closure plan or EPA or state approved corrective action.

(124) [~~(122)~~] Representative sample -- A sample of a universe or whole (e.g., waste pile, lagoon, groundwater) which can be expected to exhibit the average properties of the universe or whole.

(125) [~~(123)~~] Run-off -- Any rainwater, leachate, or other liquid that drains over land from any part of a facility.

(126) [~~(124)~~] Run-on -- Any rainwater, leachate, or other liquid that drains over land onto any part of a facility.

(127) [~~(125)~~] Saturated zone or zone of saturation -- That part of the earth's crust in which all voids are filled with water.

(128) [~~(126)~~] Shipment -- Any action involving the conveyance of municipal hazardous waste or industrial solid waste by any means off-site.

(129) [~~(127)~~] Sludge dryer -- Any enclosed thermal treatment device that is used to dehydrate sludge and that has a maximum total thermal input, excluding the heating valve of the sludge itself, of 2,500 British thermal units per pound [~~Btu/lb~~] of sludge treated on a wet-weight basis.

(130) [~~(128)~~] Small quantity generator -- A generator who generates less than 1,000 kilogram [~~kg~~] of hazardous waste in a calendar month.

(131) [~~(129)~~] Solid waste [~~Waste~~] --

(A) Any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility, and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations, and from community and institutional activities, but does not include:

(i) solid or dissolved material in domestic sewage, or solid or dissolved material in irrigation return flows, or industrial discharges subject to regulation by permit issued in accordance with [~~pursuant to the~~] Texas Water Code, Chapter 26 (an exclusion applicable only to the actual point source discharge that does not exclude industrial wastewaters while they are being collected, stored, or processed before discharge, nor does it exclude sludges that are generated by industrial wastewater treatment);

(ii) uncontaminated soil, dirt, rock, sand, and other natural or man-made inert solid materials used to fill land if the object of the fill is to make the land suitable for the construction of surface improvements. The material serving as fill may also serve as a surface improvement such as a structure foundation, a road, soil erosion control, and flood protection. Man-made materials exempted under this provision shall only be deposited at sites where the construction is in progress or imminent such that rights to the land are secured and engineering, architectural, or other necessary planning have been initiated. Waste disposal shall be considered to have occurred on any land which has been filled with man-made inert materials under this provision if the land is sold, leased, or otherwise conveyed prior to the completion of construction of the surface improvement. Under such conditions,

deed recordation shall be required. The deed recordation shall include the information required under §335.5(a) of this title (relating to Deed Recordation), prior to sale or other conveyance of the property;

(iii) waste materials which result from activities associated with the exploration, development, or production of oil or gas or geothermal resources, as those activities are defined in this section, and any other substance or material regulated by the Railroad Commission of Texas in accordance with [~~pursuant to~~] the Natural Resources Code, §91.101, unless such waste, substance, or material results from activities associated with gasoline plants, natural gas, or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants and is a hazardous waste as defined by the administrator of the EPA in accordance with [~~United States Environmental Protection Agency pursuant to~~] the federal Solid Waste Disposal Act, as amended by the RCRA [~~Resource Conservation and Recovery Act~~], 42 United States Code §§6901 *et seq*., as amended; or

(iv) a material excluded by 40 Code of Federal Regulations (CFR) [~~CFR~~] §261.4(a)(1) - (19), as amended through May 11, 1999, (64 FR 25408), subject to the changes in this clause, or by variance granted under §335.18 of this title (relating to Variances from Classification as a Solid Waste) and §335.19 of this title (relating to Standards and Criteria for Variances from Classification as a Solid Waste). For the purposes of the exclusion under 40 CFR §261.4(a)(16), 40 CFR §261.38 is adopted by reference as amended through July 10, 2000 (65 FR 42292), and is revised as follows, with "subparagraph (A)(iv) under the definition of 'Solid Waste' in 30 TAC §335.1" meaning "subparagraph (A)(iv) under the definition of 'Solid Waste' in §335.1 of this title (relating to Definitions)":

(I) in the certification statement under 40 CFR §261.38(c)(1)(i)(C)(4), the reference to "40 CFR §261.38" is changed to "40 CFR §261.38, as revised under subparagraph (A)(iv) under the definition of 'Solid Waste' in 30 TAC §335.1," and the reference to "40 CFR §261.28(c)(10)" is changed to "40 CFR §261.38(c)(10)";

(II) in 40 CFR §261.38(c)(2), the references to "§260.10 of this chapter" are changed to "§335.1 of this title (relating to Definitions)," and the reference to "parts 264 or 265 of this chapter" is changed to "Chapter 335, Subchapter E of this title (relating to Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities) or Chapter 335, Subchapter F of this title (relating to Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities)";

(III) in 40 CFR §261.38(c)(3) - (5) [~~§261.38(c)(3), (4), and (5)~~], the references to "parts 264 and 265, or §262.34 of this chapter" are changed to "Chapter 335, Subchapter E of this title (relating to Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities) and Chapter 335, Subchapter F of this title (relating to Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities), or §335.69 of this title (relating to Accumulation Time)";

(IV) in 40 CFR §261.38(c)(5), the reference to "§261.6(c) of this chapter" is changed to "§335.24(e) and (f) of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials)";

(V) in 40 CFR §261.38(c)(7), the references to "appropriate regulatory authority" and "regulatory authority" are changed to "executive director";

(VI) in 40 CFR §261.38(c)(8), the reference to "§262.11 of this chapter" is changed to "§335.62 of this title (relating to Hazardous Waste Determination and Waste Classification)";

(VII) in 40 CFR §261.38(c)(9), the reference to "§261.2(c)(4) of this chapter" is changed to "§335.1(129)(D)(iv) of this title (relating to Definitions)"; and

(VIII) in 40 CFR §261.38(c)(10), the reference to "implementing authority" is changed to "executive director."

(B) A discarded material is any material which is:

(i) abandoned, as explained in subparagraph (C) of this paragraph;

(ii) recycled, as explained in subparagraph (D) of this paragraph; or

(iii) considered inherently waste-like, as explained in subparagraph (E) of this paragraph.

(iv) a military munition identified as a solid waste in 40 CFR §266.202.

(C) Materials are solid wastes if they are abandoned by being:

(i) disposed of;

(ii) burned or incinerated; or

(iii) accumulated, stored, or processed (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated.

(D) Except for materials described in subparagraph (H) of this paragraph, materials are solid wastes if they are "recycled" or accumulated, stored, or processed before recycling as specified in this subparagraph. The chart referred to as Table 1 indicates only which materials are considered to be solid wastes when they are recycled and is not intended to supersede the definition of solid waste provided in subparagraph (A) of this paragraph.

(i) Used in a manner constituting disposal. Materials noted with an asterisk in Column 1 of Table 1 are solid wastes when they are:

(I) applied to or placed on the land in a manner that constitutes disposal; or

(II) used to produce products that are applied to or placed on the land or are otherwise contained in products that are applied to or placed on the land (in which cases the product itself remains a solid waste). However, commercial chemical products listed in 40 CFR §261.33 are not solid wastes if they are applied to the land and that is their ordinary manner of use.

(ii) Burning for energy recovery. Materials noted with an asterisk in Column 2 of Table 1 are solid wastes when they are:

(I) burned to recover energy; or

(II) used to produce a fuel or are otherwise contained in fuels (in which cases the fuel itself remains a solid waste). However, commercial chemical products, which are listed in 40 CFR §261.33, not listed in §261.33, but that exhibit one or more of the hazardous waste characteristics, or would be considered nonhazardous waste if disposed, are not solid wastes if they are fuels themselves and burned for energy recovery.

(iii) Reclaimed. Materials noted with an asterisk in Column 3 of Table 1 are solid wastes when reclaimed (except as provided under 40 CFR §261.4(a)(17)). Materials without an asterisk in Column 3 of Table 1 are not solid wastes when reclaimed (except as provided under 40 CFR §261.4(a)(17)).

(iv) Accumulated speculatively. Materials noted with an asterisk in Column 4 of Table 1 are solid wastes when accumulated speculatively.

Figure: 30 TAC §335.1(131)(D)(iv)

[~~Figure 1: 30 TAC §335.1(129)(D)(iv)~~]

(E) Materials that are identified by the administrator of the EPA as inherently waste-like materials under 40 CFR §261.2(d) are solid wastes when they are recycled in any manner.

(F) Materials are not solid wastes when they can be shown to be recycled by being:

(i) used or reused as ingredients in an industrial process to make a product, provided the materials are not being reclaimed;

(ii) used or reused as effective substitutes for commercial products;

(iii) returned to the original process from which they were generated, without first being reclaimed or land disposed. The material must be returned as a substitute for feedstock materials. In cases where the original process to which the material is returned is a secondary process, the materials must be managed such that there is no placement on the land. In cases where the materials are generated and reclaimed within the primary mineral processing industry, the conditions of the exclusion found at 40 CFR §261.4(a)(17) apply rather than this provision; or

(iv) secondary materials that are reclaimed and returned to the original process or processes in which they were generated where they are reused in the production process provided:

(I) only tank storage is involved, and the entire process through completion of reclamation is closed by being entirely connected with pipes or other comparable enclosed means of conveyance;

(II) reclamation does not involve controlled flame combustion (such as occurs in boilers, industrial furnaces, or incinerators);

(III) the secondary materials are never accumulated in such tanks for over 12 months without being reclaimed; and

(IV) the reclaimed material is not used to produce a fuel, or used to produce products that are used in a manner constituting disposal.

(G) Except for materials described in subparagraph (H) of this paragraph, the following materials are solid wastes, even if the recycling involves use, reuse, or return to the original process, as described in subparagraph (F) of this paragraph:

(i) materials used in a manner constituting disposal, or used to produce products that are applied to the land;

(ii) materials burned for energy recovery, used to produce a fuel, or contained in fuels;

(iii) materials accumulated speculatively; or

(iv) materials deemed to be inherently waste-like by the administrator of the EPA, as described in 40 CFR §261.2(d)(1) - (2) [~~§261.2(d)(1) - 2~~].

(H) With the exception of contaminated soils which are being relocated for use under §350.36 of this title (relating to Relocation of Soils Containing Chemicals of Concern for Reuse Purposes) and other contaminated media, materials that would otherwise be identified as nonhazardous solid wastes if disposed of are not considered solid wastes when recycled by being applied to the land or used as ingredients in products that are applied to the land, provided these materials can be shown to meet all of the following criteria:

(i) a legitimate market exists for the recycling material as well as its products;

(ii) the recycling material is managed and protected from loss as would be raw materials or ingredients or products;

(iii) the quality of the product is not degraded by substitution of raw material/product with the recycling material;

(iv) the use of the recycling material is an ordinary use and it meets or exceeds the specifications of the product it is replacing without treatment or reclamation, or if the recycling material is not replacing a product, the recycling material is a legitimate ingredient in a production process and meets or exceeds raw material specifications without treatment or reclamation;

(v) the recycling material is not burned for energy recovery, used to produce a fuel or contained in a fuel;

(vi) the recycling material can be used as a product itself or to produce products as it is generated without treatment or reclamation;

(vii) the recycling material must not present an increased risk to human health, the environment, or waters in the state when applied to the land or used in products which are applied to the land and the material, as generated:

(I) is a Class 3 waste under Chapter 335, Subchapter R of this title (relating to Waste Classification), except for arsenic, cadmium, chromium, lead, mercury, nickel, selenium, and total dissolved solids; and

(II) for the metals listed in subclause (I) of this clause:

(-a-) is a Class 2 or Class 3 waste under Chapter 335, Subchapter R of this title; and

(-b-) does not exceed a concentration limit under [~~30 TAC~~] §312.43(b)(3), Table 3 of this title (relating to Metal Limits); and

(viii) notwithstanding the requirements under §335.17(a)(8) of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials):

(I) at least 75% (by weight or volume) of the annual production of the recycling material must be recycled or transferred to a different site and recycled on an annual basis; and

(II) if the recycling material is placed in protective storage, such as a silo or other protective enclosure, at least 75% (by weight or volume) of the annual production of the recycling material must be recycled or transferred to a different site and recycled on a biennial basis.

(I) Respondents in actions to enforce the industrial solid waste regulations who raise a claim that a certain material is not a solid waste, or is conditionally exempt from regulation, must demonstrate that there is a known market or disposition for the material, and that they meet the terms of the exclusion or exemption. In doing so, they must provide appropriate documentation (such as contracts showing that a second person uses the material as an ingredient in a production process) to demonstrate that the material is not a waste, or is exempt from regulation. In addition, owners or operators of facilities claiming that they actually are recycling materials must show that they have the necessary equipment to do so and that the recycling activity is legitimate and beneficial.

(J) Materials that are reclaimed from solid wastes and that are used beneficially are not solid wastes and hence are not hazardous wastes under 40 CFR §261.3(c) unless the reclaimed material is burned for energy recovery or used in a manner constituting disposal.

(K) Other portions of this chapter that relate to solid wastes that are recycled include §335.6 of this title (relating to Notification Requirements), §§335.17 - 335.19 of this title [~~§335.17 of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials), §335.18 of this title (relating to Variances from Classification as a Solid Waste), §335.19 of this title (relating to Standards and Criteria for Variances from Classification as a Solid Waste)~~], §335.24 of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials), and Subchapter H of this chapter (relating to Standards for the Management of Specific Wastes and Specific Types of Materials).

(132) [~~(130)~~] Sorbent -- A material that is used to soak up free liquids by either adsorption or absorption, or both. Sorb means to either adsorb or absorb, or both.

(133) [~~(131)~~] Spill -- The accidental spilling, leaking, pumping, emitting, emptying, or dumping of solid waste or hazardous wastes or materials which, when spilled, become solid waste or hazardous wastes into or on any land or water.

(134) [~~(132)~~] Staging pile -- An accumulation of solid, non-flowing remediation waste, as defined in this section, that is not a containment building and that is used only during remedial operations for temporary storage at a facility. Staging piles must be designated by the executive director according to the requirements of 40 Code of Federal Regulations [~~CFR~~] §264.554, as adopted by reference under §335.152(a) of this title (relating to Standards).

(135) [~~(133)~~] Storage -- The holding of solid waste for a temporary period, at the end of which the waste is processed, disposed of, recycled, or stored elsewhere.

(136) [~~(134)~~] Sump -- Any pit or reservoir that meets the definition of tank in this section and those troughs/trenches connected to it that serve to collect solid waste or hazardous waste for transport to solid waste or hazardous waste storage, processing, or disposal facilities; except that as used in the landfill, surface impoundment, and waste pile rules, "sump" means any lined pit or reservoir that serves to collect liquids drained from a leachate collection and removal system or leak detection system for subsequent removal from the system.

(137) [~~(135)~~] Surface impoundment or impoundment -- A facility or part of a facility which is a natural topographic depression, man-made excavation, or diked area formed primarily of earthen materials (although it may be lined with man-made materials), which is designed to hold an accumulation of liquid wastes or wastes containing free liquids, and which is not an injection well or a corrective action management unit. Examples of surface impoundments are holding, storage, settling, and aeration pits, ponds, and lagoons.

(138) [~~(136)~~] Tank -- A stationary device, designed to contain an accumulation of solid waste which is constructed primarily of non-earthen materials (e.g., wood, concrete, steel, plastic) which provide structural support.

(139) [~~(137)~~] Tank system -- A solid waste or hazardous waste storage or processing tank and its associated ancillary equipment and containment system.

(140) [~~(138)~~] TEQ -- Toxicity equivalence, the international method of relating the toxicity of various dioxin/furan congeners to the toxicity of 2,3,7,8-tetrachlorodibenzo-p-dioxin.

(141) [~~(139)~~] Thermal processing -- The processing of solid waste or hazardous waste in a device which uses elevated temperatures as the primary means to change the chemical, physical, or biological character or composition of the solid waste or hazardous waste. Examples of thermal processing are incineration, molten salt, pyrolysis, calcination, wet air oxidation, and microwave discharge. (See also "incinerator" and "open burning.")

(142) [~~(140)~~] Thermostat -- Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(143) [~~(141)~~] Totally enclosed treatment facility -- A facility for the processing of hazardous waste which is directly connected to an industrial production process and which is constructed and operated in a manner which prevents the release of any hazardous waste or any constituent thereof into the environment during processing. An example is a pipe in which acid waste is neutralized.

(144) [~~(142)~~] Transfer facility -- Any transportation-related facility including loading docks, parking areas, storage areas, and other similar areas where shipments of hazardous or industrial solid waste are held during the normal course of transportation.

(145) [~~(143)~~] Transit country -- Any foreign country, other than a receiving country, through which a hazardous waste is transported.

(146) [~~(144)~~] Transport vehicle -- A motor vehicle or rail car used for the transportation of cargo by any mode. Each cargo-carrying body (trailer, railroad freight car, etc.) is a separate transport vehicle. Vessel includes every description of watercraft, used or capable of being used as a means of transportation on the water.

(147) [~~(145)~~] Transporter -- Any person who conveys or transports municipal hazardous waste or industrial solid waste by truck, ship, pipeline, or other means.

(148) [~~(146)~~] Treatability study -- A study in which a hazardous or industrial solid waste is subjected to a treatment process to determine:

(A) whether the waste is amenable to the treatment process;

(B) what pretreatment (if any) is required;

(C) the optimal process conditions needed to achieve the desired treatment;

(D) the efficiency of a treatment process for a specific waste or wastes; or

(E) the characteristics and volumes of residuals from a particular treatment process. Also included in this definition for the purpose of 40 Code of Federal Regulations [~~CFR~~] §261.4(e) and (f) (§§335.2, 335.69, and 335.78 of this title (relating to Permit Required; Accumulation Time; and Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators)) exemptions are liner compatibility, corrosion, and other material compatibility studies and toxicological and health effects studies. A treatability study is not a means to commercially treat or dispose of hazardous or industrial solid waste.

(149) [~~(147)~~] Treatment -- To apply a physical, biological, or chemical process(es) to wastes and contaminated media which significantly reduces the toxicity, volume, or mobility of contaminants and which, depending on the process(es) used, achieves varying degrees of long-term effectiveness.

(150) [~~(148)~~] Treatment zone -- A soil area of the unsaturated zone of a land treatment unit within which hazardous constituents are degraded, transferred, or immobilized.

(151) [~~(149)~~] Underground injection -- The subsurface emplacement of fluids through a bored, drilled, or driven well; or through a dug well, where the depth of the dug well is greater than the largest surface dimension. (See also "injection well.")

(152) [~~(150)~~] Underground tank -- A device meeting the definition of tank in this section whose entire surface area is totally below the surface of and covered by the ground.

(153) [~~(151)~~] Unfit-for-use tank system -- A tank system that has been determined through an integrity assessment or other inspection to be no longer capable of storing or processing solid waste or hazardous waste without posing a threat of release of solid waste or hazardous waste to the environment.

(154) [~~(152)~~] Universal waste -- Any of the hazardous wastes defined as universal waste under §335.261(b)(13)(F) of this title (relating to Universal Waste Rule) that are managed under the universal waste requirements of Subchapter H, Division 5 of this chapter (relating to Universal Waste Rule).

(155) [~~(153)~~] Universal waste handler -- Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(156) [~~(154)~~] Universal waste transporter -- Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(157) [~~(155)~~] Unsaturated zone or zone of aeration -- The zone between the land surface and the water table.

(158) [~~(156)~~] Uppermost aquifer -- The geologic formation nearest the natural ground surface that is an aquifer, as well as lower aquifers that are hydraulically interconnected within the facility's property boundary.

(159) [~~(157)~~] Used oil -- Any oil that has been refined from crude oil, or any synthetic oil, that has been used, and, as a result of such use, is contaminated by physical or chemical impurities. Used oil fuel includes any fuel produced from used oil by processing, blending, or other treatment. Rules applicable to nonhazardous used oil, oil characteristically hazardous from use versus mixing, Conditionally Exempt Small Quantity Generator [~~(CESQG)~~] hazardous used oil, and household used oil after collection that will be recycled are found in Chapter 324 of this title (relating to Used Oil) and 40 Code of Federal Regulations [~~CFR~~] Part 279 (Standards for Management of Used Oil).

(160) [~~(158)~~] Wastewater treatment unit -- A device which:

(A) is part of a wastewater treatment facility subject to regulation under either the Federal Water Pollution Control Act (Clean Water Act), 33 United States Code, §§466 [~~§466~~] *et seq*., §402 or §307(b), as amended;

(B) receives and processes or stores an influent wastewater which is a hazardous or industrial solid waste, or generates and accumulates a wastewater treatment sludge which is a hazardous or industrial solid waste, or processes or stores a wastewater treatment sludge which is a hazardous or industrial solid waste; and

(C) meets the definition of tank or tank system as defined in this section.

(161) [~~(159)~~] Water (bulk shipment) -- The bulk transportation of municipal hazardous waste or Class 1 industrial solid waste which is loaded or carried on board a vessel without containers or labels.

(162) [~~(160)~~] Well -- Any shaft or pit dug or bored into the earth, generally of a cylindrical form, and often walled with bricks or tubing to prevent the earth from caving in.

(163) [~~(161)~~] Zone of engineering control -- An area under the control of the owner/operator that, upon detection of a solid waste or hazardous waste release, can be readily cleaned up prior to the release of solid waste or hazardous waste or hazardous constituents to groundwater or surface water.

§335.2. Permit Required.

(a) Except with regard to storage, processing, or disposal to which subsections (c) - (h) of this section apply, and as provided in §335.45(b) of this title (relating to Effect on Existing Facilities), and in accordance with the requirements of §335.24 of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials) and §335.25 of this title (relating to Handling, Storing, Processing, Transporting, and Disposing of Poultry Carcasses), and as provided in §332.4 of this title (relating to General Requirements), no person may cause, suffer, allow, or permit any activity of storage, processing, or disposal of any industrial solid waste or municipal hazardous waste unless such activity is authorized by a permit, amended permit, or other authorization from the Texas Commission on Environmental Quality (commission) [~~Texas Natural Resource Conservation Commission~~] or its predecessor agencies, the Texas Department of Health (TDH), or other valid authorization from a Texas state agency. No person may commence physical construction of a new hazardous waste management facility without first having submitted Part A and Part B of the permit application and received a finally effective permit.

(b) (No change.)

(c) Any owner or operator of a solid waste management facility that is in existence on the effective date of a statutory or regulatory change that subjects the owner or operator to a requirement to obtain a hazardous waste permit who has filed a hazardous waste permit application with the commission in accordance with the rules and regulations of the commission, may continue the storage, processing, or disposal of hazardous waste until such time as the commission [~~Texas Natural Resource Conservation Commission (commission)~~] approves or denies the application, or, if the owner or operator becomes subject to a requirement to obtain a hazardous waste permit after November 8, 1984, except as provided by the EPA [~~United States Environmental Protection Agency~~] or commission rules relative to termination of interim status. If a solid waste facility which has become a commercial hazardous waste management facility as a result of the federal toxicity characteristic rule effective September 25, 1990, and is required to obtain a hazardous waste permit, such facility that qualifies for interim status is limited to those activities that qualify it for interim status until the facility obtains the hazardous waste permit. Owners or operators of municipal hazardous waste facilities which satisfied this requirement by filing an application on or before November 19, 1980, with the EPA [~~United States Environmental Protection Agency~~] are not required to submit a separate application with the TDH [~~Texas Department of Health~~]. Applications filed under this section shall meet the requirements of §335.44 of this title (relating to Application for Existing On-Site Facilities). Owners and operators of solid waste management facilities that are in existence on the effective date of statutory or regulatory amendments under the TSWDA [~~Solid Waste Disposal Act, Texas Health and Safety Code, Chapter 361~~] (Vernon's Supplement 1991), Texas Civil Statutes, Article 4477-7, or the RCRA [~~Resource Conservation and Recovery Act of 1976, as amended~~], 42 United States Code, §§6901 *et seq*., that render the facility subject to the requirement to obtain a hazardous waste permit, may continue to operate if Part A of their permit application is submitted no later than six months after the date of publication of regulations by the EPA under [~~United~~

States Environmental Protection Agency pursuant to the] RCRA [Resource Conservation and Recovery Act of 1976, as amended], which first require them to comply with the standards set forth in Subchapter E of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities), or Subchapter H of this chapter (relating to Standards for the Management of Specific Wastes and Specific Types of Facilities); or 30 days after the date they first become subject to the standards set forth in these subchapters, whichever first occur; or for generators who generate greater than 100 kilograms but less than 1,000 kilograms of hazardous waste in a calendar month and who process, store, or dispose of these wastes on-site, a Part A permit application shall be submitted to the EPA [United States Environmental Protection Agency] by March 24, 1987, as required by 40 Code of Federal Regulations (CFR) [,] §270.10(e)(1)(iii). This subsection shall not apply to a facility if it has been previously denied a hazardous waste permit or if authority to operate the facility has been previously terminated. Applications filed under this section shall meet the requirements of §335.44 of this title [(relating to Application for Existing On-Site Facilities)]. For purposes of this subsection, a solid waste management facility is in existence if the owner or operator has obtained all necessary federal, state, and local preconstruction approvals or permits, as required by applicable federal, state, and local hazardous waste control statutes, regulations, or ordinances; and either:

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

(d) No permit shall be required for:

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

(5) the storage of nonhazardous industrial solid waste, if the waste is stored in a transfer facility in containers for a period of ten [10] days or less, unless the executive director determines that a permit should be required in order to protect human health and the environment; or

(6) (No change.)

(e) No permit shall be required for the on-site storage of hazardous waste by a person who is a conditionally exempt small quantity generator as described in §335.78 of this title (relating to Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators).

(f) No permit under this chapter shall be required for the storage, processing, or disposal of hazardous waste by a person described in §335.41(b) - (d) of this title (relating to Purpose, Scope, and Applicability) or for the storage of hazardous waste under the provisions of 40 CFR [Code of Federal Regulations] §261.4(c) and (d).

(g) No permit under this chapter shall be required for the storage, processing, or disposal of hazardous industrial waste or municipal hazardous waste which is generated or collected for the purpose of conducting treatability studies. Such samples are subject to the requirements set out at 40 CFR [Code of Federal Regulations] §261.4(e) and (f), as amended and adopted in the CFR [Code of Federal Regulations] through February 18, 1994, as published in the *Federal Register* (59 FR 8362) [at 59 FedReg 8362], which are adopted herein by reference.

(h) A person may obtain authorization from the executive director for the storage, processing, or disposal of nonhazardous industrial solid waste in an interim status landfill which has qualified for interim status in accordance with [pursuant to] 40 CFR [Code of Federal Regulations,] Part 270, Subpart G, and which has complied with the standards set forth in Subchapter [Subpart] E of this chapter [(relating to Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing or Disposal Facilities)], by complying with the notification and information requirements as set forth in §335.6 of this title (relating to Notification Requirements). The executive director may approve or deny the request for authorization or grant the request for authorization subject to conditions which may include, without limitation, public notice, and technical requirements. A request for authorization for the disposal of nonhazardous industrial solid waste under this subsection shall not be approved unless the executive director determines that the subject facility is suitable for disposal of such waste at the facility as requested. At a minimum, a determination of suitability by the executive director must include approval by the executive director of construction of a hazardous waste landfill meeting the design requirements of 40 CFR [Title 40, Code of Federal Regulations,] §265.301(a). In accordance with §335.6 of this title [(relating to Notification Requirement)], such person shall not engage in the requested activities if denied by the executive director or unless 90 days' notice has been provided and the executive director approves the request except where express executive director approval has been obtained prior to the expiration of the 90 days. Authorization may not be obtained under this subsection for:

(1) (No change.)

(2) Polychlorinated biphenyl compounds [PCB] wastes subject to regulation by 40 CFR [Code of Federal Regulations,] Part 761;

(3) - (6) (No change.)

(7) radioactive or nuclear waste materials, receipt of which would require a license from the TDH [Texas Department of Health] or the commission [Texas Natural Resource Conservation Commission] or any other successor agency; and

(8) friable asbestos waste unless authorization is obtained in compliance with the procedures established under §330.136(b)(6)(B) - (E) of this title (relating to Disposal of Special Wastes). Authorizations obtained under this subsection shall be effective during the pendency of the interim status and shall cease upon the termination of interim status, final administrative disposition of the subject permit application, failure of the facility to operate the facility in compliance with the standards set forth in Subchapter E of this chapter [(relating to Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities)], or as otherwise provided by law.

(i) Owners or operators of hazardous waste management units must have permits during the active life (including the closure period) of the unit. Owners or operators of surface impoundments, landfills, land treatment units, and waste pile units that received wastes after July 26, 1982, or that certified closure (according to 40 CFR [Code of Federal Regulations,] §265.115) after January 26, 1983, must have post-closure permits, unless they demonstrate closure by removal or decontamination as provided under 40 CFR [Code of Federal Regulations,] §270.1(c)(5) and (6), or obtain an order in lieu of a post-closure permit, as provided in subsection (m) of this section. If a post-closure permit is required, the permit must address applicable provisions of 40 CFR [Code of Federal Regulations,] Part 264, and Subchapter F of this chapter (relating to Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities) provisions relating to Groundwater Monitoring, Unsaturated Zone Monitoring, Corrective Action, and Post-closure Care Requirements. The denial of a permit for the active life of a hazardous waste management facility or unit does not affect the requirement to obtain a post-closure permit under this section.

(j) Upon receipt of the federal Hazardous and Solid Waste Act (HSWA) authorization for the commission's Hazardous Waste Program, the commission shall be authorized to enforce the provisions that the EPA [~~Environmental Protection Agency (EPA)~~] imposed in hazardous waste permits that were issued before the HSWA authorization was granted.

(k) Any person who intends to conduct an activity under subsection (d) of this section shall comply with the notification requirements of §335.6 of this title [~~(relating to Notification Requirements)~~].

(l) No permit shall be required for the management of universal wastes by universal waste handlers or universal waste transporters, in accordance with the definitions and requirements of Subchapter H, Division 5 of this chapter (relating to Universal Waste Rule).

(m) Order in lieu of a post-closure permit. At the discretion of the commission, an owner or operator may obtain a post-closure order in lieu of a post-closure permit for an interim status unit, or alternative corrective action requirements for contamination commingled from RCRA and solid waste management units, or corrective action management units, unless authorized in a permit. The post-closure order must address the facility-wide corrective action requirements of §335.167 of this title (relating to Corrective Action for Solid Waste Management Units) and groundwater monitoring requirements of §335.156 of this title (relating to Applicability of Groundwater Monitoring and Response).

§335.7. Financial Assurance Required.

Authority to store, process, or dispose of industrial solid waste or municipal hazardous waste in accordance with [~~pursuant to~~] a permit or post-closure order issued by the commission is contingent upon the execution and maintenance of financial assurance for the amount(s) specified in its permit in accordance with Chapter 37, Subchapter P of this title (relating to Financial Assurance for Hazardous and Nonhazardous Industrial Solid Waste Facilities), which provides for the closing of the solid waste storage, processing, or disposal facility in accordance with the permit or post-closure order issued for the facility and all other rules of the commission. The commission may require the execution and maintenance of financial assurance in accordance with Chapter 37, Subchapter P of this title for the closing of any solid waste facility exempt from the requirement of a permit under this chapter, but subject to the requirement of a permit or post- closure order under [~~the~~] Texas Water Code, Chapter 26. Persons storing, processing, or disposing of hazardous waste are subject to further requirements concerning financial assurance and closure and post-closure contained in Subchapter F of this chapter (relating to Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities). If the executive director determines that there is a significant risk to human health and the environment from sudden or nonsudden accidental occurrences resulting from the operations of a solid waste storage, processing, or disposal facility, the owner or operator may be required to provide coverage for sudden and/or nonsudden accidental occurrences in accordance with Chapter 37, Subchapter P of this title.

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

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SUBCHAPTER E. INTERIM STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE STORAGE, PROCESSING, OR DISPOSAL FACILITIES

30 TAC §§335.111, 335.112, 335.116, 335.118, 335.119

STATUTORY AUTHORITY

The amendments are proposed under TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under this code and other laws of this state; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; §7.031, which authorizes the commission to issue an order for the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from an SWMU at a solid waste processing, storage, or disposal facility; Solid Waste Disposal Act, THSC, §361.024, which authorizes the commission to adopt rules consistent with Chapter 361; and THSC, §361.082, which authorizes the commission to issue an order for the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from an SWMU at a solid waste processing, storage, or disposal facility.

The proposed amendments implement TWC, §5.103 and §7.031 and THSC, §361.024 and §361.082.

§335.111. Purpose, Scope, and Applicability

(a) The purpose of this subchapter is to establish minimum requirements that define the acceptable management of hazardous waste prior to the issuance or denial of a hazardous waste permit and until certification of final closure or, if the facility is subject to post-closure requirements, until post-closure responsibilities are fulfilled. Except as provided in 40 Code of Federal Regulations (CFR) §265.1080(b), this subchapter and the standards of 40 CFR §§264.552, 264.553, and 264.554 [~~§264.552, §264.553, and §264.554~~] apply to owners and operators of hazardous waste storage, processing, or disposal facilities who have fully complied with the requirements for interim status under the RCRA [~~Resource Conservation and Recovery Act~~], §3005(e), except as specifically provided for in §335.41 of this title (relating to Purpose, Scope and Applicability).

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

(d) Owners and operators who are subject to the requirements to obtain a post-closure permit under §335.2 and §335.43 of this title (relating to Permit Required), but who obtain a post- closure order in lieu of a post-closure permit as provided in §335.2(m) of this title, must:

(1) submit information about the facility listed in §305.50(b) of this title (relating to Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit and for a Post-Closure Order);

(2) comply with facility-wide corrective action requirements of §335.167 of this title (relating to Corrective Action for Solid Waste Management Units);

(3) comply with the groundwater monitoring requirements of §§335.156 - 335.166 of this title (relating to Applicability of Groundwater Monitoring and Response; Required Programs; Groundwater Protection Standard; Hazardous Constituents; Concentration Limits; Point of Compliance; Compliance Period; General Groundwater Monitoring Requirements; Detection Monitoring Program; Compliance Monitoring Program; and Corrective Action Program); and

(4) comply with the financial assurance requirements of Chapter 37, Subchapter P of this title (relating to Financial Assurance for Hazardous and Nonhazardous Industrial Solid Waste Facilities).

(e) The commission may replace all or part of the closure requirements of 40 CFR Part 265 Subpart G (related to Closure and Post-Closure), as amended and adopted in §335.112(a)(6) of this title and the unit specific standards in §335.123 of this title (related to Closure and Post-Closure (Land Treatment Facilities)) applying to a regulated unit with alternative requirements for closure set out in a permit or a post-closure order where the commission determines that:

(1) a regulated unit is situated among solid waste management units or area of concern, a release has occurred, and both the regulated unit and one or more solid waste management unit(s) or area of concern are likely to have contributed to the release; and

(2) it is not necessary to apply the closure requirement of this subchapter because the alternative requirements will be protective of human health and the environment and will satisfy the closure performance standards of §335.8 of this title (related to Closure and Remediation) and §335.167 of this title.

§335.112. Standards.

(a) The following regulations contained in 40 Code of Federal Regulations (CFR) Part 265 (including all appendices to Part 265) (except as otherwise specified herein) are adopted by reference as amended and adopted in the CFR through June 1, 1990 (55 FR 22685) and as further amended as indicated in each paragraph of this subsection:

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

(5) Subpart F - Groundwater Monitoring (as amended through October 22, 1998, (63 FR 56709)) [~~(as amended through December 23, 1991 (56 FR 66369))~~], except 40 CFR §265.90 and §265.94;

(6) Subpart G - Closure and Post-Closure (as amended through October 22, 1998, (63 FR 56709)) [~~(as amended through August 18, 1992 (57 FR 37194))~~]; except 40 CFR §265.112(d)(3) and (4) and §265.118(e) and (f);

(7) - (24) (No change.)

(b) The regulations of the EPA that are adopted by reference in this section are adopted subject to the following changes.

(1) The term "regional administrator" is changed to the "executive director" of the Texas Commission on Environmental Quality [~~Texas Natural Resource Conservation Commission~~] or to the commission, consistent with the organization of the commission as set out in [~~the~~] Texas Water Code, Chapter 5, Subchapter B.

(2) - (9) (No change.)

(10) Reference to the EPA is changed to the Texas Commission on Environmental Quality [~~Texas Natural Resource Conservation Commission~~].

(c) A copy of 40 CFR [~~,~~] Part 265 is available for inspection at the library of the Texas Commission on Environmental Quality [~~Texas Natural Resource Conservation Commission~~], located on the first floor of Building A at 12100 Park 35 Circle, Austin, Texas.

§335.116. Applicability of Groundwater Monitoring Requirements.

(a) (No change.)

(b) Except as provided in subsections (c), (d), and (g) [~~and (d)~~] of this section, the owner or operator must install, operate, and maintain a groundwater monitoring system which meets the requirements of 40 Code of Federal Regulations (CFR) §265.91, and must comply with 40 CFR [~~Code of Federal Regulations~~] §265.92 and §265.93, and §335.117 of this title (relating to Recordkeeping and Reporting). This groundwater monitoring program must be carried out during the active life of the facility, and for disposal facilities during the post-closure care period as well.

(c) (No change.)

(d) If an owner or operator assumes (or knows) that groundwater monitoring of indicator parameters in accordance with 40 CFR [~~Code of Federal Regulations~~] §265.91 and §265.92 would show statistically significant increases (or decreases in the case of pH) when evaluated under 40 CFR [~~Code of Federal Regulations~~] §265.93(b), he may install, operate, and maintain an alternate groundwater monitoring system (other than the one described in 40 CFR [~~Code of Federal Regulations~~] §265.91 and §265.92). If the owner or operator does decide to use an alternate groundwater monitoring system he must:

(1) prior to November 19, 1981, submit to the executive director a specific plan certified by a qualified geologist or geotechnical engineer which satisfies the requirements of 40 CFR [~~Code of Federal Regulations~~] §265.93(d)(3), for an alternate groundwater monitoring system;

(2) prior to November 19, 1981, initiate the determinations specified in 40 CFR [~~Code of Federal Regulations~~] §265.93(d)(4);

(3) prepare and submit a written report in accordance with 40 CFR [~~Code of Federal Regulations~~] §265.93(d)(5);

(4) continue to make the determinations specified in 40 CFR [~~Code of Federal Regulations~~] §265.93(d)(4) on a quarterly basis until final closure of the facility; and

(5) comply with the recordkeeping and reporting requirements in §335.117 of this title [~~(relating to Recordkeeping and Reporting)~~].

(e) The groundwater monitoring requirements of this subchapter may be waived with respect to any surface impoundment that:

(1) is used to neutralize wastes which are hazardous solely because they exhibit the corrosivity characteristic under 40 CFR [~~Code of Federal Regulations~~] §261.22 or are listed as hazardous wastes in 40 CFR [~~Code of Federal Regulations~~] Part 261, Subpart D, only for this reason; and

(2) (No change.)

(f) For owners and operators who have not established background concentrations or values in accordance with 40 CFR [~~Code of Federal Regulations~~] §265.92(c) by November 19, 1982, the executive director may require the implementation of a groundwater assessment plan under 40 CFR [~~Code of Federal Regulations~~] §265.93, whenever he determines that existing data indicates that there is a substantial likelihood that hazardous waste or hazardous constituents from the facility have entered the uppermost aquifer.

(g) The commission may replace all or part of the requirements of this subchapter applying to a regulated unit with alternative

requirements developed for groundwater monitoring set out in a permit or a post-closure order where the commission determines that:

(1) a regulated unit is situated among solid waste management units or area of concern, a release has occurred, and both the regulated unit and one or more solid waste management unit(s) or area of concern are likely to have contributed to the release; and

(2) it is not necessary to apply the requirement of this subchapter because the alternative requirements will be protective of human health and the environment. The alternative standards for the regulated unit must meet the requirements of §335.8 and §335.167 of this title (related to Closure and Remediation and Corrective Action for Solid Waste Management Units).

§335.118. Closure Plan; Submission and Approval of Plan.

(a) Except as provided in this section, the owner or operator must submit his closure plan to the executive director in accordance with the procedures outlined in 40 Code of Federal Regulations (CFR) §265.112. The owner or operator must submit his closure plan to the executive director no later than 15 days after:

(1) (No change.)

(2) issuance of a judicial decree or compliance order under the RCRA [~~Resource Conservation and Recovery Act of 1976,~~] or Texas Health and Safety Code, Chapter 361, to cease receiving wastes or close.

(b) Except as provided in subsection (c) of this section, the [~~The~~] executive director will provide the owner or operator and the public, through newspaper notice, the opportunity to submit written comments on the plan and request modifications of the plan within 30 days of the date of the notice. The owner or operator is responsible for the cost of publication. The executive director may, in response to a request or at his own discretion, hold a public hearing whenever such a hearing might clarify one or more issues concerning a closure plan. The executive director will give public notice of the hearing at least 30 days before it occurs. (Public notice of the hearing may be given at the same time as notice of the opportunity for the public to submit written comments, and the two notices may be combined.) The executive director will approve, modify, or disapprove the plan within 90 days of receipt. If the executive director does not approve the plan, he shall provide the owner or operator with a detailed written statement of reasons for the refusal and the owner or operator must modify the plan or submit a new plan within 30 days after receiving such written statement. The executive director will approve or modify this plan in writing within 60 days. If the executive director modifies the plan, this modified plan becomes the approved closure plan. The executive director's decision must assure that the approved closure plan is consistent with 40 CFR §§265.111 - 265.115, and the applicable closure requirements contained in this chapter for specific waste management methods, and contained in 40 CFR §264.1102. A copy of this modified plan with a detailed statement of reasons for the modifications must be mailed to the owner or operator.

(c) Closure plans submitted in an application for a post-closure order in accordance with §305.50(b) of this title (relating to Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit and for a Post-Closure Order) must comply with the public notice and comment requirements specified in Chapter 39, Subchapter N of this title (regarding Public Notice of Post Closure Orders).

§335.119. Post-Closure Plan; Submission and Approval [~~Approved~~] of Plan.

(a) (No change.)

(b) Except as provided in subsection (c) of this section, the [~~The~~] executive director will provide the owner or operator and the public, through a newspaper notice, the opportunity to submit written comments on the post-closure plan and request modifications of the plan, including modification of the 30-year post-closure period required in 40 CFR §265.117 within 30 days of the date of the notice. The owner or operator is responsible for the cost of publication. The executive director may, in response to a request or at his own discretion, hold a public hearing whenever a hearing might clarify one or more issues concerning the post-closure plan. The executive director will give the public notice of the hearing at least 30 days before it occurs. (Public notice of the hearing may be given at the same time as notice of the opportunity for written public comments and the two notices may be combined.) The executive director will approve, modify, or disapprove the plan within 90 days of its receipt. If the executive director does not approve the plan, he shall provide the owner or operator with a detailed written statement of reasons for the refusal and the owner or operator must modify the plan or submit a new plan for approval within 30 days after receiving such written statement. The executive director will approve or modify this plan in writing within 60 days. If the executive director modifies the plan, this modified plan becomes the approved post-closure plan. The executive director must ensure that the approved post-closure plan is consistent with 40 CFR §§265.117 - 265.120. A copy of this modified plan with a detailed statement of reasons for the modifications must be mailed to the owner or operator. If an owner or operator plans to begin closure before November 19, 1981, he must submit the post-closure plan by May 19, 1981.

(c) Post-closure plans submitted in an application for a post-closure order in accordance with §305.50(b) of this title (relating to Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit and for a Post-Closure Order) must comply with the public notice and comment requirements specified in Chapter 39, Subchapter N of this title (regarding Public Notice of Post-Closure Orders).

This 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 September 13, 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) 239-4712

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SUBCHAPTER F. PERMITTING STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE STORAGE, PROCESSING, OR DISPOSAL FACILITIES

30 TAC §§335.151, 335.152, 335.156, 335.167, 335.179

STATUTORY AUTHORITY

The amendments are proposed under TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under this code and other laws of this state; §5.105, which authorizes the commission to establish

and approve all general policy of the commission by rule; §7.031, which authorizes the commission to issue an order for the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from an SWMU at a solid waste processing, storage, or disposal facility; Solid Waste Disposal Act, THSC, §361.024, which authorizes the commission to adopt rules consistent with Chapter 361; and THSC, §361.082, which authorizes the commission to issue an order for the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from an SWMU at a solid waste processing, storage, or disposal facility.

The proposed amendments implement TWC, §5.103 and §7.031 and THSC, §361.024 and §361.082.

§335.151. Purpose, Scope, and Applicability.

(a) The purpose of this subchapter is to establish minimum standards to define the acceptable management of hazardous waste. These standards are to be applied in the evaluation of an application for a permit to manage hazardous waste, in accordance with TSWDA [~~pursuant to the Texas Solid Waste Disposal Act, Texas Health and Safety Code, Chapter 361 (Vernon Pamphlet 1992)~~], and in the evaluation of an investigation report to implement groundwater protection requirements relating to compliance monitoring and corrective action; and in the evaluation of corrective action measures to be instituted in accordance with [~~pursuant to~~] §335.167 of this title (relating to Corrective Action for Solid Waste Management Units). For facilities that store, process, or dispose of industrial solid waste, in addition to hazardous waste, nothing herein shall be construed to restrict or abridge the commission's authority to implement the provisions of [~~the~~] Texas Water Code, Chapter 26, and §335.4 of this title (relating to General Prohibitions), with respect to those activities.

(b) (No change.)

(c) A facility owner or operator who has fully complied with the requirements for interim status, as defined in the RCRA [~~Resource Conservation and Recovery Act~~], §3005(e), and §335.2 and §335.43 of this title (relating to Permit Required), must comply with the requirements of Subchapter E of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities) in lieu of the requirements of this subchapter, until final administrative disposition of his permit application is made, except as provided under 40 Code of Federal Regulations (CFR) [~~Title 40, Code of Federal Regulations,~~] Part 264, Subpart S.

(d) The regulations of this subchapter apply to all owners and operators subject to the requirements of §335.2(m) of this title when the commission issues either a post-closure permit or a post-closure order at the facility. When the commission issues a post-closure order, references in this subchapter to "in the permit" also mean "in the order."

(e) The commission may replace all or part of the requirements of 40 CFR Part 264 Subpart G (related to Closure and Post-Closure), as amended and adopted in §335.152(a)(5) of this title (relating to Standards) and the unit specific standards in §§335.169, 335.172, and 335.174 of this title (relating to Closure and Post-Closure Care (Surface Impoundments); Closure and Post-Closure Care (Land Treatment Units), and Closure and Post-Closure Care (Landfills)) applying to regulated units, with alternative requirements as set out in a permit or order where the commission determines that:

(1) a regulated unit is situated among solid waste management units or area of concern, a release has occurred, and both the regulated unit and one or more solid waste management unit(s) or area of concern are likely to have contributed to the release; and

(2) it is not necessary to apply the closure requirements of this subchapter (and those referenced herein) because the alternative requirements will be protective of human health and the environment and will satisfy the performance standards of §335.8 of this title (relating to Closure and Remediation) and §335.167 of this title.

(f) If a permitted facility obtains an order setting out alternative requirements provided in subsection (e) of this section, then the alternative requirements shall also be referenced in the facility's permit.

§335.152. Standards.

(a) The following regulations contained in 40 Code of Federal Regulations (CFR) Part 264 (including all appendices to Part 264) are adopted by reference as amended and adopted in the CFR through June 1, 1990 (55 FR 22685) and as further amended and adopted as indicated in each paragraph of this subsection:

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

(5) Subpart G - Closure and Post-Closure (as amended through October 22, 1998, (63 FR 56709)) [~~(as amended through August 18, 1992 (57 FR 37194))~~]; facilities which are subject to 40 CFR Part 264, Subpart X, are subject to 40 CFR §§264.90(d), 264.111(c), 264.112(a)(2), 264.114, 264.117(a)(1)(i) and (ii), and 264.118(b)(1) and (2)(i) and (ii);

(6) - (22) (No change.)

(b) The provisions of 40 CFR §264.18(b) are applicable to owners and operators of hazardous waste management facilities, for which a permit is being sought, which are not subject to the requirements of §§335.201 - 335.206 of this title (relating to Location Standards for Hazardous Waste Storage, Processing, or Disposal). A copy of 40 CFR §264.18(b) is available for inspection at the library of the Texas Commission on Environmental Quality [~~Texas Natural Resource Conservation Commission~~], located on the first floor of Building A at 12100 Park 35 Circle, Austin, Texas.

(c) The regulations of the EPA that are adopted by reference in this section are adopted subject to the following changes.

(1) The term "regional administrator" is changed to the "executive director" of the Texas Commission on Environmental Quality [~~Texas Natural Resource Conservation Commission~~] or to the commission, consistent with the organization of the commission as set out in [~~the~~] Texas Water Code, Chapter 5, Subchapter B.

(2) - (9) (No change.)

(10) Reference to the EPA is changed to the Texas Commission on Environmental Quality [~~Texas Natural Resource Conservation Commission~~].

(d) A copy of 40 CFR Part 264 is available for inspection at the library of the Texas Commission on Environmental Quality [~~Texas Natural Resource Conservation Commission~~], located on the first floor of Building A at 12100 Park 35 Circle, Austin.

§335.156. Applicability of Groundwater Monitoring and Response.

(a) Except as provided in subsection (b) of this section, the rules pertaining to groundwater monitoring and response apply to owners and operators of facilities that process, store, or dispose of hazardous waste.

(1) The owner or operator must satisfy those requirements of paragraph (2) or (3) of this subsection for all wastes (or constituents thereof) contained in any such waste management unit at the facility, regardless of the time at which waste was placed in the units.

(2) Except as provided in paragraph (3) of this subsection, all [~~All~~] solid waste management units must comply with the requirements in §335.167 of this title (relating to Corrective Action for Solid Waste Management Units). A surface impoundment, waste pile, land treatment unit, or landfill that receives hazardous waste after July 26, 1982, (hereinafter referred to as a regulated unit) must comply with the requirements of §§335.157 - 335.166 of this title (relating to Required Program; Groundwater Protection Standard; Hazardous Constituents; Compliance Period; General Groundwater Monitoring Requirements; Detection Monitoring Program; Compliance Monitoring Program; and Corrective Action Program) in lieu of §335.167 of this title [~~(relating to Corrective Action for Solid Waste Management Units)~~] for purposes of detecting, characterizing, and responding to releases to the uppermost aquifer. The financial responsibility requirements of §335.167 of this title [~~(relating to Corrective Action for Solid Waste Management Units)~~] apply to regulated units.

(3) The commission may replace all or part of the requirements of §§335.157 - 335.166 of this title with alternative requirements for groundwater monitoring and corrective action for releases to groundwater set out in the permit or in a post-closure order where the commission determines that:

(A) a regulated unit is situated among solid waste management units or area of concern, a release has occurred, and both the regulated unit and one or more solid waste management unit(s) or area of concern are likely to have contributed to the release; and

(B) it is not necessary to apply the groundwater monitoring and corrective action requirements of §§335.157 - 335.166 of this title because the alternative requirements will be protective of human health and the environment.

(4) If a permitted facility obtains an order setting out alternative requirements provided in §335.151(e) of this title (relating to Purpose, Scope, and Applicability), then the alternative requirements shall also be referenced in the facility's permit.

(b) The owner or operator's regulated unit or units are not subject to regulation for releases into the uppermost aquifer under this section and §§335.157 - 335.166 of this title [~~(relating to Required Programs; Groundwater Protection Standard; Hazardous Constituents; Concentration Limits; Point of Compliance Period; General Groundwater Monitoring Requirements; Detection Monitoring Program; Compliance Monitoring Program; and Corrective Action Program)~~] if:

(1) he is exempted under 40 Code of Federal Regulations (CFR) §264.1;

(2) (No change.)

(3) the commission finds, in accordance with [~~pursuant to~~] 40 CFR [~~Code of Federal Regulations~~] §264.280(d), that the treatment zone of a land treatment unit that qualifies as a regulated unit does not contain levels of hazardous constituents that are above backgrounds levels of those constituents by an amount that is statistically significant, and if an unsaturated zone monitoring program meeting the requirements of 40 CFR [~~Code of Federal Regulations~~] §264.278 has not shown a statistically significant increase in hazardous constituents below the treatment zone during the operating life of the unit. An exemption under this paragraph can only relieve an owner or operator or responsibility to meet the requirements of this subchapter relating to groundwater monitoring and response during the post-closure care period; [~~or~~]

(4) the [~~The~~] commission finds that there is no potential for migration of liquid from a regulated unit to the uppermost aquifer during the active life of the regulated unit (including the closure period) and the post-closure care period specified under 40 CFR [~~Code of Federal Regulations~~] §264.117. This demonstration must be certified by a qualified geologist or geotechnical engineer. In order to provide an adequate margin of safety in the prediction of potential migration of liquid, the owner or operator must base any predictions on assumptions that maximize the rate of liquid migration; or

(5) he designs and operates a pile in compliance with 40 CFR [~~Code of Federal Regulations~~] §264.250(c).

(c) Sections 335.157 - 335.166 [~~This §§335.157 - 335.166~~] of this title [~~(relating to Required Programs; Groundwater Protection Standard; Hazardous Constituents; Concentration Limits; Point of Compliance; Compliance Period; General Groundwater Monitoring Requirements; Detection Monitoring Program; Compliance Monitoring Program; and Corrective Action Program)~~] apply during the active life of the regulated unit (including the closure period). After closure of the regulated unit, these sections:

(1) (No change.)

(2) apply during the post closure care period under 40 CFR [~~Code of Federal Regulations~~] §264.117 if the owner or operator is conducting a detection monitoring program under §335.164 of this title [~~(relating to Detection Monitoring Program)~~]; or

(3) apply during the compliance period under §335.162 of this title [~~(relating to Compliance Period)~~] if the owner or operator is conducting a compliance monitoring program under §335.165 of this title [~~(relating to Compliance Monitoring Program)~~] or a corrective action program under §335.166 of this title [~~(relating to Corrective Action Program)~~].

§335.167. Corrective Action for Solid Waste Management Units.

(a) The owner or operator of a facility seeking a permit or post-closure order for the processing, storage, or disposal of hazardous waste must institute corrective action as necessary to protect human health and the environment for all releases of hazardous waste or constituents from any solid waste management unit at the facility, regardless of the time at which waste was placed in such unit.

(b) Corrective action at a permitted facility will be specified in the compliance plan under §305.401 of this title (relating to [~~Groundwater~~] Compliance Plan) and in accordance with this section, 40 Code of Federal Regulations (CFR) Part 264, Subpart S, and §335.152 of this title (relating to Standards). The plan will contain schedules of compliance for such corrective action where such corrective action cannot be completed prior to issuance of the permit or plan. Financial assurance for such corrective action shall be established and maintained in accordance with Chapter 37, Subchapter P of this title (relating to Financial Assurance for Hazardous and Nonhazardous Industrial Solid Waste Facilities) in an amount acceptable to the executive director.

(c) Corrective action at a facility under a post-closure order will be specified in the facility's post-closure order in accordance with this section, 40 CFR Part 264, Subpart S, and §335.152 of this title. The post-closure order will contain schedules of compliance for such corrective action where such corrective action cannot be completed prior to issuance of the post-closure order. Financial assurance for such corrective action shall be established and maintained in accordance with Chapter 37, Subchapter P of this title in an amount acceptable to the executive director.

(d) [~~(c)~~] The owner or operator must implement corrective actions beyond the facility boundary, where necessary to protect human health and the environment, unless the owner or operator demonstrates to the satisfaction of the executive director that, despite the owner's or operator's best efforts, the owner or operator was unable to obtain the necessary permission to undertake such action. The owner/operator is

not relieved of all responsibility to clean up a release that has migrated beyond the facility boundary where off-site access is denied. On-site measures to address such releases will be determined on a case-by-case basis. Financial assurance for such corrective action shall be established and maintained in accordance with Chapter 37, Subchapter P of this title, in an amount acceptable to the executive director.

§335.179. Financial Assurance.

(a) Before a permit or post-closure order may be issued, amended, extended, or renewed for a solid waste facility for storage, processing, or disposal of hazardous waste, the commission shall determine the type or types of financial assurance which may be used by the applicant to comply with applicable regulations.

(b) - (e) (No change)

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

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Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 27, 2002
For further information, please call: (512) 239-4712

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 65. WILDLIFE

SUBCHAPTER A. STATEWIDE HUNTING AND FISHING PROCLAMATION

DIVISION 3. SEASONS AND BAG LIMITS--FISHING PROVISIONS

31 TAC §65.78

The Texas Parks and Wildlife Department proposes an amendment to §65.78, concerning the Statewide Hunting and Fishing Proclamation. The proposed rule would establish a 16-day closed season for crab traps.

The crab resources in Texas support valuable sport and commercial fisheries. Over 6 million pounds are harvested annually with a dockside value of $4.0 million. Responsibility for establishing seasons, bag limits, means and methods for taking wildlife resources, including crabs, is delegated to the Texas Parks and Wildlife Commission (TPWC) under Parks and Wildlife Code, Chapter 61, Uniform Wildlife Regulatory Act (Wildlife Conservation Act of 1983). The crab fishery is managed using guidelines in the Crab Fishery Management Plan (FMP) adopted by the Commission in 1992. That FMP noted concerns about abandoned crab traps. Senate Bill 1410 from the 77th Texas Legislature provided the Commission new authority to establish a season closed to the use of crab traps for the purpose of removing abandoned crab traps. The legislation authorizes the Commission to create a closed season lasting a minimum of 10 days to a maximum of 30 days beginning no earlier than January 31st and ending no later than April 1st during any year of a closure.

For the first year of the closure, Department staff solicited input on the appropriate length of a closed season from commercial crab fishermen, crab dealers and commercial finfish fishermen via eight outreach meetings held along the Texas Coast. Staff also consulted twice with members of the Texas Crab Advisory Committee, the Crab License Management Review Board, and the Finfish License Management Review Board. The closed period in 2002 occurred from February 16 to March 3. During the closed period 8,070 traps were collected and removed from the public waters of the state. Over 550 volunteers participated in the abandoned crab trap removal program. TPWD biologists and observers randomly selected 647 traps to determine the composition of organisms within the abandoned traps. Twenty-one different species were encountered. The most frequent species observed were blue crabs and stone crabs, which made up over 77% of the organisms released. In addition, recreationally and commercially important finfish species including black drum, red drum, flounder, spotted seatrout and sheepshead were reported and released.

Based on review of last years closure and consultation with the Texas Parks and Wildlife Department Crab Advisory Committee, the Department proposes changes to §65.78 that will establish a closed season for the period March 1 - March 16, 2003, during which the placement and/or use of crab traps in public waters will be prohibited.

Robin Riechers, staff economist, has determined that for each of the first five years that the rule as proposed is in effect, there will be no fiscal implications to local governments as a result of enforcing or administering the rules. In the first five years the proposed rule will have minimal costs to state government. Currently, lost or abandoned traps are subject to removal from the water through routine law enforcement activities. The closed season will create efficiency by clearly identifying abandoned traps for removal by law enforcement and volunteers. The closure provides easy identification of abandoned traps and allows for use of volunteers in removal of the traps after the seventh day of the closure when the traps become litter by definition in statute. Any additional cost of administration of the trap removal program should be minimal.

Mr. Riechers has also determined that for each of the first five years the rule as proposed is in effect, the public benefits anticipated as a result of enforcing or administering the rule as proposed will be: a) better achievement of optimum yield for the crab fishery; b) increased conservation through reduced waste of the crab resource and other aquatic organisms, and; c) increased boating safety by decreasing current navigation hazards. Overall, increased benefits to the public will be to provide on a continuing basis greater protection and enhancement of the crab population.

Anticipated benefits to the crab fishery include a reduction in current crab mortality associated with lost or abandoned traps. These crabs will be available for subsequent harvest and contribution to the spawning stock. Based on the number of traps removed in 2002 and the observed species found within the traps, it is estimated that on the day of the trap-removal event over 11,000 organisms were saved. The one-day release prevented the waste of over 5,500 crabs, 3,000 stone crabs, 855 sheepshead, and 36 diamond back terrapins.

Studies from Louisiana indicate an average loss of 26 crabs/trap/year when no degradable panels are installed. Based on the observed traps, 66 % of the traps collected did not appear to have degradable panels. Using the percent that did not have degradable panels and the total traps collected, it is estimated that over 138,000 crabs were saved on an annual basis due to the removal of abandoned traps in 2002. The program will directly benefit the crab fishermen, the public, and the resource by wasting fewer crabs and other organisms. It is estimated that based on average weights of 0.5 pounds/crab, the direct benefit from the cleanup in 2002 was 69,000 additional pounds of crabs available for harvest throughout the year.

The benefits listed above are based on the cleanup of 2002. The benefits for this year may likely be less due to fewer traps available for removal, but certainly benefits will be derived. Previous estimates of lost traps are based on trap loss by legal crab fishermen and do not even consider illegal traps or recreational traps which are lost. While the current limited entry system has probably decreased the number of lost traps per individual it has not eliminated these losses.

Mr. Riechers has also determined that for each of the first five years the rule as proposed is in effect there will be an adverse economic effect on microbusinesses, small businesses, and an economic cost persons who are required to comply with the rules; however, the rules will result in an overall economic benefit to microbusinesses, small businesses, and persons required to comply.

From the period 1996-2000, average coastwide total landings in March were 237,234 pounds. This equates to a value of $178,594. Dividing a month's value by the number of days in the month provides an estimated cost per day of the closure. Based on a five-year average the statewide loss in pounds per day (value in parenthesis) for March is 8,472 pounds ($6,378). TPWD proposes to minimize the economic cost of these rules by establishing a closed season of the minimum practical duration during some of the least productive time of the year.

The loss can be estimated by multiplying the number of closed days by the average cost per day for the current proposed closed season. The closed season creates an estimated ex-vessel (dockside) loss of 135,552 pounds and $102,048 in value, without considering the survivability of market sized crabs throughout the closed period. The amount of loss is adjusted for the percent of crabs of harvestable size (crabs 5 inches or greater in carapace width) that will be deferred until the re-opening of the season. Given the low natural mortality rate when crabs reach legal harvest size, it is likely that much of the harvest will be deferred. Based on previous studies using an annual mortality rate of 38%, an average monthly mortality rate of 3% can be derived. Thus the loss due to natural mortality for an entire month would be 3%, or on a semi-monthly basis about 1.5%. Calculating the loss in ex-vessel (dockside) value requires that the total loss of pounds (value) of average historical landings of 135,552 pounds ($102,048) be multiplied by the semi-monthly loss rate due to natural mortality (1.5%). This creates a total coastwide loss of 2,033 pounds ($1,530) for the days of the closure. Based on the 251 eligible licensed crabbers in fiscal year 2001, the cost per individual would be $6 per year.

There may be additional losses associated with the days prior to and at the end of the closure when crabbers are removing traps or placing traps back in the water and have days of reduced catch. These additional lost fishing days prior to and after the closure will be based on individual fishing practices and are not quantifiable at this time.

Again, the benefits of the program are the reduction in crab mortalities associated with lost or abandoned traps, which is estimated to be 69,000 pounds. Each individual will thus have increased harvest potential of 275 pounds. Based on an ex-vessel value of $0.66/pound (annual avg. 1996-2000) represents a potential gain of $181.00 to each fisherman. The net benefit would thus be $175 per fisherman ($181 - $6). These gains do not consider the additional benefits associated with increased spawning capacity, nor does it consider natural mortality associated with undersized crabs that are saved due to the crab trap clean-up program.

Other economic impacts of the 16-day closure are expected to be minimal. Commercial finfish fishermen will not be able to harvest bait during the closure. It is expected that this loss will be minimal as bait can be frozen in advance to plan for this time period and artificial baits may be used. Crab dealers may also be affected by the closure and in the short run may not be able to meet product demand during the closed season. The effect of the closure on the long-run product demand is unknown at this time. Recreational crabbers will lose opportunity during this time period. Currently the losses to commercial finfish fishermen, dealers, and recreational interests are not quantifiable.

It is anticipated that there will be no adverse local employment impacts associated with these proposed rules. There will be a stoppage of cash flow for the businesses during the closed period, but based on the previous analysis the closure should not result in a negative impact. The loss in revenue for the specific time period is compensated by the deferred harvest aspect of the closure as well as additional benefits from the reduction in crab mortalities from lost and abandoned traps. An overall gain in potential harvest is available when considering the present waste of the crab resources which occurs due to these lost and abandoned traps. The closure may create a direct impact on employment for the days of the closure, but it is not anticipated that this reduction in employment will be for a period greater than the closure. The proposal minimizes this impact by choosing a closure period during what is usually the least profitable time of year and for the minimum practical duration.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

Comments are requested on the proposed rule change from any interested person. Writtten comments may be submitted to Robin Riechers, Coastal Fisheries Division, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4645 or 1-800-792-1112 extension 4645; e-mail at robin.riechers@tpwd.state.tx.us no later than November 1, 2002. Comments may be submitted orally at public hearings that are scheduled around the state. Please call or check the TPWD web site, www.tpwd.state.tx.us to find the most convenient hearing.

The amendment is proposed under Parks and Wildlife Code, §78.115, which authorizes the commission to establish a closed season for the use of crab traps in the public water of Texas.

The amendment affects Parks and Wildlife Code, Chapter 78.

§65.78. Crabs and Ghost Shrimp.

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

(c) Closed crab trap season: It is unlawful to place or fish a crab trap in the coastal waters of the state from 12:01 a.m. Saturday, March 1, 2003 [~~February 16, 2002~~] through 12:00 midnight Sunday, March 16, 2003 [~~March 3, 2002~~]. No crab or crab trap component may be left in the coastal waters of this state from 12:01 a.m. Saturday, March 1, 2003 [~~February 16, 2002~~] through 12:00 midnight Sunday, March, 16, 2003 [~~March 3, 2002~~].

(d)-(e) (No change.)

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

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TRD-200206011
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
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For further information, please call: (512) 389-4775

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SUBCHAPTER C. PERMITS FOR TRAPPING, TRANSPORTING, AND TRANSPLANTING GAME ANIMALS AND GAME BIRDS

31 TAC §65.102

The Texas Parks and Wildlife Department proposes new §65.102, concerning Permits to Trap, Transport, and Transplant Game Animals and Game Birds (Triple T permits). The new section would narrow the effect of the subchapter by excluding white-tailed deer and mule deer from applicability. The new rule may be necessary because of concerns related to Chronic Wasting Disease (CWD), which has been detected in free-ranging deer populations in other states and Canada. Because CWD has not yet been exhaustively studied, the peculiarities of its transmission, infection rate, incubation period, and potential for transmission to other species are not definitively known. Although no deer have tested positive for CWD in Texas, the department cannot categorically discount the presence of the disease in the state. Although the department acted in February to curtail the importation of deer into the state and has worked closely with the Texas Animal Health Commission to develop and implement monitoring protocols to detect the disease, at the commission's August meeting there was a prolonged discussion of the practice of trapping and transplanting deer and the potential for the spread of CWD by way of trapping and transplanting. In 2001, the department issued 95 Triple T permits, authorizing the transplantation of 4,348 deer. Any one of those deer conceivably could have been in contact with a CWD-positive deer prior to being trapped and transplanted and could thus be a vector for introducing the disease to additional areas of the state. Consequently, the commission directed staff to publish and seek public comment on a proposal to suspend issuance of Triple T permits.

Robert Macdonald, regulations coordinator, has determined that for each of the first five years that the new section as proposed is in effect, there will be no fiscal implications to the department or other units of state or local government.

Mr. Macdonald also has determined that for each of the first five years the new section as proposed is in effect, the public benefit anticipated as a result of enforcing the rule as proposed will be the protection of native deer from communicable diseases, thus ensuring the public of continued enjoyment of the resource and the protection of the state's $2.5 billion per year hunting industry.

There will be economic costs to persons required to comply with the rule as proposed, and effects for small businesses or microbusinesses engaged in commercial trapping activities. Under 31 TAC §65.115, the department requires the disclosure of financial information related to trap and transplant activities. Of 95 persons permitted in 2001, the highest reported trap and transplant cost was $577 per deer. The average cost per deer trapped and transplanted was $204 and the median cost was $162. The department concludes, based on the data submitted from the regulated community, that deer generally are and can be trapped and transplanted for somewhere between $150 - $200. These figures represent only the reported gross cost of trapping and transplanting. The department has no data from which to estimate the actual profit to those persons or businesses conducting trap and transplant activities.

Triple T permits can be issued to the owner or agent of the trap site, the owner or agent of the release site, or the person doing the trapping, but in most cases permits are acquired by the owner or authorized agent of the release site (the person who desires to obtain the deer), who then contracts with a trapper to capture and transport the deer. Department records indicate that the total number of deer trapped in 2001 was 4,348, and the largest number of deer trapped by a single individual in 2001 was 1,361. Using the average value of $204 per deer trapped and the upper value of 1,361 deer trapped (by a single person) last year, the department estimates that the economic loss to the largest trapping business in the state, using 2001 data, would be $277,644 gross dollars. This is the gross revenue lost by the individual or business, not the profit lost.

The department is unable to predict the demand for permits for current and subsequent years, but believes that the number of transplanted deer will not decrease, given that in the years since 1993 there have been only three years when less than 4,000 deer were moved. Therefore, using 4,000 as a rough baseline for demand, the total gross revenue loss if trapping were to be prohibited would be $856,000 to the persons and businesses trapping and transplanting deer. Again, this is the total revenue that would be lost to those persons or businesses that trap and transplant deer. Net revenue cannot be determined at this time.

Additionally, any revenue associated with the marketing of hunting opportunity that is dependent upon trapped and transplanted animals would be lost as well. That figure also cannot be quantified at this time, but is a minuscule component of the state's estimated $2.5 billion per year hunting industry.

The department has not filed a local impact statement with the Texas Employment Commission as required by Government Code, §2001.022, as this agency has determined that the rule as proposed will not impact local economies.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed new section.

Comments on the proposed rule may be submitted to Jerry Cooke, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389- 4774 or 1-800-792-1112, e-mail (jerry.cooke@tpwd.state.tx.us).

The new rule is proposed under Parks and Wildlife Code, §43.061, which requires the commission to adopt rules for the content of wildlife stocking plans, certification of wildlife trappers, and the trapping, transporting, and transplanting of game animals and game birds under the subchapter, and §43.0611, which requires the commission to adopt rules for fees, applications, and activities, including limitations on the times of the activities, relating to permits for trapping, transporting, or transplanting white-tailed deer

The proposed new rule affects Parks and Wildlife Code, Chapters 43, Subchapter E.

§65.102. Limitation of Applicability.

Until this section is repealed, no permits to trap, transport, and transplant white-tailed deer or mule deer shall be issued by the department.

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

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Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
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For further information, please call: (512) 389-4775

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SUBCHAPTER T. SCIENTIFIC BREEDER'S PERMITS

31 TAC §§65.609 - 65.611

The Texas Parks and Wildlife Department proposes amendments to §§65.609-65.611, concerning Scientific Breeder's Permits. The emergence of tuberculosis (TB) and chronic wasting disease (CWD) in both captive and free-ranging deer populations in other states is cause for concern due to the potential threat to wild deer and livestock populations in Texas. The biological and epidemiological nature of CWD is not well understood and has not been extensively studied, but it is known to be communicable, incurable, and invariably fatal. At the current time, there is no live test for CWD; animals suspected of having CWD must be euthanized in order to obtain brain tissue for definitive diagnosis.

The Texas Parks and Wildlife Department has worked closely with the Texas Animal Health Commission to characterize the threat potential of CWD to native wildlife and livestock, and to determine the appropriate level of response. The department strongly believes that vigilance and early detection are crucial to minimizing the severity of biological and economic impacts in the event that an outbreak occurs in Texas, and that the implementation of reasonable rules to prevent the spread of the disease if in fact it is present in Texas is warranted. At the present time, regulations promulgated by the Texas Animal Health Commission are deemed by the department to be sufficiently stringent to prevent the importation of diseased cervids into the state. Therefore, the department proposes to lift the temporary suspension on importation of deer.

The amendment to §65.609, concerning Purchase Permit and Purchase of Deer would lift the temporary suspension on importation of deer. The amendment is necessary because the department has determined that rules promulgated by the Texas Animal Health Commission are sufficient protection against the importation of diseased cervids.

The amendment to §65.610, concerning Transport of Deer and Transport Permit, stipulates that deer temporarily relocated for nursing or veterinary purposes may not leave the state for those purposes. The amendment also lifts the temporary restriction on the importation of deer. The amendment is necessary to prevent deer from being relocated beyond the department's ability to monitor or enforce laws designed to protect Texas deer from exposure and infection.

The amendment to §65.611, concerning Prohibited Acts, would make it an offense for any person to sell deer to another person if the buyer did not possess a valid purchase permit. The amendment is necessary to create an auditable paper trail for transactions involving white-tailed deer.

Robert Macdonald, regulations coordinator, has determined that for each of the first five years that the rules as proposed are in effect, there will be no fiscal implications to state and local governments as a result of enforcing or administering the rules.

Mr. Macdonald has also determined that for each of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the rules as proposed will be the protection of wild, native deer from communicable diseases, thus ensuring the public of continued enjoyment of the resource. In light of regulations promulgated by the Texas Animal Health Commission to prevent infected deer from being imported to Texas, the commission has determined that a continued suspension of importation of deer is unnecessary.

There will be no adverse economic effect on small businesses, microbusinesses, or persons required to comply with the rule as proposed.

The department has not filed a local impact statement with the Texas Workforce Commission as required by the Administrative Procedures Act, §2001.022, as the agency has determined that the rules as proposed will not impact local economies.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rules.

Comments on the proposed rules may be submitted to Jerry Cooke, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4774 or 1-800-792-1112 extension 4774 (e-mail: jerry.cooke@tpwd.state.tx.us).

The amendments are proposed under Parks and Wildlife Code, Chapter 43, Subchapter L, which authorizes the Parks and Wildlife Commission to establish regulations governing the possession of white-tailed and mule deer for scientific, management, and propagation purposes.

The proposed rules affect Parks and Wildlife Code, Chapter 43, Subchapter L.

§65.609. Purchase of Deer and Purchase Permit.

(a) Deer may be purchased or obtained for:

(1) holding for propagation purposes if the purchaser possesses a valid scientific breeder's permit; or

(2) liberation for stocking purposes.

(b) Deer may be purchased or obtained only from:

(1) the holder of a valid scientific breeder's permit; or

(2) a lawful out-of-state source.

(c) An individual may possess or obtain deer only after a purchase permit has been issued by the department. A purchase permit is valid for a period of 30 days after it has been completed (to include the unique number of each deer being transferred), dated, signed, and faxed to the Law Enforcement Communications Center in Austin prior to the transport of any deer. The purchase permit shall also be signed and dated by the buyer or buyer's agent prior to or at the time that the transfer of possession of any deer occurs. A purchase permit does not authorize and is not valid for the transport of deer into this state from any other state or country.

(d) A purchase permit is valid for only one transaction and expires after one instance of use.

(e) A one-time, 30-day extension of effectiveness for a purchase permit may be obtained by notifying the department prior to the original expiration date of the purchase permit.

(f) A person may amend a purchase permit at any time prior to the transport of deer; however:

(1) the amended permit shall reflect all changes to the required information submitted as part of the original permit;

(2) the amended permit information shall be reported by phone to the Law Enforcement Communications Center in Austin at the time of the amendment; and

(3) the amended permit information shall be faxed to the Law Enforcement Communications Center in Austin within 48 hours of transport.

(g) The department may issue a purchase permit for liberation for stocking purposes if the department determines that the release of deer will not detrimentally affect existing populations or systems.

(h) Deer lawfully purchased or obtained for stocking purposes may be temporarily held in captivity:

(1) to acclimate the deer to habitat conditions at the release site;

(2) when specifically authorized by the department;

(3) for a period to be specified on the purchase permit, not to exceed six months;

(4) if they are not hunted prior to liberation; and

(5) if the temporary holding facility is physically separate from any scientific breeder facility and the deer being temporarily held are not commingled with deer being held in a scientific breeder facility. Deer removed from a scientific breeder facility to a temporary holding facility shall not be returned to any scientific breeder facility.

(i) No person may sell deer to another person unless either the purchaser or the seller possesses a purchase permit valid for that specific transaction.

[~~(j) Except as provided in this subsection, no person may possess a deer acquired from an out-of-state source. This subsection does not apply to deer lawfully possessed prior to the effective date of this subsection.~~]

§65.610. Transport of Deer and Transport Permit.

(a) The holder of a valid scientific breeder's permit may, without any additional permit, transport legally possessed deer:

(1) to another scientific breeder when a valid purchase permit has been issued for that transaction;

(2) to another scientific breeder on a temporary basis for breeding purposes. The scientific breeder providing the deer shall complete and sign a free, department-supplied invoice prior to transporting any deer, which invoice shall accompany all deer to the receiving facility. The scientific breeder receiving the deer shall sign and date the invoice upon receiving the deer, and shall maintain a copy of the invoice during the time the deer are held in the receiving facility. At such time as the deer are to return to the originating facility, the invoice shall be dated and signed by both the scientific breeder relinquishing the deer and the scientific breeder returning the deer to the originating facility, and the invoice shall accompany the deer to the original facility. A photocopy of the original of the invoice shall be submitted to the department with the annual report required by §65.608 of this title (relating to Annual Reports and Records). In the event that a deer has not been returned to a facility at the time the annual report is due, a scientific breeder shall submit a photocopy of the incomplete original invoice with the annual report. A photocopy of the completed original invoice shall then be submitted as part of the permittee's annual report for the following year.

(3) to another person on a temporary basis for nursing purposes, provided the deer do not leave this state. The scientific breeder shall complete and sign a free, department-supplied invoice prior to transporting deer to a nursery, which invoice shall accompany all deer to the receiving facility. The person receiving the deer shall sign and date the invoice upon receiving the deer, and shall maintain a copy of the invoice during the time the deer are held by that person. At such time as the deer are to return to the originating facility, the invoice shall be dated and signed by both the person holding the deer and the scientific breeder returning the deer to the originating facility, and the invoice shall accompany the deer to the original facility. A photocopy of the original of the invoice shall be submitted to the department with the annual report required by §65.608 of this title.

(4) to an individual who does not possess a scientific breeder's permit if a valid purchase permit for release into the wild for stocking purposes has been issued for that transaction;

(5) to and from an accredited veterinarian for the purpose of obtaining medical attention, provided the deer do not leave this state; and

(6) to a facility authorized under Subchapter D of this chapter (relating to Deer Management Permit) to receive buck deer on a temporary basis. The scientific breeder shall complete and sign a free, department-supplied invoice prior to transporting deer to a DMP facility, which invoice shall accompany all deer to the receiving facility. The DMP permittee or authorized agent receiving the deer shall sign and date the invoice upon receiving the deer, and shall maintain a copy of the invoice during the time the deer are held by that person. At such time as the deer are to return to the facility of origin, the invoice shall be dated and signed by both the person holding the deer under a DMP permit and the scientific breeder, and the invoice shall accompany the deer to the facility of origin. A photocopy of the original of the invoice shall be submitted to the department with the annual report required by §65.608 of this title.

(b) The department may issue a transport permit to an individual who does not possess a scientific breeder's permit if the individual is transporting deer within the state and the deer were legally purchased or obtained from a scientific breeder or lawful out-of-state source.

(c) [~~A transport permit does not authorize and is not valid for the transport of deer into this state from any other state or country.~~]

[~~(d)~~] Except as provided in this subchapter, no person may transport deer during any open season for deer or during the period beginning 10 days immediately prior to an open season for deer unless the person notifies the department by contacting the Law Enforcement Communications Center in Austin no less than 24 hours before actual transport occurs.

(d) [~~(e)~~] During an open season for deer or during the period beginning 10 days immediately prior to an open season for deer, deer may be transported for the purposes of this subchapter without prior notification of the department; however, deer transported under this subsection shall be transported only from one scientific breeder facility to another scientific breeder facility. Deer transported under this subsection shall not be liberated unless the scientific breeder holding the deer notifies the Law Enforcement Communications Center no less than 24 hours prior to liberation.

(e) [~~(f)~~] Transport permits shall be effective for 30 days from the date that the scientific breeder has completed (to include the unique number of each deer being transported), dated, signed, and faxed the permit to the Law Enforcement Communications Center in Austin prior to the transport of any deer. The transport permit shall also be signed and dated by the other party to a transaction (or their authorized agent) upon the transfer of possession of any deer.

(f) [~~(g)~~] A transport permit is valid for only one transaction, and expires after one instance of use.

(g) [~~(h)~~] A person may amend a transport permit at any time prior to the transport of deer; however:

(1) the amended permit shall reflect all changes to the required information submitted as part of the original permit;

(2) the amended permit information shall be reported by phone to the Law Enforcement Communications Center in Austin at the time of the amendment; and

(3) the amended permit information shall be faxed to the Law Enforcement Communications Center in Austin within 48 hours of transport.

(h) [~~(i)~~] A one-time, 30-day extension of effectiveness for a transport permit may be obtained by notifying the department prior to the original expiration date of the transport permit.

(i) [~~(j)~~] No person may possess, transport, or cause the transportation of deer in a trailer or vehicle under the provisions of this subchapter unless the trailer or vehicle exhibits an applicable inscription, as specified in this subsection, on the rear surface of the trailer or vehicle. The inscription shall read from left to right and shall be plainly visible at all times while possessing or transporting deer upon a public roadway. The inscription shall be attached to or painted on the trailer or vehicle in block, capital letters, each of which shall be of no less than six inches in height and three inches in width, in a color that contrasts with the color of the trailer or vehicle. If the person is not a scientific breeder, the inscription shall be "TXD". If the person is a scientific breeder, the inscription shall be the scientific breeder serial number issued to the person.

[~~(k) Except as provided in this subsection, no person may possess a deer acquired from an out-of-state source. This subsection does not apply to deer lawfully possessed prior to the effective date of this subsection.~~]

§65.611. Prohibited Acts.

(a) Deer obtained from the wild under the authority of a permit or letter of authority issued pursuant to Parks and Wildlife Code, Chapter 43, Subchapter C, E, or R shall not be commingled with deer held in a permitted scientific breeder facility.

(b) A person commits an offense if that person places or holds deer in captivity at any place or on any property other than property for which a scientific breeder's permit, or a permit authorized under other provisions of this title or Parks and Wildlife Code, is issued, except that a permittee may transport and temporarily hold deer at another location for breeding, nursing, or [~~a~~] veterinary purposes as provided in this subchapter [~~facility for treatment~~].

(c) No live deer taken from the wild may be possessed under a scientific breeder's permit or held in a scientific breeder's facility.

(d) No deer shall be held in a trailer or other vehicle of any type except for the purpose of immediate transportation from one location to another.

(e) Possession of a scientific breeder's permit is not a defense to prosecution under any statute prohibiting abuse of animals.

(f) No scientific breeder shall hunt or kill, or allow the hunting or killing of deer held pursuant to this subchapter.

(g) No scientific breeder shall exceed the number of deer allowable for the permitted facility, as specified by the department on the scientific breeder's permit.

(h) No person may sell deer to another person unless either the purchaser or the seller possesses a purchase permit valid for that specific transaction.

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

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER K. HOTEL OCCUPANCY TAX

34 TAC §3.161

The Comptroller of Public Accounts proposes an amendment to §3.161, concerning definitions, exemptions, and exemption certificate. This amendment incorporates legislative changes in House Bill 2812, 77th Legislature, 2001, which amended Tax Code, Chapter 156, to remove the requirement that public and private institutions of higher education be Texas public and private institutions of higher education to be exempt from state hotel occupancy tax. Subsections (a)(4) and (b)(6) are added to clarify the permanent resident exemption. Subsection (a) (5) is added to define a private club. Subsection (d)(1) is added to clarify that dormitories and other housing facilities operated by institutions of higher education are excluded from the definition of a hotel. Subsection (d)(2) is added to clarify that hotel tax is not due on

room rentals to members by a private club, which eliminates the need for subsection (b)(1). Subsection (b) is amended to delete the language concerning private clubs from the exemption section and add requirements to obtain a permanent resident exemption. Other subsections of the proposed rule are amended for clarity.

James LeBas, Chief Revenue Estimator, has determined the amendment to the rule would have no fiscal impact on small business. The rule would benefit the public by providing additional information concerning tax responsibilities.

Mr. LeBas also has determined the proposed amendment would have a negative fiscal impact on the state. As the rule change regarding an exemption for institutions of higher education located outside the state only applies to the state hotel occupancy tax, there would be no impact on units of local government.

Figure: 34 TAC Chapter 3 -- Preamble

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code, §111.102, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §156.101 and §156.102(b).

§3.161. Definitions, Exemptions, and Exemption Certificate.

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

(1) Charitable or eleemosynary organization--A nonprofit organization devoting all or substantially all of its activities to the alleviation of poverty, disease, pain, and suffering by providing food, clothing, drugs, treatment, shelter, or psychological counseling directly to indigent or similarly deserving members of society with its funds derived primarily [,] from sources other than fees or charges for its services. If the organization engages in any substantial activity other than the activities described in this section, it will not be considered as having been organized for purely public charity, and therefore, will not qualify for exemption under this provision. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of organizations that do not meet the requirements for exemption under this definition are fraternal organizations, lodges, fraternities, sororities, service clubs, veterans groups, mutual benefit or social groups, professional groups, trade or business groups, trade associations, medical associations, chamber of commerce, and similar organizations. Even though not organized for profit and performing services that[~~which~~] are often charitable in nature, these types of organizations do not meet the requirements for exemption under this provision.

(2) Educational organization--A nonprofit organization or governmental entity whose activities are devoted solely to systematic instruction, particularly in the commonly accepted arts, sciences, and vocations, and has a regularly scheduled curriculum, using the commonly accepted methods of teaching, a faculty of qualified instructors, and an enrolled student body or students in attendance at a place where the educational activities are regularly conducted. An organization that has activities consisting solely of presenting discussion groups, forums, panels, lectures, or other similar programs, may qualify for exemption under this provision, if the presentations provide instruction in the commonly accepted arts, sciences, and vocations. The organization will not be considered for exemption under this provision if the systematic instruction or educational classes are incidental to some other facet of the organization's activities. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of organizations that do not meet the requirements for exemption under this definition are professional associations, business leagues, information resource groups, research organizations, support groups, home schools, and organizations that merely disseminate information by distributing printed publications. Entities that are defined in the Education Code, §61.003, as [~~Texas~~] "institutions of higher education" are recognized for exemption under this provision. Included in the definition of "institutions of higher education" are state and private universities and colleges. [~~Public and private "institutions of higher education" of other states or countries do not meet the requirements for exemption under this provision.~~]

(3) [~~(4)~~] Hotel--Any building or buildings in which members of the public obtain sleeping accommodations for a consideration. The term includes, in addition to the buildings listed in [~~the~~] Tax Code, §156.001, manufactured homes, skid mounted bunk houses, residency inns, condominiums, cabins, and cottages.

(4) Permanent Resident--A person who has the right to use or occupy a room or space in a hotel for at least 30 consecutive days without interruption. A person may be an individual, organization, or entity.

(5) Private Club--An organization that provides members entertainment, recreation, sport, dining, or social facilities and assesses dues, initiation fees, and other charges for special privileges or status not available to the general public.

(6) [~~(3)~~] Religious organization--A nonprofit organization that is an organized group of people regularly meeting for the primary purpose of holding, conducting and sponsoring religious worship services, according to the rights of their sect. The organization must be able to provide evidence of an established congregation showing that there is an organized group of people regularly attending these services. An organization that supports and encourages religion as an incidental part of its overall purpose, or one whose general purpose is furthering religious work or instilling its membership with a religious understanding, will not qualify for exemption under this provision. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of organizations that do not meet the requirements for exemption under this definition are conventions or associations of churches, evangelistic associations, churches with membership consisting of family members only, missionary organizations and groups who meet for the purpose of holding prayer meetings, bible study or revivals.

(b) Exemptions. This subsection[~~section~~] deals with exemptions from the state hotel occupancy tax. For information on city and county hotel taxes, contact the affected city or county.

[~~(1) The YMCA, YWCA, and private clubs are exempt from the collection of tax for room rental to members.~~]

(1) [~~(2)~~] Religious, charitable, and educational organizations and their employees, including college and university personnel, traveling on official business of the organization are exempt from payment of hotel occupancy tax.

(2) [~~(3)~~] State officials, judicial officers, heads of state agencies, the Executive Director of the Legislative Council, the

Secretary of the Senate, state legislators, legislative employees, members of state boards and commissions, and designated state employees of the State of Texas who present a Hotel Tax Exemption Photo Identification Card when traveling on official state business are exempt from the hotel occupancy tax. State agency, institution, board, or commission employees who have not been issued a Hotel Tax Exemption Photo Identification Card must pay the hotel occupancy tax. The hotel tax paid by the state or reimbursed to a state employee may be refunded as provided in §3.163 of this title (relating to Refund of Hotel Occupancy Tax). For the purpose of claiming an exemption, a Hotel Tax Exemption Photo Identification Card includes:

(A) any photo identification card issued by a state agency that states "EXEMPT FROM HOTEL OCCUPANCY TAX, under Tax Code, §156.103(d)", or similar wording; or

(B) a Hotel Tax Exemption Card that states "when presented with a photo identification card issued by a Texas agency, the holder of this card is exempt from state, municipal, and county hotel occupancy tax, Tax Code, §156.103(d)", or similar wording.

(3) [~~(4)~~] The United States government[~~Government~~] and its employees traveling on official business representing the United States government are exempt from the hotel occupancy tax.

(4) [~~(5)~~] Diplomatic personnel of a foreign government who present an appropriate Tax Exemption Card issued by the United States Department of State are exempt from the tax.

(5) [~~(6)~~] If[~~Where~~] an exemption applies, then the organization or individual claiming exemption[~~it~~] must present an exemption certificate to the hotel.

(6) Permanent residents are exempt from payment of hotel occupancy tax.

(A) A permanent resident is exempt beginning on:

(i) the first day for which the resident has entered into a written agreement with the hotel or has given a written notice to the hotel of the resident's intent to use or occupy a room or space in the hotel for the next 30 or more consecutive days and the resident actually stays for at least the next 30 consecutive days; or

(ii) the first day after the 30th consecutive day of the stay, if the resident neither gave written notice of intent to stay, nor entered into any written agreement with the hotel. For example, if a person does not notify the hotel that he intends to stay for at least 30 days, but stays 35 days, then the person is exempt from hotel tax from the 31st day through the 35th day, but tax is due on the first 30 consecutive days of the occupancy.

(B) The permanent resident exemption ends when an interruption in the right to use or occupy the room or space occurs.

(C) Permanent residents are not required to physically occupy a room or space.

(D) Permanent residents may have the right to use or occupy different rooms in the same hotel without loss of the permanent resident exemption.

(E) The permanent resident exemption applies to the lowest number of rooms in a written notice, agreement, or contract for a range of rooms plus the number of rooms that qualify for the permanent resident exemption under subsection (b)(6)(A)(ii) of the section.

Figure: 34 TAC §3.161(b)(6)(E)

(c) Exemption certificate.

(1) Any organization or individual claiming exemption from the payment of hotel occupancy tax must furnish the hotel with a signed exemption certificate.

(2) A hotel claiming exemption of its receipts from hotel occupancy tax must provide proof that the receipts were exempt, either through exemption certificates or other competent evidence.

(3) Exemption numbers or tax numbers do not exist for purposes of the hotel occupancy tax.

(4) The exemption certificate must be substantially in the form herein adopted by reference. Copies of the certificate are available for inspection at the office of the Texas Register or may be obtained from the Comptroller of Public Accounts, P.O. Box 13528, Austin, Texas 78711. Copies may also be requested by calling our toll-free number 1-800-252-1385. In Austin, call 463-4600. (From a Telecommunication Device for the Deaf (TDD) only, call 1-800-248-4099 toll free. In Austin the local TDD number is 463-4621.) Taxpayers may download copies at www.window.state.tx.us.

(d) Exclusions.

(1) Dormitories and other housing facilities owned or leased and operated by institutions of higher education as defined in subsection (a)(2) and used to provide sleeping accommodations for persons engaged in educational programs or activities at the institutions are excluded from the definition of a hotel in Tax Code, §156.001, and their rentals are not subject to tax. Hotels owned or leased and operated by institutions of higher education, however, are not excluded and their rentals are subject to tax.

(2) Private clubs as defined in subsection (a)(5) do not collect tax on rentals of rooms to members. Tax is due, however, on the rental of rooms to nonmembers.

This 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 September 13, 2002.

TRD-200205975
Martin Cherry
Deputy General Counsel for Taxation
Comptroller of Public Accounts
Earliest possible date of adoption: October 27, 2002
For further information, please call: (512) 475-0387

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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 T. SCIENTIFIC BREEDER'S PERMIT

31 TAC §65.610, §65.611

The Texas Parks and Wildlife Department has withdrawn from consideration proposed amendments §65.610 and §65.611 which appeared in the July 19, 2002 issue of the *Texas Register* (27 TexReg 6492).

Filed with the Office of the Secretary of State on September 16, 2002.

TRD-200206010
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Effective date: September 16, 2002
For further information, please call: (512) 389-4775

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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 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 3. OIL AND GAS DIVISION

16 TAC §3.21

The Railroad Commission of Texas adopts amendments to §3.21, relating to fire prevention and swabbing, without changes to the proposal published in the July 12, 2002, issue of the *Texas Register* (27 TexReg 6161). The amendments clarify current Commission policy concerning swabbing, air jetting, and bailing of wells. Swabbing is a legitimate method for starting or re- starting production in a well. However, swabbing as an ongoing production technique poses a host of problems and, in most circumstances, these problems far outweigh the minimal benefits of swabbing.

When used as a production technique for shallow wells, swabbing most often involves a mobile truck or trailer-mounted unit. The unit runs a series of swab cups into the well on a wireline to a point below the oil column in the well. When the cups are retrieved, the column of fluid above the cups is brought to the surface. Typically, these fluids go directly into a tank on the mobile unit. Wells produced by swabbing typically report one to three barrels of production per month.

Swabbing does, in some circumstances, extend the productive life of extremely marginal, shallow oil wells. However, swabbing as an ongoing production technique creates or contributes to a host of problems for the Commission, royalty owners, and surface owners, including pollution, stripping of salvageable equipment, safety, theft, inaccurate reporting of production, and complicating Commission oversight of well production.

Because of the problems swabbing creates or contributes to, the Commission finds that the existing general prohibition on swabbing should be continued. In addition, the adopted amendments clarify that swabbing as a production technique may only be permitted after notice and hearing.

The Commission received only one comment on the proposed amendments. That comment was filed by an association, the Texas Independent Producers and Royalty Owners Association ("TIPRO"). TIPRO criticized the Commission's discussion of swabbing in the proposal preamble, characterizing it as "broad" and "often incorrect." TIPRO's comments also noted a distinction between swabbing as a production technique and its use as a method to clean out a well or restore the flow of a well. As stated in the proposal preamble, the Commission recognizes that swabbing is a legitimate method of starting or restoring production in a well. The discussion in the proposal preamble of problems caused by swabbing expressly concerns swabbing "as an ongoing production technique." The Commission recognizes that the vast majority of operators work diligently to comply with Commission rules and operate in a safe and environmentally conscientious manner. However, the proposal preamble's references to the problems associated with swabbing as a production method are supported by a review of the history of many of the operators that have purportedly used swabbing as a continuing production technique. This review shows that a significant percentage of those operators have been the subject of Commission enforcement proceedings. Additionally, operators that have purported to produce by swabbing have left thousands of stripped wells that likely will ultimately have to be plugged by the Commission.

The only specific change addressed by TIPRO was a suggestion that the Commission "streamline" the proposed hearing process for exceptions to §3.21 by allowing operators of leases producing less than 15 barrels per month to obtain exceptions from the district director or the director's designee. In essence, TIPRO's proposal would exempt leases that are reportedly producing 15 barrels or less per month from the general hearing requirement.

The Commission declines to adopt TIPRO's proposed amendment. Commission records indicate that only 10 operators with active organization reports are currently engaged in swabbing as a production method. In light of this limited number of affected operators with active organization reports, the Commission finds that such streamlining is not necessary. Further, many of the problems associated with swabbing as a production technique arise most often on leases reporting minimal production - the very leases TIPRO suggests exempting from the hearing requirement. The inaccurate reporting of production is most prevalent on leases putatively being swabbed but reporting minimal production. Additionally, leases which have actually been stripped of their equipment and are not producing by any means, still report to the Commission "pencil" production through swabbing.

The Commission simultaneously adopts the review and readoption of §3.21, as amended, in accordance with Texas Government Code, 2001.039. The agency's reasons for adopting the rule continue to exist. The notice of adopted review has been filed with the *Texas Register* concurrently with the adoption of the amendments to §3.21.

The Commission adopts the amendments to §3.21 pursuant to Texas Natural Resources Code, §§81.051 and 81.052, which provide the Commission with jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission, and §88.011, which authorizes the Commission to adopt rules for the keeping of complete and accurate records correctly reflecting the amount of oil or gas or both produced

from each oil property each calendar day and the disposition and method of disposition of all the oil and gas produced, and for the monthly filing with the governmental agency of monthly reports accurately reflecting the true facts with respect to all such matters.

Texas Natural Resources Code, §§81.051, 81.052, 85.202, and 88.011, are affected by the adopted amendments.

Issued in Austin, Texas, on September 12, 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 September 12, 2002.

TRD-200205961
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Effective date: October 2, 2002
Proposal publication date: July 12, 2002
For further information, please call: (512) 475-1295

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CHAPTER 7. GAS UTILITIES DIVISION

The Railroad Commission of Texas adopts the repeal of §7.54, relating to Effective Date of Orders; Interest on Deferred Funds, and adopts new §7.245, relating to Effective Date of Orders, without changes to the versions published in the July 26, 2002, issue of the *Texas Register* (27 TexReg 6597).

The Commission adopts the repeal and new section to complete the reorganization of the rules in Chapter 7 that pertain to gas utilities. In a previous rulemaking published in the May 3, 2002, issue of the *Texas Register* (27 TexReg 3676), the Commission proposed the repeal of §7.54 and the adoption of new §7.245, in which the Commission proposed to reflect the limitations imposed by the Texas Utilities Code on the effective date of Commission orders in municipal appeals by setting a specific time frame by which orders should become effective. However, based on comments filed by Spencer Station Generating Company, L.P., regarding the wording of the May 3 version of proposed new §7.245, the Commission withdrew that proposal. The Commission agreed with the comment, but because of the significance of the change in language and Commission practice, the Commission determined that notice of the changed language in new §7.245 would be necessary under Texas Government Code, §§2001.023 and 2001.024, and republished the new proposed rule in the July 26, 2002, issue of the *Texas Register*.

The Commission received two comments on the July 26 proposal. Spencer Station Generating Company, L.P. supported the repeal of §7.54 and the adoption of new §7.245 as published in the July 26, 2002, issue of the *Texas Register*. TXU Gas Distribution, a division of TXU Gas Company ("Distribution"), questioned the need for the new rule, stating that it is essentially identical to the statutory provisions of Texas Utilities Code, §§103.055 and 103.056. Distribution also stated that the new rule failed to take into account Texas Utilities Code, §104.108, which allows the Commission to establish temporary rates, and §104.109, which give a utility the right to put into effect bonded rates. Distribution suggested that to clarify these issues, if the Commission determines the rule is necessary, the Commission change the title of the rule to "Effective Date of Rate Changes." In subsection (a), Distribution suggested changing the phrase "rate proceedings under the Commission's original jurisdiction" to "temporary and permanent rates." Distribution would also add a sentence reading, "However, a gas utility may, pursuant to Texas Utilities Code, §104.109, put a changed rate into effect by filing a bond with the Commission if the Commission fails to make a final determination within 90 days from the date the proposed increase would otherwise be effective." In subsection (b), Distribution would add a reference to "temporary and permanent rates."

The Commission disagrees with Distribution's suggested changes because the intent of the proposed rule was to reorganize the rules in Chapter 7 pertaining to gas utilities, and to replace an existing rule about the effective date of Commission orders with a similarly limited rule that contains a correct statement of the governing law. The Commission finds that adding the qualifying phrase "temporary and permanent" to "rates" does not enhance the meaning of the rule. In addition, the Commission finds that including the statement that a utility may implement bonded rates, without prescribing a procedure for the Commission to approve a bond form, amount, and surety, is not helpful; to do so in adopting this rule would be beyond the scope of the notice given in the published proposal.

SUBCHAPTER B. PROCEDURAL RULES

16 TAC §7.54

The Commission adopts the repeal under Texas Utilities Code, §§103.055 and 103.056, which govern the Commission's authority in appeals from municipal rate ordinances, and §§104.104, 104.107, 104.108, 104.109, 104.110, and 104.151, which govern various rate orders that the Commission may enter.

Texas Utilities Code, §§103.055, 103.056, 104.104, 104.107 through 104.110, and 104.151, are affected by the proposed repeal.

Issued in Austin, Texas, on September 12, 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 September 12, 2002.

TRD-200205962
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Effective date: October 2, 2002
Proposal publication date: July 26, 2002
For further information, please call: (512) 475-1295

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CHAPTER 7. GAS SERVICES DIVISION
SUBCHAPTER B. SPECIAL PROCEDURAL RULES

16 TAC §7.245

The Commission adopts the new section under Texas Utilities Code, Texas Utilities Code, §§103.055 and 103.056, which govern the Commission's authority in appeals from municipal rate ordinances, and §§104.104, 104.107, 104.108, 104.109, 104.110, and 104.151, which govern various rate orders that the Commission may enter.

Texas Utilities Code, §§103.055, 103.056, 104.104, 104.107 through 104.110, and 104.151, are affected by the new section.

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This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
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For further information, please call: (512) 475-1295

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TITLE 25. HEALTH SERVICES

PART 2. TEXAS DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

CHAPTER 403. OTHER AGENCIES AND THE PUBLIC

SUBCHAPTER M. USE OF DEPARTMENTAL FACILITIES BY PUBLIC EMPLOYEE ORGANIZATIONS

25 TAC §§403.351 - 403.359

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts the repeal of Chapter 403, Subchapter M, §§403.351-403.359, concerning use of department facilities by public employee organizations. The repeal of §§403.351-403.359 are adopted without changes to the proposed text published in the May 10, 2002, issue of the *Texas Register* (25 TexReg 3903-3904). The repealed sections are replaced by new Chapter 417, Subchapter A, concerning standard operating procedures, which concerned substantially the same matters is contemporaneously adopted in this issue of the Texas Register.

The repealed §§403.351-403.359 authorized a facility CEO to permit public employee organizations to use department facilities, as long as service delivery is not affected by the presence of the organization's members and procedures for such organizations to request permission to use department facilities.

The adoption of the repeals and new rules fulfills the requirements of Texas Government Code, §2001.039, concerning the periodic review of department rules.

Comments were not received from the public.

These sections are repealed under the Texas Health and Safety Code, §532.015(a), which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority; Texas Government Code, §2001.039, which requires the department to review it 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-200206007
Andrew Hardin
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: October 6, 2002
Proposal publication date: May 10, 2002
For further information, please call: (512) 206-4516

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CHAPTER 407. INTERNAL FACILITIES MANAGEMENT

SUBCHAPTER D. INSCRIPTION ON STATE VEHICLES

25 TAC §407.171

The Texas Department of Mental Health and Mental Retardation (department) adopts the repeal of Chapter 407, Subchapter D, §407.171, concerning inscription on state vehicles. The repeal of section §407.171 is adopted without changes to the proposed text published in the May 10, 2002, issue of the *Texas Register* (25 TexReg 3904-3905). The repealed section is replaced by new Chapter 417, Subchapter A, concerning standard operating procedures, which concerns substantially the same matter, is contemporaneously repealed in this issue of the *Texas Register*.

The repealed §407.171 justified the department's exemption from the state vehicle inscription requirement.

The adoption of the repeal and new rule fulfills the requirements of Texas Government Code, §2001.039, concerning the periodic review of department rules.

Comment were not received from the public.

The repeal is adopted under the Texas Health and Safety Code, §532.015, which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority and Texas Government Code, §2001.039, which requires the department to review its 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-200206006

Andrew Hardin
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: October 6, 2002
Proposal publication date: May 10, 2002
For further information, please call: (512) 206-4516

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CHAPTER 417. AGENCY AND FACILITY RESPONSIBILITIES
SUBCHAPTER A. STANDARD OPERATING PROCEDURES

The Texas Department of Mental Health and Mental Retardation (department) adopts the repeal of existing Chapter 417, Subchapter A, §§417.1 - 417.6 concerning standard operating procedures. The repeals of §§417.1 - 417.6 are adopted without changes to the proposed text published in the May 10, 2002, issue of the *Texas Register* (25 TexReg 3904-3905). The repealed sections are replaced by new Chapter 417, Subchapter A, concerning standard operating procedures, which concerns substantially the same matters, is contemporaneously adopted in this issue of the *Texas Register*.

The repealed §§417.1 - 417.6, described the department's procedures for implementing the fleet management plan as required by Texas Government Code, §2171.104.

The adoption of the repeals and new rules fulfills the requirements of Texas Government Code, §2001.039, concerning the periodic review of department rules.

Comments were not received from the public.

DIVISION 1. GENERAL REQUIREMENTS

25 TAC §§417.1 - 417.3

The repeals are adopted under the Texas Health and Safety Code, §532.015, which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority, and Texas Government Code, §2171.1045, which restricts the assignment of state vehicles; Texas Government Code, §2001.039, which requires the department to review its 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-200206005
Andrew Hardin
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: October 6, 2002
Proposal publication date: May 10, 2002
For further information, please call: (512) 206-4516

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DIVISION 2. TRANSPORTATION

25 TAC §417.4

The repeals are adopted under the Texas Health and Safety Code, §532.015, which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority, and Texas Government Code, §2171.104, which restricts the assignment of state vehicles; Texas Government Code, §2001.039, which requires the department to review its 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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Andrew Hardin
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
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For further information, please call: (512) 206-4516

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DIVISION 3. REFERENCES AND DISTRIBUTION

25 TAC §417.5, §417.6

The repeals are adopted under the Texas Health and Safety Code, §532.015, which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority, and Texas Government Code, §2171.104, which restricts the assignment of state vehicles; Texas Government Code, §2001.039, which requires the department to review its 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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Andrew Hardin
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
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Proposal publication date: May 10, 2002
For further information, please call: (512) 206-4516

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25 TAC §§417.1 - 417.4, 417.6, 417.7, 417.9, 417.14, 417.15, 417.49, 417.50

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts new Chapter 417, Subchapter A, §§417.1 - 417.4, 417.6, 417.7, 417.9, 417.14, 417.15, 417.49 and 417.50, governing standard operating procedures. Sections §§417.3, 417.4, 417.14, 417.15, and 417.49 are adopted with changes to the proposed text published in the May 10, 2002, issue of the *Texas Register* (25 TexReg 3907-3909). Sections §§417.1, 417.2, 417.6, 417.7, 417.9, and 417.50 are adopted without changes. The new sections replace §§403.351 - 403.359 of Chapter 403, Subchapter M, concerning Use of Departmental

Facilities by Public Employee Organizations; §407.171 of Chapter 407, Subchapter D, concerning Inscription on State Vehicles; and §§417.1 - 417.6 of Chapter 417, Subchapter A, concerning Standard Operating Procedures, which concern substantially the same matters, are contemporaneously repealed in this issue of the *Texas Register*.

The adoption of new §§417.1 - 417.4, 417.6, 417.7, 417.9, 417.14, 417.15, 417.49, and 417.50 and the contemporaneous repeals of §§403.351 - 403.359, 407.171, and 417.1 - 417.6 are made to provide procedures for public employee organizations and people who want to use facility resources; document the department's exemption from the vehicle inscription requirement; restrict the assignment of state vehicles; and limit the use of asbestos-containing materials in state mental health and mental retardation facilities.

The adoption of the new rules and repeals fulfill the requirements of Texas Government Code, §2001.039, concerning the periodic review of department rules.

Minor grammatical changes were made and clarifying language was added to the subchapter. In §417.3 the list of potential areas of discrimination has been expanded to include religion and political affiliation. Sections 417.13 and 417.14 were combined in §417.14 because the charges and procedures for public employee organizations and non-commercial groups were the same. In the definition section, the term "non-commercial group" was revised to include public employee organizations and in the definition of the term "public employee organization" language was added to clarify that only public employee organizations that represent TDMHMR employees would be able to use facility resources for meetings, etc. Also, in §417.14(e), the reference to Exhibit A, Facility Resource Use Fee Schedule was replaced by a reference in the *TDMHMR Contracts Manual* and in §417.15 the reference to Exhibit A, Facility Resource Use Fee Schedule, was replaced by a reference to the *TDMHMR Fiscal Manual* to provide access to the most current fee schedules. As a result, §417.48 (Exhibits) was deleted and the *TDHMR Fiscal Manual* was added to the list of references in §417.49. To promote customer service the fee schedules and related forms will be distributed with the rule. Throughout §417.14, language pertaining to internal procedures was deleted and the subsections were renumbered so that only procedures pertaining to the public remain.. The internal procedures will be included in a program manual and distributed with this subchapter. Language was added in §417.14(b), to clarify which form to use when requesting use of TDMHMR facilities as well as to submit the completed form to the facility CEO. In subsection (c) of the same section, language was added to clarify that the facility could approve or deny the use of facility resources by non-commercial groups. In subsection (i), the requirement to obtain a $1 million general liability insurance policy was changed to require insurance coverage in an amount sufficient to cover TDMHMR's potential liability.

Comments were not received from the public.

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; Texas Government Code, §2001.039, which requires the department to review its rules; Texas Transportation Code, which requires the department to adopt rules justifying its exemption from the state vehicle inscription requirement; Texas Government, Code §2171.104, which restricts the assignment of state vehicles; and Texas Health and Safety Code, §161.402, which limits the use of asbestos-containing materials in state facilities.

§417.3. Compliance with Nondiscrimination Laws.

Services, financial assistance, and other benefits of TDMHMR's programs and facility resources are provided in a manner that does not discriminate of the basis or race, gender, sexual orientation, age, color, national origin, disability, religion, or political affiliation in compliance with applicable state and federal law.

§417.4. Definitions.

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

(1) Facility--A state mental health facility or a state mental retardation facility operated by the TDMHMR.

(2) Individual--A person receiving services from the Texas Department of Mental Health and Mental Retardation.

(3) Material safety data sheet--The document provided by a manufacturer that describes a material's or part's chemical properties along with proper use, storage and disposal guidelines.

(4) Non-commerical group--A group of people associated with an organization (e.g., civic, fraternal, religious, social, service, community, or public employee organization).

(5) Public employee organization--An organization that represents TDMHMR employees in legislative, human resource, and related issues.

(6) TDMHMR--The Texas Department of Mental Health and Mental Retardation.

§417.14. Non-Commercial Groups.

(a) Policy. The facility CEO may make facility resources available to the public at large whenever it can do so without compromising the department's primary mission.

(b) Requesting permission. The Facility/Premises Use Request form, which is in the *TDMHMR Contracts Manual*, must be completed and submitted to the facility CEO.

(c) Criteria for approving requests. The facility CEO may approve or disapprove the use of facility resources based on whether:

(1) the organization agrees in writing to abide by all rules and regulations established by the facility CEO regarding the use facility resources and that its meetings in no way interfere with or disrupt the delivery of services to the individuals mental illness or mental retardation;

(2) the event does not conflict with any of the facility's scheduled events, programs, or priorities;

(3) the event is consistent with the physical constraints of the resources to be used;

(4) the facility can provide the services for the time period requested; and

(5) the event does not conflict with the best interests of the facility or individuals.

(d) Facility resource use fee. Any non-commercial group may be charged a facility resource use fee according to the Facility Resource Use Fee Schedule, which is in the *TDMHMR Contracts Manual*.

(e) Revoking permission. Permission granted pursuant to such a request continues until revoked by the facility CEO. The non-commercial group must immediately notify the facility CEO of any change

in the information stated in its written request for permission to use the facilities.

(f) Advertising. If language clearly reflects that the facility is not sponsoring or promoting the event is included in the copy, the facility's name may be used to advertise the location of the activities. The facility CEO may require that a proof of the advertising copy be submitted for approval and may require the a disclaimer, e.g., (facility name) is not a promoter or sponsor of this event. No inference of support can be drawn because of the event's location.

(g) Liability. Any non-commercial group or any member thereof using facility resources is liable for any destruction or damage to the resources. The department is not liable for any injury to any person or for the loss of or damage to the property of any person, organization, or group using facility resources.

(h) Required documentation. As described in the *TDMHMR Contracts Manual* and this subchapter, if the request is for an athletic or sporting event, a water-related activity, overnight use, or an event that is open to the public at large or attendance is expected to exceed 25 or more people, then the requestor by no later than 72 hours prior to the event must:

(1) execute a license and use agreement;

(2) execute a waiver and indemnity agreement; and

(3) obtain general liability insurance in an amount sufficient to cover TDMHMR's potential liability (as established on the Facility/Premises Use Request form), with the Texas Department of Mental Health and Mental Retarded and/or its successors listed as an additional insured; and

(4) submit the use and indemnity agreements and proof of insurance to the facility CEO.

§417.15. Family Members and Guests of an Individual Receiving Services.

If a facility has on-site overnight accommodations that are made available to family members or guests of an individuals receiving services, a facility resource use fee may be charged. The facility use fee schedule is in the *TDMHMR Fiscal Manual*. If the family member or guest is unable to pay the entire use fee, the facility CEO may waive any portion or all of the fee based on the family member's or guest's ability to pay.

§417.49. Reference.

Reference is made to the:

(1) *TDMHMR Contracts Manual;* and

(2) *TDMHMR Fiscal Manual*.

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 September 16, 2002.

TRD-200206008
Andrew Hardin
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: October 6, 2002
Proposal publication date: May 10, 2002
For further information, please call: (512) 206-4516

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 3. TEXAS WORKS
SUBCHAPTER YY. FOOD STAMP SIMPLIFIED NUTRITIONAL ASSISTANCE PROGRAM

40 TAC §§3.7801 - 3.7809

The Texas Department of Human Services (DHS) adopts new §§3.7801-3.7809, without changes to the proposed text published in the June 14, 2002, issue of the *Texas Register* (27 TexReg 5125).

Justification for the new sections is to improve access to Food Stamp Program services for elderly Supplemental Security Income (SSI) clients and simplify the application and certification process. DHS is authorized to conduct this demonstration project by the United States Department of Agriculture's Food and Nutrition Service.

DHS received no comments regarding adoption of the new sections.

The new sections are adopted under the Human Resources Code, Chapters 31 and 33, which authorizes DHS to administer financial and nutritional assistance programs.

The new sections implement the Human Resources Code, §§31.001-31.053 and §§33.001-33.027.

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 September 16, 2002.

TRD-200206002
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: October 6, 2002
Proposal publication date: June 14, 2002
For further information, please call: (512) 438-3734

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CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

The Texas Department of Human Services (DHS) adopts amendments to §§§19.210, 19.211, and 9.2301; repeals of §§19.2322, 19.2324, and 19.2325; and new §19.2322 and §19.2324 in its Nursing Facility Requirements for Licensure and Medicaid Certification chapter. New §19.2322 is adopted with changes to the proposed text published in the July 5, 2002, issue of the *Texas Register* (27 TexReg 5952). The amendments to §§19.210, 19.211, and 19.2301; the repeals of §§19.2322,

19.2324, and 19.2325; and new §19.2324 are adopted without changes to the proposed text.

Justification for the repeals, amendments, and new sections is to allow more flexibility in some areas of the bed allocation rules and tighten requirements in others. The current bed allocation rules were developed in a negotiated rulemaking process in 1998 in response to Senate Bill 190, which mandated their revision. It became apparent in the course of administering the rules over the past four years that changes were needed.

DHS amended the rules to: allow exceptions to the quality-of-care screen when necessary to benefit Medicaid recipients, because the current rules had no such flexibility; require bed allocation exemptions to comply with federally mandated Centers for Medicare and Medicaid Services (CMS) restrictions; restrict the transferability of waivers because this provision was being misused under the current rules; relax spend-down provisions so persons spending down to be eligible for Medicaid could stay in their current nursing facility; require applicants for certain waivers to submit a demographic study to provide objective evidence in justification of their waiver request; standardize time limits and extensions to make the bed allocation process more consistent; require applicants granted waivers or exemptions to submit progress reports on construction so DHS can verify that the waiver or exemption is being used; require property owners of closed facilities to identify their plans for future use of allocated Medicaid beds and re-certify the beds within 12 months or risk losing their certification, in order to control the number of Medicaid beds; establish informal review procedures to provide an avenue for appeal for providers; and simplify the requirements that pertain to high-occupancy counties by deleting the requirements for proof of ownership of land, a letter of finance, liquidated damages, and a third posting of notice of an open solicitation period for additional Medicaid beds because the current process is unnecessarily complicated.

DHS has initiated minor editorial changes to the text of §19.2322 to correct punctuation in the section.

DHS received one written comment from the Texas Association of Residential Care Communities. A summary of the comment and DHS's response follows.

Comment: In §19.2322(j)(3)(A), the sentence seems clear until the last four words, which read, ". of inquiry from DHS." Those words make the last sentence ambiguous and make the meaning unclear.

Response: DHS revised the sentence to read, "The property owner of a nursing facility that closes or ceases to participate in the Medicaid program must inform DHS in writing of the intended future use of the Medicaid beds within 90 days of closure."

SUBCHAPTER C. NURSING FACILITY LICENSURE APPLICATION PROCESS

40 TAC §19.210, §19.211

The amendments are adopted under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs; and under Texas Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendments implement the Human Resources Code, §§22.001-22.036 and §§32.001-32.052.

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 September 11, 2002.

TRD-200205953
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
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Proposal publication date: July 5, 2002
For further information, please call: (512) 438-3734

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SUBCHAPTER X. REQUIREMENTS FOR MEDICAID-CERTIFIED FACILITIES

40 TAC §§19.2301, 19.2322, 19.2324

The amendments and new sections are adopted under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department to administer public and medical assistance programs; and under Texas Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendments and new sections implement the Human Resources Code, §§22.001- 22.036 and §§32.001-32.052.

§19.2322. Medicaid Bed Allocation Requirements.

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

(1) Applicant--The entity requesting a bed allocation waiver or exemption.

(2) Assignment of rights--The conveyance of all rights to a specific number of allocated Medicaid beds from a nursing facility or entity to another entity for purposes of constructing a new nursing facility or for any other use as authorized by these rules.

(3) Bed allocation--The process by which the Texas Department of Human Services (DHS) controls the number of nursing facility beds that are eligible to become Medicaid-certified in each nursing facility.

(4) Bed certification--The process by which DHS certifies compliance with state and federal Medicaid requirements for a specified number of Medicaid beds within a nursing facility.

(5) Licensee--The entity, which includes controlling persons, that is:

(A) an applicant for licensure by DHS under Chapter 242 of the Texas Health and Safety Code and Medicaid certification;

(B) licensed by DHS under Chapter 242 of the Texas Health and Safety Code; or

(C) licensed under Chapter 242 of the Texas Health and Safety Code and holds the contract to provide Medicaid services.

(6) Lien holder--The entity that holds a lien against the physical plant.

(7) Multiple-facility owner--An entity that owns, controls, or operates under lease two or more nursing facilities within or across state lines.

(8) Occupancy rate--The number of residents occupying certified Medicaid beds divided by the number of certified Medicaid beds in a nursing facility.

(9) Physical plant--The land and attached structures to which beds are allocated or for which an application for bed allocation has been submitted.

(10) Property owner--The person or entity that owns a physical plant.

(11) Transfer of beds--The conveyance of a specific number of allocated Medicaid beds from a nursing facility or entity to an existing licensed nursing facility. The nursing facility may use the transferred Medicaid beds to increase the number of Medicaid-certified beds currently licensed or to increase the number of Medicaid certified beds when additional licensed beds are added to the nursing facility in the future.

(b) Purpose. The purpose of this section is to control the number of Medicaid beds for which DHS contracts, to improve the quality of resident care by selective and limited allocation of Medicaid beds, and to promote competition.

(c) Bed allocation general requirements. The allocation of Medicaid beds represents an opportunity for the property owner or the lessee of a nursing facility to obtain a Medicaid nursing facility contract for a specific number of Medicaid-certified beds.

(1) Medicaid beds are allocated to a nursing facility and remain at the physical plant to which they originally were allocated, unless beds are assigned or transferred in accordance with these requirements.

(2) When Medicaid beds are allocated to a nursing facility as a result of actions by the licensee, the beds remain allocated to the physical plant, even when the licensee ceases operating the nursing facility, unless the beds are subsequently assigned or transferred in accordance with these requirements.

(3) Notwithstanding any language in subsections (f) and (g) of this section and the fact that applicants for bed allocation waivers and exemptions may be licensees or property owners, beds are allocated to the physical plant and the rights to all allocated Medicaid beds belong to the property owner, subject to any and all valid physical plant liens.

(d) Control of beds. Except as specified in this section, DHS does not accept applications for a Medicaid contract for nursing facility beds from any nursing facility that was not granted:

(1) a valid certificate of need (CON) by the Texas Health Facilities Commission before September 1, 1985;

(2) a waiver by DHS before January 1, 1993; or

(3) other valid order that had the effect of authorizing the operation of the nursing facility at the bed capacity for which participation is sought.

(e) Quality of care. Unless specifically exempted from this requirement, applicants for Medicaid bed allocation waivers or exemptions and any controlling persons must demonstrate a history of providing quality care.

(1) In determining if an applicant or a controlling person has a history of providing quality care, DHS may consider the provisions detailed in §19.214(a) of this title (relating to Criteria for Denying a License or Renewal of a License).

(A) Additionally, DHS will determine an applicant to have demonstrated a history of quality of care if, within the preceding 24 months, an applicant has not received any of the following sanctions:

(i) termination of Medicaid and/or Medicare certification;

(ii) termination of Medicaid contract;

(iii) denial, suspension, or revocation of nursing facility license;

(iv) cumulative Medicaid and/or Medicare civil monetary penalties totaling more than $5,000 per facility;

(v) civil penalties pursuant to §242.065 of the Texas Health and Safety Code; or

(vi) denial of payment for new admissions; and

(B) DHS finds no clear pattern of substantial or repeated licensing and Medicaid sanctions, including administrative penalties and/or other sanctions.

(2) Nursing facilities that have received any of the sanctions listed under paragraph (1) of this subsection within the previous 24 months are not eligible for an allocation of additional Medicaid beds. In the case of sanctions that are appealed, either administratively or judicially, an application will be suspended until the appeal has been resolved. Sanctions that have been administratively withdrawn or were subsequently reversed upon administrative or judicial appeal will not be considered.

(3) When the applicant for an allocation of additional Medicaid beds is a multiple-facility owner or a multiple-facility owner owns an applicant nursing facility, the multiple-facility owner must demonstrate an overall record of providing quality care in addition to the applicant facility's meeting the quality-of-care requirements in this subsection.

(4) When a licensee has operated a nursing facility for less than 24 months, the nursing facility must establish at least a 12-month compliance record in which the nursing facility has not received any of the sanctions listed under paragraph (1) of this subsection.

(5) When the applicant has no history of operating nursing facilities, DHS will review the compliance record of health-care facilities operated, managed, or otherwise controlled by controlling parties of the applicant. If the controlling parties or the applicant has never operated, managed, or otherwise controlled any health-care facilities, a compliance review will not be required.

(6) The commissioner, or the commissioner's designee, may make an exception to any of the requirements in this subsection if it is determined the needs of Medicaid recipients in a local community will be served best by granting a Medicaid bed allocation waiver or exemption. In determining whether to make an exception to the quality-of-care requirements, the commissioner or the commissioner's designee may consider the following:

(A) the overall compliance record of the waiver or exemption applicant;

(B) the current availability of Medicaid beds in facilities providing a high quality of care in the local community;

(C) the level of support for the waiver or exemption from the local community;

(D) how a waiver or exemption will improve the overall quality of care for nursing facility residents; and

(E) the age and condition of nursing facility physical plants in the local community.

(f) Exemptions. Under the following circumstances, DHS may grant an exemption of the policy stated in subsection (d) of this section. All exemption actions must comply with the requirements in this subsection and with requirements of the Centers for Medicare and Medicaid Services (CMS) regarding bed additions and reductions. When a bed allocation exemption is approved, the licensee must comply with the requirements contained in §19.201 of this title (relating to Criteria for Licensing) at the time of licensure and/or Medicaid certification of the new beds or nursing facility.

(1) Replacement Medicaid nursing facilities and beds. Currently allocated Medicaid beds may be replaced through the construction of one or more new nursing facilities.

(A) The applicant must either own the physical plant to which the beds are allocated or possess a valid assignment of rights to the Medicaid beds.

(B) Assignment of the Medicaid beds to the replacement nursing facility must be approved by all lien holders of the physical plant to which the beds are allocated.

(C) Replacement nursing facility applicants, including those who obtained the rights to the beds through a valid assignment of rights, must comply with the history of quality-of-care requirements in subsection (e) of this section, unless the applicant for a replacement nursing facility is the current property owner.

(D) Replacement facilities will be granted an increase of up to 25% of the currently allocated Medicaid beds, if the applicant complies with the history of quality-of-care requirements in subsection (e) of this section. The additional allocation of beds may not be transferred or assigned until they are certified at the replacement facility.

(E) The replacement nursing facility must be located in the same county in which the Medicaid beds currently are allocated.

(2) Transfer of Medicaid beds. Allocated Medicaid beds currently certified or certified previously may be transferred to another physical plant.

(A) The applicant must own the physical plant to which the beds are allocated or must present DHS with one of the following:

(i) a valid Medicaid bed transfer agreement that specifies the number of additional Medicaid beds to be allocated to the receiving nursing facility; or

(ii) a valid assignment of rights to currently allocated Medicaid beds that specifies the number of additional Medicaid beds to be allocated to the receiving nursing facility.

(B) If the Medicaid beds currently are allocated to a specific physical plant, the current property owner and all current lien holders must approve the transfer agreement.

(C) The receiving licensee must comply with the history of quality-of-care requirements in subsection (e) of this section.

(D) Both facilities must be located in the same county.

(3) High-occupancy facilities. Medicaid-certified nursing facilities with high occupancy rates may periodically receive bed allocation increases.

(A) The occupancy rate of the Medicaid beds of the applicant nursing facility must be at least 90% for nine of the previous 12 months.

(B) The application for additional Medicaid beds may be no greater than 10% (rounded to the nearest whole number) of the current number of Medicaid-certified nursing facility beds.

(C) The applicant nursing facility must comply with the history of quality-of-care requirements in subsection (e) of this section.

(D) The applicant nursing facility may reapply for additional Medicaid beds no sooner than nine months from the date of the previous allocation increase.

(E) Medicaid beds allocated to a nursing facility under this requirement may only be certified at the applicant facility. The additional allocation of beds may not be transferred or assigned until they are certified at the applicant facility.

(4) Non-certified nursing facilities. Licensed nursing facilities that do not have Medicaid-certified beds may receive an initial allocation of Medicaid beds.

(A) The application for Medicaid beds may be no greater than 10% (rounded to the nearest whole number) of the current licensed nursing facility beds.

(B) The applicant licensee must comply with the history of quality-of-care requirements in subsection (e) of this section.

(C) After the applicant receives an allocation of Medicaid beds, the licensee may reapply in accordance with provisions of paragraph (3) of this subsection.

(D) Facilities that have Medicaid beds allocated under provisions of the Alzheimer's waiver may apply for general Medicaid beds in accordance with paragraph (3) or (4) of this subsection. The beds allocated under the Alzheimer's waiver provisions will be excluded from this computation; for example, a 120-bed nursing facility with 60 Alzheimer waiver beds would be eligible for 10% of the 60 remaining beds or six additional Medicaid beds.

(5) Low-capacity facilities. For purposes of efficiency, nursing facilities with a Medicaid bed capacity of less than 60 may receive additional Medicaid beds to increase their capacity up to a total of 60 Medicaid beds.

(A) The nursing facility must be licensed for less than 60 beds and have a current certification of less than 60 Medicaid beds.

(B) The nursing facility must have been Medicaid-certified before June 1, 1998.

(C) The applicant licensee must comply with the history of quality-of-care requirements in subsection (e) of this section.

(D) Facilities that have a Medicaid capacity of less than 60 beds due to the loss of Medicaid beds under provisions in subsection (h) of this section are not eligible for this exemption.

(6) Spend-down Medicaid beds. Licensed nursing facilities may receive temporary spend-down Medicaid beds for residents who have "spent down" to become eligible for Medicaid, but for whom no Medicaid bed is available. Approval of spend-down Medicaid beds allows a nursing facility to exceed temporarily its allocated Medicaid bed capacity.

(A) The applicant nursing facility must have a Medicaid contract. If the nursing facility is not currently Medicaid-certified, the licensee must be approved for Medicaid certification and obtain a Medicaid contract.

(B) All Medicaid or dually certified beds must be occupied by Medicaid or Medicare recipients at the time of application.

(C) The application for a spend-down Medicaid bed must include documentation that the person for whom the spend-down bed is requested:

(i) was not eligible for Medicaid at the time of the resident's most recent admission to the nursing facility; and

(ii) was a resident of the nursing facility for at least the immediate three months before becoming eligible for Medicaid, excluding hospitalizations.

(D) The nursing facility is eligible to receive Medicaid benefits effective the date the resident meets Medicaid eligibility requirements.

(E) The nursing facility must assign a permanent Medicaid bed to the resident as soon as one becomes available.

(F) Facilities with multiple residents in spend-down beds must assign permanent Medicaid beds to those residents in the same order the residents were admitted to spend-down beds.

(G) The assignment of residents in spend-down beds to permanent Medicaid beds must precede the admission of new residents to permanent beds.

(H) The nursing facility must notify DHS immediately upon the death or permanent discharge of the resident or transfer of the resident to a permanent Medicaid bed. Failure of the nursing facility to notify DHS of these occurrences in a timely manner is basis for denying applications for spend-down Medicaid beds.

(I) The nursing facility is not required to comply with quality-of-care requirements in subsection (e) of this section.

(g) Waivers. The commissioner or the commissioner's designee may grant a waiver of the policy stated in subsection (d) of this section under certain conditions. Applicants must meet the following conditions to be eligible for the specific waivers in subsection (h) of this section.

(1) The applicant must meet the quality-of-care requirement stated in subsection (e) of this section.

(2) Every waiver application must include identification of all controlling parties of the applicant entity.

(3) At the time of licensure and/or Medicaid certification of the allocated beds, the licensee must comply with the requirements contained in §19.201 of this title.

(4) Approved waivers may be assigned by the applicant to another entity under the following circumstances.

(A) Waivers may be assigned to another entity controlled by the majority owners of the waiver.

(B) Waivers may be assigned to the entity that owns the facility at the time of certification. Assignment of the waiver under these circumstances will be approved by DHS only if the entity that owns the facility at the time of certification complies with subsection (e) of this section and the waiver applicant is the licensee of the new facility. Control of the allocated beds after initial Medicaid certification is subject to subsection (c) of this section.

(C) Assignment of waivers under circumstances listed in subparagraphs (A) and (B) of this paragraph must be reported to DHS.

(5) Any additional controlling parties of the new entity must be reported to DHS. The validity of the waiver will be contingent on the new controlling parties' compliance with the quality-of-care requirements in subsection (e) of this section.

(6) Waiver applicants who submit false information will not be eligible for a waiver. Waivers issued based on false information provided by the applicant are void.

(7) Waiver applications will be considered in the order in which they are received.

(h) Specific waivers. Waivers may be granted if it is determined that Medicaid beds are necessary for the following circumstances.

(1) Community needs waiver. A community needs waiver is designed to meet the needs of communities that do not have reasonable access to quality nursing facility care.

(A) The applicant must submit a study, prepared by an independent professional experienced at preparing demographic studies, that documents:

(i) an immediate need for additional Medicaid beds in the community;

(ii) Medicaid residents in the community do not have reasonable access to quality nursing facility care; and

(iii) substantial community support for the new nursing facility or beds.

(B) Applicants must disclose if they have served as a trustee of a nursing facility within the previous 24 months.

(2) Criminal justice waiver. The criminal justice waiver is designed to meet the needs of the Texas Department of Criminal Justice (TDCJ). The applicant must document that:

(A) the waiver is needed to meet the identified and determined nursing facility needs of TDCJ; and

(B) the new nursing facility is approved by TDCJ to serve persons under their supervision who have been released on parole, mandatory supervision, or special needs parole under the Code of Criminal Procedure, Article 42.18.

(3) Under-served minority waiver. The under-served minority waiver is designed to meet the needs of minority communities that do not have adequate nursing facility care. For purposes of this waiver, the term minority means black, Hispanic, Asian or Pacific Islander, American Indian, or Alaskan native. The applicant must submit a study, prepared by an independent professional experienced at preparing demographic studies, that documents:

(A) the new nursing facility or beds will serve a ZIP code that has a minority population greater than 50% according to the most recent U.S. census; and

(B) minority residents in the ZIP code in which the nursing facility or beds will be located do not have reasonable access to quality nursing facility care.

(4) Alzheimer's waiver. The Alzheimer's waiver is designed to meet the needs of communities that do not have reasonable access to Alzheimer's nursing facility services.

(A) The applicant must document that:

(i) the nursing facility is affiliated with a medical school operated by the state;

(ii) the nursing facility will participate in ongoing research programs for the care and treatment of persons with Alzheimer's disease;

(iii) the nursing facility will be designed to separate and treat residents with Alzheimer's disease by stage and functional level;

(iv) the nursing facility will obtain and maintain voluntary certification as an Alzheimer's nursing facility in accordance with §§19.2204, 19.2206, 19.2208 of this title (relating to Voluntary Certification of Facilities for Care of Persons with Alzheimer's Disease; General Requirements for a Certified Facility; and Standards for Certified Alzheimer's Facilities); and

(v) only residents with Alzheimer's disease or related dementia will be admitted to the Alzheimer's Medicaid beds.

(B) The applicant must submit a study, prepared by an independent professional experienced at preparing demographic studies, that documents the need for the number of Medicaid Alzheimer's beds requested.

(5) Teaching nursing facility waiver. A teaching nursing facility waiver is designed to meet the statewide needs for providing training and practical experience for health-care professionals. The applicant must submit documentation that the nursing facility:

(A) is affiliated with a state-supported medical school;

(B) is located on land owned or controlled by the state-supported medical school; and

(C) serves as a teaching nursing facility for physicians and related health-care professionals.

(6) Rural county waiver. A rural county waiver is designed to meet the needs of rural areas of the state that do not have reasonable access to quality nursing facility care. For purposes of this waiver, a rural county is one that has a population of 100,000 or less according to the most recent census, and has no more than two Medicaid-certified nursing facilities. DHS will approve no more than 120 additional Medicaid beds per county per year and no more than 500 additional Medicaid beds statewide in a calendar year under this waiver provision. The waivers will be considered on a first-come, first-served basis. Requests received in a year in which the 500-bed limit has been met will be carried over to the next year. The waiver must be requested by the county commissioner's court.

(A) The commissioner's court must notify DHS of its intent to consider a rural county waiver and obtain verification from DHS that the county complies with the definition of rural county.

(B) The commissioner's court must publish a notice in the *Texas Register* and in a newspaper of general circulation in the county. The notice must seek:

(i) comments on whether a new Medicaid nursing facility should be requested; and

(ii) proposals from persons or entities interested in providing additional Medicaid-certified beds in the county, including persons or entities currently operating Medicaid-certified facilities with high occupancy rates. Persons or entities that submit false information will be eliminated from the process.

(C) The commissioner's court must determine whether to proceed with the waiver request after considering all comments and proposals received in response to the notices provided under subparagraph (B) of this paragraph. In determining whether to proceed with the waiver request, the commissioner's court must consider:

(i) the demographic and economic needs of the county;

(ii) the quality of existing Medicaid nursing facilities in the county;

(iii) the quality of the proposals submitted, including a review of the past history of care provided, if any, by the person or entity submitting the proposal; and

(iv) the degree of community support for additional Medicaid nursing facility services.

(D) The commissioner's court must document the comments received, proposals offered and factors considered in subparagraph (C) of this paragraph.

(E) The commissioner's court, if it decides to proceed with the waiver request, must submit a recommendation that DHS issue a waiver to a person or entity who submitted a proposal for new or additional Medicaid beds. The recommendation must include:

(i) the name, address, and telephone number of the person or entity recommended for contracting for the Medicaid beds;

(ii) the location, if the commissioner's court desires to identify one, of the recommended nursing facility;

(iii) the number of beds recommended; and

(iv) the information listed in subparagraph (D) of this paragraph used to make the recommendation.

(7) State veterans homes. State veterans homes, authorized and built under the auspices of the State Veterans Land Board, must meet all requirements for Medicaid participation.

(i) Time Limits and Extensions.

(1) With the exception of transferred Medicaid beds and temporary Medicaid beds, all beds approved under the exemption provisions of subsection (f) of this section must be constructed, licensed, and certified within 24 months of the exemption approval.

(2) Medicaid beds transferred in accordance with subsection (f)(2) of this section must be certified within six months of the exemption approval.

(3) Time limits applicable to temporary Medicaid beds are specified in subsection (f)(6) of this section.

(4) All facilities and beds approved in accordance with waiver provisions of subsection (h) of this section must be constructed, licensed, and certified within 24 months of the waiver approval.

(5) With the exception of transferred Medicaid beds and temporary Medicaid beds, applicants for exemptions and waivers must submit a progress report every 12 months after approval of the exemption or waiver. The exemption or waiver may be declared void if the applicant fails or refuses to provide the progress report as required or if the progress report contains false information.

(6) At the discretion of the commissioner or the commissioner's designee, deadlines specified in this section may be extended. The applicant must submit evidence of good-faith efforts to meet the deadline and/or evidence that delays were beyond the applicant's control.

(7) Applicants who receive an extension of their waiver of exemption must submit a progress report every six months after approval of the extension until the nursing facility beds are certified. The

exemption or waiver may be declared void if the applicant fails or refuses to provide the progress report as required or if the progress report contains false information.

(8) Failure to meet the requirements of this section is grounds for loss of the Medicaid bed allocation.

(j) Loss of Medicaid Beds.

(1) Loss of Medicaid beds based on sanctions.

(A) A Medicaid nursing facility operated by the person or entity who also owns the property will lose the allocation of all Medicaid beds assigned to the nursing facility property if the nursing facility's license is denied or revoked.

(B) A Medicaid nursing facility operated by one person or entity and owned by another person or entity will lose the allocation of Medicaid beds if two or more of the following actions occur within a 42-month period:

(i) licensure denial;

(ii) licensure revocation; or

(iii) Medicaid termination.

(C) DHS may waive this loss of allocation of Medicaid beds in order to facilitate a change of ownership or other actions that would protect the health and safety of residents or assure reasonable access to quality nursing facility care.

(2) Voluntary decertification of Medicaid beds.

(A) Facilities may request to voluntarily decertify Medicaid beds.

(B) The licensee must submit written approval of the Medicaid bed reduction signed by the property owner and all physical plant lien holders.

(C) Medicaid beds voluntarily decertified will result in reduction of allocated Medicaid beds equal to the number of beds decertified.

(D) Facilities that voluntarily decertify Medicaid beds are eligible to receive an increased allocation of Medicaid beds if the facility qualifies for a bed allocation waiver or exemption.

(3) Nursing facility ceases to operate.

(A) The property owner of a nursing facility that closes or ceases to participate in the Medicaid program must inform DHS in writing of the intended future use of the Medicaid beds within 90 days of closure.

(B) Unless the Medicaid beds will be used for a replacement nursing facility, the allocated beds must be re-certified within 12 months of the date the Medicaid contract was terminated.

(C) Time limits in subparagraphs (A) and (B) of this paragraph may be extended in accordance with subsection (i)(6) of this section.

(D) Failure to meet the requirements of this paragraph is grounds for loss of the Medicaid bed allocation.

(k) Informal review procedures.

(1) Applicants may request an informal review of DHS actions regarding bed allocations. The request must be submitted within 30 days of notification of the action.

(2) The request for the informal review and all documentation or evidence that forms the basis for the informal review must be submitted in writing.

(3) The commissioner or the commissioner's designee will conduct the informal review.

(l) Loss of Medicaid beds based on low occupancy.

(1) DHS may review Medicaid bed occupancy rates annually for the purpose of de-allocating and decertifying unused Medicaid beds. The Medicaid bed occupancy reports for the most recent six-month period that DHS has validated will be used to determine the bed occupancy rate of each nursing facility.

(2) Medicaid beds will be de-allocated and decertified in facilities that have an average occupancy rate below 70%. The number of beds to be decertified is calculated by subtracting the preceding six-month average occupancy rate of Medicaid-certified beds from 70% of the number of allocated certified beds and dividing the difference by 2, rounding the final figure down if necessary. For example, for a facility with 100 Medicaid-certified beds and a 50% occupancy rate, the difference between 70% (70 beds) and 50% (50 beds) is 20 beds, divided by 2, is 10 beds to be decertified.

(3) Medicaid beds in a nursing facility that has obtained a replacement nursing facility exemption are not subject to the de-allocation and decertification process.

(4) Medicaid beds in a new or replacement physical plant or a newly constructed wing of an existing physical plant will be exempt from this de-allocation and decertification process until the new physical plant or new wing has been certified for two years.

(5) Medicaid beds that have been subject to a change of ownership within the past 24 months are exempt from the de-allocation and decertification process.

(6) Medicaid beds allocated to a closed nursing facility are exempt from this de-allocation and decertification process.

(7) Nursing facilities that lose Medicaid beds through this process are eligible to receive an additional allocation of Medicaid beds at a later date if the facility qualifies for a bed allocation waiver or exemption.

(8) The de-allocation and decertification of unused beds does not affect the licensed capacity of the nursing facility.

(m) Medicaid occupancy reports.

(1) Medicaid nursing facilities must submit occupancy reports to DHS each month.

(A) The occupancy data must be reported on a form prescribed by DHS. The form must be completed in accordance with instructions and the occupancy data must be accurate and verifiable. The completed report must be submitted to DHS no later than the fifth day of the month following the reporting period.

(B) The Medicaid occupancy rate will be determined by calculating the monthly average of the number of persons who occupy Medicaid beds.

(C) All persons residing in Medicaid-certified beds, including Medicaid recipients, Medicare recipients, private-pay residents, or residents with other sources of payment, will be included in the calculation.

(D) Failure or refusal to submit accurate occupancy reports in a timely manner may result in the nursing facility's vendor payment being held in abeyance until the report is submitted.

(2) DHS will determine nursing facility and county occupancy rates based on the data submitted by the nursing facilities.

(A) The occupancy data will be used to determine eligibility for and/or compliance with waiver and exemption requirements. The occupancy data also will be used to determine if Medicaid beds should be decertified based on low occupancy.

(B) The occupancy data will be made available to nursing facilities, licensees, property owners, waiver or exemption applicants, and others in accordance with public disclosure requirements.

(C) Inaccurate or falsified occupancy data is grounds to disqualify facilities from eligibility for bed allocation exemptions and waivers. DHS may refuse to accept corrections to bed occupancy data submitted more than six months after the due date of the occupancy report.

(n) School-age residents. Any bed allocation waiver or exemption applicant that serves or plans to serve school-age residents must provide written notice to the affected local education agency (LEA) of its intent to establish or expand a nursing facility within the LEA's boundary.

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 September 11, 2002.

TRD-200205954
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: November 1, 2002
Proposal publication date: July 5, 2002
For further information, please call: (512) 438-3734

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40 TAC §§19.2322, 19.2324, 19.2325

The repeals are adopted under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs; and under Texas Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The repeals implement the Human Resources Code, §§22.001-22.036 and §§32.001-32.052.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TEXAS 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

The public hearing regarding Texas Workers' Compensation Classification Relativities (docket number 2530) has been rescheduled to October 17, 2002, in room 100 at 1:30 p.m. Notice of the hearing was published in the September 13, 2002, issue of the *Texas Register* (27 TexReg 8781).

TRD-200206128
Gene C. Jarmon
Acting General Counsel and Chief Clerk
Texas Department of Insurance
Filed: September 19, 2002

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Final Action on Rules

EXEMPT FILING NOTIFICATION PURSUANT TO THE INSURANCE CODE CHAPTER 5, SUBCHAPTER L, ARTICLE 5.96

The Commissioner of Insurance (Commissioner) adopted amendments to the Texas Statistical Plan For Residential Risks (Stat Plan) as proposed by the staff of the Texas Department of Insurance (Staff).

The Commissioner has jurisdiction over this matter pursuant to Insurance Code, Article 5.96 and §§38.204 and 38.207. Article 5.96 authorizes the Commissioner to prescribe, promulgate, adopt, approve, amend, or repeal standard and uniform manual rules, rating plans, classification plans, statistical plans and policy and endorsement forms for fire and allied lines of insurance. Section 38.204 provides that a designated statistical agent shall collect data from reporting insurers under a statistical plan adopted by the Commissioner. Section 38.207 authorizes the Commissioner to adopt rules necessary to accomplish the purposes of the subchapter regarding statistical data collection.

The adopted amendments allow the reporting of experience relating to the use of recently approved residential policy forms. The adopted amendments add options to the Policy Forms field of the Stat Plan. The new options for this field are:

A FP-7955 TX (State Farm Homeowners Policy Form).

B FP-7954 TX (State Farm Renters Policy Form).

C FP-7956 TX (State Farm Condo Policy Form).

D HO-3RTX (USAA Homeowners policy Form).

E HO-6RTX (USAA Condo Policy Form).

F HO 00 02 (ISO Homeowners 2-Broad Form).

G HO 00 03 (ISO Homeowners 3-Special Form).

H HO 00 04 (ISO Homeowners 4-Contents Broad Form).

I HO 00 05 (ISO Homeowners 5-Comprehensive Form).

J HO 00 06 (ISO Homeowners 6-Unit Owners Form).

K HO 00 08 (ISO Homeowners 8-Modified Coverage Form).

As additional policy forms are approved, Staff will add options to this field for the reporting of experience related to the use of such policy forms.

The adopted amendments also add two new fields. One field is to report the actual dollar amount of the deductible associated with a particular policy and the other is to indicate whether wind coverage is included. These new fields are available for both the recently approved policy forms mentioned above as well as for existing policy forms.

The current deductible field remains in place for companies that are not able to make system changes necessary to report the actual dollar amount of a deductible.

The adopted amendments also edit existing fields to allow for reporting buy-back endorsements pertaining to foundation, water, and other specified coverage and for reporting the amount of coverage purchased.

In addition, the adopted amendments make changes to the Stat Plan to eliminate the Protection Key Rate field, to delete invalid Deductible Type Codes, to correct Type of Loss Codes, and to expand the types of submission media to include electronic media types that are currently available.

Staff's petition (Ref. P-0702-30-I) proposing the amendments was filed with the Chief Clerk of the Texas Department of Insurance (Department) on July 31, 2002, and notice of the filing was published in the August 9, 2002 issue of the *Texas Register* (27 Tex Reg 7193).

The Department received comments from one commenter. The commenter asserted that because the new policy forms are not currently subject to a benchmark rate it is not possible for them to provide the required information for the flex fields. The commenter suggested adding specific instructions to the Stat Plan that code 100 be used in any applicable flex field where a benchmark rate has not been promulgated for a given policy form. Staff agrees with instructing the use of code 100, but disagrees with the commenter's suggested language which lists by policy number the policies that do not have a benchmark rate. Instead the Staff has amended the flex field instructions to include the following: "If there is not a promulgated benchmark rate, code 100".

The commenter also raised the concern that company-specific information provided under the Stat Plan be kept confidential. The department shares this concern and will comply with the provisions of the Public Information Act concerning the confidentiality of company-specific data.

The amendments as adopted by the Commissioner are filed with the Department's Chief Clerk under Ref. No. P-0702-30-I and are incorporated by reference by Commissioner's Order 02-0954.

Consistent with the Insurance Code, Article 5.96(h), prior to the effective date of this action, the Department will notify all insurers writing the affected lines of insurance in this state of this action.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts action taken under this article from the requirements of the Administrative Procedure Act (Government Code, Title 10, ch. 2001).

IT IS THEREFORE THE ORDER of the Commissioner of Insurance that the amendments to the Texas Statistical Plan for Residential Risks as described herein, be adopted to be effective for fourth quarter 2002 experience reporting for all affected insurers.

TRD-200206019
Gene C. Jarmon
Acting General Counsel and Chief Clerk
Texas Department of Insurance
Filed: September 16, 2002

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Final Action on Rules

The Commissioner of Insurance has adopted three new residential property policy forms which include form no. HO-542 (homeowners policy), form no. HC-542 (condominium policy), and form no. HT-542 (tenants policy) filed by Nationwide Lloyds Insurance Company (Nationwide) and further has adopted fourteen new endorsements that may be attached to the new residential property policy forms for use in the State of Texas.

The Commissioner has jurisdiction over this matter pursuant to Texas Insurance Code Article 5.35. Article 5.35(b) provides in pertinent part that the Commissioner may adopt policy forms and endorsements of a national insurer, which is defined as an insurer subject to that article that, either directly or together with its affiliates as part of an insurance holding company system as defined by Article 21.49-1, is licensed to do business and write the kinds of insurance that are subject to Texas Insurance Code Chapter 5, Subchapter C (fire and allied lines) in 26 or more states and maintains minimum annual direct written premiums for residential property insurance of $750 million in the aggregate for all states. Based on information furnished to the Texas Department of Insurance (Department), Nationwide is a national insurer under this section and is thus authorized to file its policies and endorsements with the Texas Department of Insurance to be considered by the Commissioner for adoption.

Article 5.35(g) establishes the standards by which a policy form or endorsement filed under that statute will be judged. That subsection provides, in pertinent part, that "The Commissioner may disapprove a policy form or endorsement filed under this article, or withdraw any previous approval thereof, if the policy form or endorsement:

A. violates or does not comply with the Insurance Code, or any valid rule related thereto duly adopted by the Commissioner, or is otherwise contrary to law; or

B. contains provisions or has any titles or headings which are unjust, encourage misrepresentation, are deceptive, or violate public policy."

Nationwide's original petition on this matter, filed on June 10, 2002, requested the adoption of a new Texas homeowners policy, tenants policy, and condominium policy. Since the filing of the original petition, Nationwide and Department staff have engaged in discussions and dialogue relating to the new forms and endorsements. Nationwide has made several modifications to the homeowners, tenants, and condominium policies, as originally filed, as a result of discussions with Department staff. Nationwide amended its June 10, 2002, filing on July 17, 2002, by providing Flesch scores for the policy forms and endorsements and by making editorial revisions to the policy forms including changing the form numbers from HO-142 to HO-542, HC-142 to HC-542, and HT-142 to HT-542 to avoid potential confusion with TDI endorsement no. HO-142. In letters dated July 26, 2002, August 21, 2002, and September 16, 2002 Nationwide made additional changes in response to concerns expressed by staff during the policy and endorsement review. Potential action on these policy forms and endorsements was noticed in the *Texas Register* (27 TexReg 7193) on August 9, 2002, to solict comments. No hearing on this matter was requested. All amendments that were made to the policy forms and endorsements during and after the thirty day comment period were available from the Office of the Chief Clerk upon request. All individuals who requested copies of the Nationwide proposal have been sent copies of the amended policy forms and endorsements.

After review of Nationwide's filings and supporting documentation and other information, public comments, and recommendations by Texas Department of Insurance staff, the Commissioner finds that the policy forms, endorsements, and the agreed-upon conditions as detailed herein meet the requirements of Article 5.35, and should be adopted subject to the following provisos. Article 5.35 requires that a filed policy form or endorsement shall not contain provisions that are unjust, encourage misrepresentation, are deceptive, or violate public policy. Under these circumstances, as noted earlier, the Commissioner may disapprove a policy form or endorsement, or withdraw any previous approval of a form or endorsement. The Commissioner believes that there is a reasonable expectation on the part of insureds that the offer of a new policy with less coverage would be at a lower cost than a policy offered by the same company with more coverage, and that if this were not the case the filing would not come within the standards of Article 5.35, including the public policy requirement. This is especially true as the current insurance market transitions from a single, prescribed policy to individually filed policies. Accordingly, the Commissioner's adoption of Nationwide's filing is predicated on information and representations provided to the Department by Nationwide, including the preliminary determination that insureds purchasing the new basic policy forms and endorsements can reduce their homeowners premium from 9% to 27% from the amount they otherwise would have paid for the basic HO-B, depending upon geographic location and coverage selection. The Commissioner's adoption is also predicated on the requirement in this order, which Nationwide has agreed to, that Nationwide file its initial rates and any subsequent rate changes/reductions with the Department for a two year period beginning on the date the policies are first sold, in order that the Department may monitor impacts related to the policy form adoption, including compliance with Article 5.35.

I. Nationwide Homeowners Policy. The following is a general description of the coverage provided by the new Nationwide homeowners policy that is adopted by the Commissioner pursuant to Article 5.35 (b).

A. Section I-Property Coverages.

1. The policy covers the dwelling and other structures on the premises against the risk of direct physical loss, with certain exceptions.

2. It covers personal property on and away from the premises against losses by fire or lightning, windstorm or hail, explosion, riot or civil

commotion, aircraft, vehicles, smoke, vandalism and malicious mischief, theft, falling objects, weight of ice, snow, or sleet, sudden and accidental discharge or overflow or water or steam, sudden and accidental tearing apart, and freezing.

3. It provides loss of use which covers additional living expenses if a covered loss requires the insured to leave the residence premises and fair rental value when part of the premises is rented to others.

4. The policy excludes loss caused by mold, fungus or other microbes. However, as an exception to the exclusion, Nationwide will provide coverage if the mold, fungus or other microbes is caused by or results from sudden and accidental discharge or overflow of water which otherwise would be covered under the policy. Sudden and accidental shall include a loss event that is hidden or concealed for a period of time until it is detectable. A hidden loss must be reported to Nationwide no later than 30 days after the date the loss was detected or should have been detected. The cost to treat, contain, remove or dispose of mold, fungus or other microbes beyond that which is required to repair or replace the covered property physically damaged by water; the cost of testing or monitoring of air or property; and the cost of any decontamination of the residence premises is excluded. (See Section I-Property Exclusions, item 1.l.) Pursuant to Commissioner's Order No. 01-1105, the HO-B modified by endorsement no. HO-162A provides coverage for removal of ensuing mold, fungi, or other microbial losses caused by sudden and accidental discharge, leakage or overflow of water if the water loss is a covered loss. However, the modified HO-B does not provide coverage for the remediation of mold or fungus.

B. Section II-Liability Coverages.

1. Coverage E-Personal Liability. The policy covers payment on behalf of the insured of all sums, up to the stipulated limit, which the insured is legally obligated to pay as damages because of bodily injury or property damage arising out of the residence premises or personal activities.

2. Coverage F-Medical Payments to Others. The policy covers medical and related expenses, subject to the stipulated limit, arising out of accidents to persons other than the insured and residents of the premises.

3. Additional Coverages. Additional coverage is provided for claim expenses, first aid expenses, and damage to property of others.

II. Nationwide Condominium Policy. This policy for a condominium covers items of real property which are the insured's responsibility under the governing rules of a condominium. This policy covers personal property on and away from the premises against losses by fire or lightning; windstorm or hail; explosion; riot or civil commotion; aircraft; vehicles; smoke; vandalism and malicious mischief; theft; falling objects; weight of ice, snow, or sleet; sudden and accidental discharge or overflow of water or steam; accidental electrical damage to electrical appliances; sudden and accidental tearing apart; and freezing. This policy also contains loss of use, additional coverages, and liability coverage provisions that are the same as those described for the Nationwide homeowners policy. Additionally, this policy contains provisions similar to those described in the Nationwide homeowners policy relating to mold, fungi, and other microbes.

III. Nationwide Tenants Policy. This is a tenants policy that covers personal property on and away from the premises against losses by fire or lightning; windstorm or hail; explosion; riot or civil commotion; aircraft; vehicles; smoke; vandalism and malicious mischief; theft; falling objects; weight of ice, snow, or sleet; sudden and accidental discharge or overflow of water or steam; accidental electrical damage to electrical appliances; accidental tearing apart; and freezing. This policy also contains loss of use, additional coverages, and liability coverage provisions that are the same as those described for the Nationwide homeowners policy. Additionally, this policy contains provisions similar to those described in the Nationwide homeowners policy relating to mold, fungi, and other microbes.

IV. Changes To the Policies and Endorsements as Proposed. As a result of comments on the proposal, the Commissioner has adopted the homeowners, condominium, and tenants policies and endorsements with changes as proposed. Form no. HO-542 (homeowners policy), form no. HC-542 (condominium policy), and form no. HT-542 (tenants policy) and the endorsements were adopted with the following changes:

A. With respect to all three policies, Section I-Exclusions, item 1.f., the Increased Hazard exclusion was deleted. This exclusion enabled Nationwide to exclude any loss if there was an increase in hazard within the knowledge and control of the insured. The language of this exclusion conflicted with the intent of Article 21.49-2B which provides that an insurer may cancel a homeowners policy if there is an increase in hazard that would produce an increase in the premium rate of the policy. However, while the insurer may cancel a policy under Article 21.49-2B because of an increased hazard that would produce an increase in the premium rate, it does not authorize an insurer to exclude losses and deny payment of a claim due to an increase in hazard.

B. With respect to all three policies, the remaining paragraph 1 exclusions were relettered to reflect the new sequence of the exclusions that resulted from the deletion of the Increased Hazard exclusion.

C. With respect to the homeowners and condominium policies, a reference to certain Section I Policy Exclusions in the Section 1-Additional Property Coverages, Household Supplies was revised due to the relettering of paragraph 1 exclusions.

D. In response to concerns expressed by Department staff, Nationwide revised its Certificate of Liability Insurance form, Cas. 6300 to clarify that it could only be used with the homeowners policies and also provided Nationwide's own version of the Sworn Proof of Loss, form no. Fire 3919.

V. Comparison of the Nationwide Policies to the Currently Prescribed Texas Homeowners Policy-Form B (HO-B). The HO-B has traditionally been the predominant policy form issued in Texas for owner occupied dwellings. In the course of staff's review of Nationwide's homeowners, condominium, and tenants policies, staff has noted several differences in the coverage provided in the HO-B and that provided in the Nationwide policy forms. Since the tenants policy contains the same coverages as the homeowners policy (except the tenants policy does not provide dwelling coverage) and the condominium policy also contains the same coverages as the homeowners policy (except that the dwelling coverage is much more limited) the restrictions and enhancements in coverage will be discussed in terms of a comparison between the Nationwide homeowners policy and the HO-B. However, it should be noted that most of the comparisons of coverage also apply to the tenants and condominium policies.

VI. Restrictions In Coverage. The following is a list of some of the restrictions in coverage that are contained in the homeowners policy as compared to the existing HO-B. This list is not intended to cover every restriction in coverage that is contained in the Nationwide policy forms. If more detailed coverage information is desired, a side by side comparison of the Nationwide homeowners policy and the HO-B, a side by side comparison of the Nationwide condominium policy and the HO-B-CON, and a side by side comparison of the Nationwide tenant policy and the HO-BT are available from the Department upon request from the Office of the Chief Clerk.

A. Coverage for Boats, Boat Trailers, and Other Trailers.

The Nationwide policy provides up to $1,000 in coverage for watercraft and outboard motors, including trailers, furnishings, and equipment; and other utility type trailers not used with watercraft for losses that

occur on and off premises for named perils. (See Section I-Property Coverages, Coverage C-Personal Property, Special Limits of Liability, items 10. and 11.) The Nationwide policy provides theft coverage for watercraft, including their trailers, furnishings, equipment and outboard motors or trailers and campers if the theft occurs on the residence premises; however, if the theft occurs off of the residence premises, theft coverage is excluded. (See Section 1-Perils Insured Against, item 9.) The Nationwide policy provides windstorm and hail coverage for boats and their trailers only if they are inside a fully enclosed building. (See Section 1-Perils Insured Against, item 2.) The HO-B provides coverage up to the limits of liability that apply to Coverage B (Personal Property) for boats and boat trailers while located on land on the residence premises for all perils insured against. Additionally, the HO-B provides coverage up to the limits of liability that apply to Coverage B (Personal Property) for trailers designed for use principally off public roads (e.g., travel trailers) whether on or off premises. (See Section 1-Property Coverage, Coverage B (Personal Property), Property Not Covered, items 4. and 6.)

B. Coverage for Firearms.

The Nationwide policy limits the coverage for firearms to losses by the peril of theft with a maximum limit of liability of $1,000. (See Section I- Property Coverages, Coverage C-Personal Property, Special Limits of Liability, item 2.) The HO-B provides coverage for firearms to the extent described under the Perils Insured Against section of the policy, including the peril of theft, up to the limits of liability that apply to Coverage B (Personal Property).

C. Coverage for Goldware and Silverware.

The Nationwide policy limits the coverage for goldware, gold-plated ware, silverware, silver-plated ware, and pewterware to losses by the peril of theft with a maximum limit of liability of $2,500. (See Section I-Property Coverages, Coverage C-Personal Property, Special Limits of Liability, item 4.) The HO-B provides coverage for goldware and silverware to the extent described under the Perils Insured Against section of the policy, including the peril of theft, up to the limits of liability that apply to Coverage B (Personal Property).

D. Coverage for Golf Carts.

The Nationwide policy does not cover golf carts unless used to service the residence premises or while used for golfing purposes. (See Section I - Property Coverages, Coverage C - Personal Property, Property Not Covered, item 4. c.) The HO-B provides coverage for golf carts up to the limits of liability that apply to Coverage B (Personal Property) to the extent described under the Perils Insured Against section of the policy. (See Section I - Property Coverage, Coverage B (Personal Property) Property Not Covered, item 3.c.)

E. Coverage for Business Property.

The Nationwide policy limits coverage for business property on the residence premises, except computers including their hardware and software to $500. (See Section I-Property Coverages, Coverage C-Personal Property, Special Limits of Liability, item 9.) The HO-B provides $2,500 coverage for business personal property, except samples or articles for sale or delivery, while on the residence premises. (See Coverage B (Personal Property) Special Limits of Liability, item 4.)

F. Debris Removal.

Nationwide provides reasonable expense incurred for removing debris of covered property if the peril causing the loss is covered. This includes debris of trees that cause damage to covered property or covered structures, or that obstruct access to covered structures if such access is necessary to repair or replace the structure. However, coverage is only provided to move away from, or off of, covered property the debris of trees that cause damage to covered property. (See Additional Property Coverages, item 1.) The HO-B will pay the expense for removal from the residence premises of a tree that has damaged covered property if a peril insured against causes the tree to fall. (See Extensions of Coverage, item 1.)

G. Coverage for Water Damage.

1. The Nationwide policy specifies that it does not include coverage for losses to the dwelling and other structures caused by continuous or repeated seepage or leakage of water or steam over a period of time from a heating, air conditioning or automatic fire protective sprinkler system, household appliance, or plumbing system. (See Section I Property Exclusions, item 3.e.) The HO-B provides coverage for water damage from repeated and continuous seepage or leakage of water or steam from a plumbing system, heating or air conditioning system, or household appliance which occurs over a period of time. (See Section 1-Perils Insured Against, item 9.)

2. The Nationwide policy does not cover losses caused by water which backs up through sewers or drains from outside the dwelling's plumbing system or which overflows from a sump pump, sump pump well, or similar device designed to remove subsurface water or water-borne material from the foundation area. (See Section I-Exclusions, item 1.b.(2).) The HO-B provides coverage for damage to property covered under Coverage A (Dwelling) or Coverage B (Personal Property) for a loss caused by back up or overflow from a sewer, drain, or sump pump of sewage or water even if it is from outside the residence premises. Property covered under Coverage B (Personal Property) is specifically insured for loss caused by accidental discharge, leakage, or overflow of water or steam from within a plumbing system, heating or air conditioning system, or household appliance which may include a loss caused by water or sewage from outside the residence premises that backs up or overflows from a sewer, drain, or sump pump. (See Section 1-Perils Insured Against, Coverage B-Personal Property, item 9.)

H. Coverage for Vandalism and Malicious Mischief.

The Nationwide policy excludes loss from vandalism and malicious mischief or breakage of glass if the dwelling is vacant for more than 30 consecutive days immediately before a loss. (See Section I-Exclusions, item 2.d.) The HO-B provides coverage for all perils insured against for up to 60 days of vacancy. (See Section 1-Conditions, item 13.)

I. Nationwide Policy Exclusions.

1. The Nationwide policy excludes loss caused by a fault, weakness, defect or inadequacy in specifications, planning, zoning, design, workmanship, construction, materials, surveying, grading, backfilling, development or maintenance of any property whether on or off of the residence premises. (See Section I-Exclusions, item 2. a.) The HO-B does not contain this exclusion.

2. Nationwide excludes settling, cracking, shrinking, bulging or expansion of pavements, patios, foundations, walls, floors, roofs or ceilings. (See Section I - Exclusions, item 1. f.) The HO-B provides coverage for an ensuing loss caused by a covered water loss to foundations, walls, floors, ceilings, roof structures, walks, drives, curbs, fences, retaining walls or swimming pools. (See Section I - Exclusions, item 1. h.)

J. Coverage for Loss of Use.

The Nationwide policy limits the time allowable for payment of Additional Living Expense and Fair Rental Value to 12 months. (See Section I-Property Coverages, Coverage D-Loss of Use, item 1. 2.) The HO-B does not have a time limitation for the payment of Additional Living Expense and Fair Rental Value.

VII. Coverage Enhancements. The following is a list of some of the areas where the Nationwide homeowners policy provides coverage that

is broader than the coverage provided in the HO-B. This list is not intended to cover every enhancement in coverage that is contained in the Nationwide policy forms. If more detailed coverage information is desired, a side by side comparison of the Nationwide homeowners policy and the HO-B, a side by side comparison of the Nationwide condominium policy and the HO-B-CON, and a side by side comparison of the Nationwide tenants policy and the HO-BT are available from the Office of the Chief Clerk on request.

A. Personal Property, Special Limits of Liability.

1. The Nationwide policy provides a $200 limit of liability for losses of money, bank notes, bullion, gold other than goldware, silver other than silverware, platinum, coins, stored value cards, smart cards, gift certificates, and medals. (See Section I-Property Coverages, Coverage C-Personal Property, Special Limits of Liability, item 6.) The HO-B provides a $100 limit of liability for losses of money. (See Section 1-Property Coverage, Coverage B (Personal Property), Special Limits of Liability, item 1.)

2. The Nationwide policy provides a $1,000 limit of liability for loss of securities, accounts, deeds, documents, evidences of debt, letters of credit, notes other than bank notes, passports, stamps and tickets. (See Section I-Coverages, Coverage C-Personal Property, Special Limits of Liability, item 7.) The HO-B provides a $500 limit of liability for "Bullion/Valuable Papers". (See Section I-Property Coverage, Coverage B (Personal Property), Special Limits of Liability, item 2.)

3. The Nationwide policy provides a $1,000 limit of liability for watercraft and outboard motors, including trailers, furnishings, and equipment; and other utility type trailers while away from the residence premises. (See Section I-Coverages, Coverage C-Personal Property, Special Limits of Liability, items 10. and 11.) The HO-B excludes coverage for boats and boat trailers while away from the residence premises. (See Section I-Property Coverage, Property Not Covered, items 4. b. and 6.)

4. The Nationwide policy provides $1,000 coverage for loss by theft of jewelry, watches, furs, and precious and semi-precious stones. (See Section I-Coverages, Coverage C-Personal Property, Special Limits of Liability, item 1.) The HO-B provides a $500 limit of liability for loss by theft of gems, watches, jewelry or furs. (See Section I-Property Coverage, Coverage B (Personal Property), Special Limits of Liability, item 3.)

B. Additional Property Coverages.

1. The Nationwide policy provides an additional 5% of the limit of liability for the damaged property for debris removal when the amount payable for the property loss plus debris removal expense exceeds the limit of liability for the damaged property. (See Section I-Property Coverages, Additional Property Coverages, item 1.) The HO-B's debris removal coverage is included in the limit of liability that applies to the damaged property and does not add additional coverage. (See Section I-Property Coverage, Coverage B (Personal Property), Extensions of Coverage, item 1.)

2. The Nationwide policy provides up to $500 for live tree debris removal. In the event of a loss by a covered peril, Nationwide will pay the reasonable expense incurred for the removal of live tree debris from the residence premises that does not cause damage to covered property or covered structures. (See Additional Property Coverages, item 2.) The HO-B does not provide this coverage.

3. The Nationwide policy provides up to $500 for covered damage to any one tree, shrub or plant. (See Section I-Coverages, Additional Property Coverages, item 4.) The HO-B provides up to $250 for covered damage to any one tree, shrub or plant. (See Section I-Property Coverage, Coverage B (Personal Property), Extensions Of Coverage, item 4.)

4. The Nationwide policy provides up to $500 for fire department service charge for the insured's liability under contract or agreement for customary fire department charges. The HO-B does not provide similar coverage.

5. The Nationwide policy provides up to $1,000 for credit card, electronic fund transfer card, access device and forgery coverage for the legal obligation of an insured to pay theft or unauthorized use of credit cards, including electronic fund transfer cards or access devices, issued to or registered in an insured's name. (See Section 1-Coverages, Additional Property Coverages, item 7.) The HO-B provides a $100 limit of liability for loss by theft or unauthorized use of bank fund transfer cards. (See Section 1-Property Coverage, Coverage B (Personal Property), Special Limits of Liability, item 1.)

6. The Nationwide policy provides $100 coverage for lock replacement, with no deductible, if the keys to the residence premises are stolen. (See Section I-Coverages, Additional Property Coverages, item 11.) The HO-B does not provide similar coverage.

VIII. Nationwide Homeowners Endorsements. In addition to the three residential property policy forms, the Commissioner has adopted fourteen endorsements pursuant to Article 5.35 (b). Since the Nationwide policies contain notable restrictions in the water damage coverage and the dwelling foundation coverage as compared to the coverage contained in the HO-B, a general description of the coverage that will be provided by the Nationwide Dwelling Foundation Endorsement and Water Damage Endorsement is provided. Additionally, a description of the coverage that will be provided by the Nationwide Fungus (Including Mold) Limited Coverage Endorsement is provided. Two endorsements provide coverage that is not currently available under a Texas homeowners policy. H-6005, Home Care Services provides liability coverage arising out of home care services provided by or at the direction of an insured on or from the residence premises; and H-6006, Watercraft Endorsement provides physical damage for boats, motors, trailers, and portable equipment and accessories.

A. Dwelling Foundation Endorsement.

The endorsement provides coverage up to 15% of the amount of insurance for Coverage A-Dwelling for damage to the slab or foundation of the building, if the damage is caused by accidental discharge or leakage of water or steam, including constant or repeated seepage over a period of time from within a plumbing, heating, air conditioning or automatic fire protective sprinkler system or from within a household appliance. The loss to the system from which the water or steam escaped is not covered. The tear out provisions include the cost of tearing out and replacing any part of the building necessary to repair or replace the plumbing, heating, air conditioning or automatic fire protective sprinkler system or household appliance from which the water or steam escaped. The endorsement does not provide coverage for settling, cracking, shrinking, bulging, or expansion of pavements, patios, walls, floors, roofs, or ceilings whether caused directly or indirectly by accidental discharge or leakage of water including constant or repeated seepage or leakage of steam or water over a period of time from within a plumbing, heating, air conditioning or automatic fire protective sprinkler system or household appliance, except as specifically provided in the Dwelling Foundation Endorsement, regardless of any other cause or event contributing concurrently or in any sequence to the loss. The endorsement further specifies that the exclusion in the policy for foundation damage caused by constant or repeated leakage or seepage of water or steam (Section I-Policy Exclusions) does not apply to the coverage provided in the Dwelling Foundation Endorsement.

B. Water Damage Endorsement.

The endorsement provides coverage for direct physical loss consisting of water damage to property described in Coverage A - Dwelling, Coverage B - Other Structures, and Coverage C - Personal Property caused by the continuous or repeated seepage or leakage of water or steam from a heating, air conditioning or automatic fire protective sprinkler system; household appliances; or plumbing system. A plumbing system includes a shower pan, but does not include the shower stall or shower bath enclosure. The coverage includes the cost of tearing out and replacing any part of the building necessary to provide access to repair the system or appliance from which the seepage or leakage occurred. The endorsement does not provide coverage for fungus caused by continuous or repeated seepage or leakage of steam or water from a heating, air conditioning or automatic fire protective sprinkler system; household appliances; or plumbing system; loss caused by, consisting of, or resulting from fungus; and loss to the system or appliance from which the water or steam escaped. The endorsement further specifies that Coverage C-Personal Property peril 12 (Section I-Perils Insured Against, item 12.) concerning damage caused by constant or repeated leakage or seepage of water or steam is amended such that the exclusion for loss: (a) caused by water that backs up and enters through the sewers or drains, (b) due to continuous or repeated leakage or seepage of water or steam over a period of time; (c) due to freezing; and (d) to the system or appliance from which the water or steam escaped does not apply to the coverage provided in the Water Damage Endorsement.

C. Fungus (Including Mold) Limited Coverage Endorsement.

The endorsement provides coverage for remediation of fungus if the fungus is the result of a covered loss. The coverage includes remediation of the mold or fungus including the following costs to: (1) remove the fungus from covered property or to repair, restore, or replace that property; and (2) tear out and replace any part of the building or other property as needed to gain access to the fungus. The coverage further includes the cost of any testing or monitoring of air or property to confirm the type, absence, presence, or level of fungus, whether performed prior to, during, or after remediation of covered property. The coverage further includes any loss of use or delay in rebuilding, repairing, or replacing covered property. The endorsement specifies that the mold or fungus that is the result of continuous or repeated seepage or leakage of water or steam from a heating, air conditioning or automatic fire protective sprinkler system; household appliances; or plumbing system and that is the result of a defect, weakness, inadequacy, fault, or unsoundness in planning; zoning; development; surveying; siting; design; specifications; workmanship; construction; grading; compaction; or materials used in construction, repair, or maintenance of any property or improvements whether on or off the residence premises is not covered. The fungus coverage applies only if the insurer receives immediate notice of the occurrence that resulted in the fungus and remediation begins as soon as possible and all reasonable means were used to save and preserve the property from further damage following a covered loss. The endorsement specifies that the most that Nationwide will pay under the policy for a mold loss in any one policy period is the Limit of Liability shown on the declarations for the Fungus (Including Mold) Limited Coverage Endorsement regardless of:(1) the number of covered losses that contribute to the resulting mold; or (2) the number of claims made during the policy period. The limits of liability available for mold or fungus coverage are 25%, 50%, or 100% of the Coverage A-Dwelling, Coverage B-Other Structures, and Coverage C-Personal Property limit of liability and includes any payments for Section I-Additional Property Coverages and Coverage D-Loss of Use.

IX. Phase In Of the Adopted Policy Forms, Dwelling Foundation Endorsement, Water Damage Endorsement, and Fungus (Including Mold) Limited Coverage Endorsement. Nationwide has informed the Department that the adopted policy forms will be phased in for use with Nationwide policyholders while the policy forms promulgated by TDI are discontinued for use with Nationwide policyholders. Nationwide has outlined the details of its plan to implement the adopted policy forms as follows:

New Business.

Nationwide will write all new business on the new policy forms as soon as the new policy forms are effective and upon implementation by Nationwide. The new policy forms limit coverage for dwelling foundation losses and water damage losses and exclude certain mold damage losses. At the time each new residential property policy is written, the applicant will be offered the Dwelling Foundation Endorsement, the Water Damage Endorsement, and the Fungus (Including Mold) Limited Coverage Endorsement subject to Nationwide's current underwriting guidelines. If a policyholder desires to continue the dwelling foundation coverage (subject to 15% of Coverage A-Dwelling) and the water damage coverage that the policyholder essentially has under the HO-B, the Dwelling Foundation Endorsement and Water Damage Endorsement must be purchased for an additional premium. These endorsements will be available for purchase at a later date subject to underwriting review. The Fungus (Including Mold) Limited Coverage Endorsement will be made available for an additional premium subject to underwriting review.

B. Existing Business.

Nationwide will begin converting renewal business to the new forms as soon as new policy forms are effective and are implemented.

1. Homeowners-Form B (HO-B), Homeowners-Form C (HO-C). The HO-B's and HO-C's that are in force at the time of the conversion will be non-renewed and offered the Nationwide policy with the Dwelling Foundation Endorsement and Water Damage Endorsement attached. The renewal policy packet will contain a cover sheet message informing the consumer of information in the packet regarding the various policy changes. The information will include an explanation of the Dwelling Foundation Endorsement and Water Damage Endorsement with an offer to exclude the endorsements for a decrease in premium. The information will further include an explanation of the Fungus (Including Mold) Limited Coverage Endorsement with an offer to purchase this endorsement for an additional premium subject to underwriting. The endorsements will also be available for purchase at a later date subject to underwriting review.

2. Homeowners-Form A (HO-A). The HO-A's that are in force at the time of the conversion will be non-renewed and offered the Nationwide homeowners policy without the Water Damage Endorsement and Dwelling Foundation Endorsement attached. The renewal policy packet will contain a cover sheet message informing the consumer of information in the packet regarding the various policy changes. The information will include an explanation of the Water Damage Coverage, Dwelling Foundation Coverage, and Mold Coverage endorsements with an offer to purchase the endorsements for an additional premium. The endorsements will also be available for purchase at a later date subject to underwriting review.

3. Homeowners Tenant-Form B (HO-BT) and Homeowners Condo-Form B (HO-CON-B). The HO-BT's and HO-CON-B's that are in force at the time of the conversion will be non-renewed and offered the corresponding Nationwide policy with the Water Damage Endorsement attached. The renewal policy packet will contain a cover sheet message informing the consumer of information in the packet regarding the various policy changes. The information will include an explanation of the Water Damage Endorsement with an offer to exclude the endorsement for a decrease in premium. The information will further include an explanation of the Fungus (Including Mold) Limited Coverage Endorsement with an offer to purchase this endorsement for an additional

premium subject to underwriting. The endorsements will also be available for purchase at a later date subject to underwriting review.

4. Consumer Disclosures. Nationwide agrees to provide an explanatory letter and a summary of coverages expressly noting where there is less coverage in the Nationwide policies than in the currently prescribed policies to the policyholders who are being converted from the currently prescribed Texas forms to the new Nationwide forms. This notice letter will be sent to the policyholders sixty (60) days in advance of the policy conversion date. This notice letter will be provided to the Department for its review prior to Nationwide's use of this letter.

C. Rating Information.

Nationwide agrees to file its initial rates and any rate changes for policies written through Nationwide Lloyds with the Department on an informational basis for a period of two years from implementation to allow the Department to monitor the rates on the new Nationwide policies. Nationwide also agrees to provide the Department with a copy of its loss cost analyses during the time period it is providing the rating information.

X. Other Insurers Who Elect to Use the Nationwide Residential Property Policy Forms and Endorsements. Article 5.35 was amended by the 75th Texas Legislature, in pertinent part, to allow the Commissioner to adopt policy forms and endorsements of national insurers. That bill, SB 1499, in addition to adding current subsection (b), amended subsection (a), which has historically been the source of the agency's authority to adopt standard, promulgated forms, to provide that such forms "may be used by an insurer without filing for approval to use such form." SB 1499 did not add similar language to subsection (b), pursuant to which the Nationwide filing was made. In addition, subsection (e) of Article 5.35 states that no form or endorsement can be delivered or issued for delivery in this state unless adopted or approved pursuant to subsections (a), (b), (c), or (d). Therefore, any insurer that wishes to use the policy and endorsements adopted in this order must make a filing for approval with the Department and agree to abide by the conditions and requirements imposed by this order including: (1) agree to provide rating information including detailed information regarding premium reduction for reduced coverage; (2) agree to offer the Water Damage Endorsement, the Dwelling Foundation Endorsement, and the Fungus (Including Mold) Limited Coverage Endorsement in accordance with the terms specified herein; (3) agree to provide the consumer disclosures as specified herein; (4) agree to provide at a minimum the coverage for water damage in the same manner as provided in the HO-B as specified in Section II.A.2. Paragraphs a. through e. of Commissioner's Order No. 01-1105, concerning Mold, Fungi, or Other Microbes.

XI. Severability. If any provision of this order or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this order that can be given effect without the invalid provision or application, and to this end the provisions of this order are declared to be severable.

The Commissioner has jurisdiction of this matter pursuant to the Insurance Code, Articles 5.35 and 5.96.

The policy forms and endorsements as adopted by the Commissioner of Insurance are on file with the Chief Clerk's Office of the Texas Department of Insurance under Reference No. P-0602-22 and are incorporated by reference by Commissioner Order No. 02-0975.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Government Code, Chapter 2001 (Administrative Procedure Act).

Consistent with the Insurance Code, Article 5.96 (h), the Department will notify all insurers affected by this section of the adoption by letter summarizing the Commissioner's action.

IT IS THEREFORE THE ORDER of the Commissioner of Insurance that three new residential property policy forms which include form no. HO-542 (homeowners policy), form no. HT-542 (tenants policy), and form no. HC-542 (condominium policy) and fourteen endorsements as specified herein and which are attached to this Order and incorporated into this Order by reference, are adopted.

TRD-200206091
Gene C. Jarmon
Acting General Counsel and Chief Clerk
Texas Department of Insurance
Filed: September 18, 2002

♦ ♦ ♦

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.

Adopted Rule Reviews

Texas Department of Mental Health and Mental Retardation

Title 25, Part 2

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts the review of Chapter 411, Subchapter D, concerning administrative hearings of the department in contested cases. The notice of intent to review was published in the April 19, 2002, issue of the *Texas Register* (27 TexReg 3373).

No comments were received regarding the review. TDMHMR reviewed the rules in Chapter 411, Subchapter D, and has determined that the reasons for originally adopting the rules continue to exist. The rules in Chapter 411, Subchapter D, are readopted in accordance with the General Appropriations Act, House Bill 1, 76th Legislature, Article IX, 9-10.13; the Texas Government Code, §2001.039, which requires the Texas Board of Mental Health and Mental Retardation to review and consider for readoption each of its rules every four years; and the Texas Health and Safety Code, §532.015(a), which provides the Texas Board of Mental Health and Mental Retardation with broad rulemaking authority for mental health and mental retardation services.

TRD-200206047
Andrew Hardin
Chairman, TDMHMR Board
Texas Department of Mental Health and Mental Retardation
Filed: September 17, 2002

♦ ♦ ♦

Railroad Commission of Texas

Title 16, Part 1

The Railroad Commission of Texas (Commission) files this notice of completion of the review and readoption, as amended, of §3.21, relating to fire prevention and swabbing.

The review and consideration were conducted in accordance with Texas Government Code, §2001.039. The notice of review was published in the April 5, 2002, issue of the *Texas Register* (27 TexReg 2846). The Commission received no comments regarding the proposed rule review, and one comment concerning proposed amendments to §3.21, which were published in the July 12, 2002, issue of the *Texas Register* (27 TexReg 6161). The comments are discussed in the adoption preamble for §3.21, filed concurrently with this proposal. After review, the Commission readopts this section, as amended.

The Commission has determined that the reason for adopting this rule, with the adopted amendments, continues to exist.

Issued in Austin, Texas, on September 12, 2002.

TRD-200205960
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Filed: September 12, 2002

♦ ♦ ♦

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: 4 TAC §20.22(a)

Pest Mgmt Zone	Planting Dates	Destruction Deadline
1	after February 1	September 1
2 - Area 1	No dates set	September 1
2 - Area 2 - [~~Jim Wells County south of State Highways 2295 and 141,~~] Kleberg, Nueces, and northern Kenedy County above an east-west line through Katherine and Armstrong	No dates set	September 1
2 - Area 2 - Jim Wells County [~~north of State Highways 2295 and 141~~]	No dates set	September **28** [~~14~~]
2 - Area 3 - Aransas, San Patricio County east of Highway 77, Live Oak County south and east of **U.S.** [~~State~~] Highway 59.	No dates set	September **28** [~~1~~]
2- Area 3 - San Patricio County west of Highway 77, Bee County south and east of **U.S.** [~~State~~] Highway 59	No dates set	September **28** [~~14~~]
2 - Area 4	No dates set	October 1
3 - Area 1	after February 1	October 1
3 - Area 2	after February 1	October 15
4	No dates set	October 10
5	No dates set	October 20
6	No dates set	October 31
7	after February 1	November 30
8 - Area 1	after February 1	October 31
8 - Area 2	after February 1	November 30
9	No dates set	No date set
10	No dates set	February 1

Figure 1: 10 TAC Chapter 49--Preamble

Weighting of Selection Criteria in the 2003 QAP					
		Maximum		Sample Scenario	
2003 QAP Citation 49.9(f)	Issue	Number of Points	Portion of Total	Number of Points	Portion of Total
(1)(A)-(D)	Development Location	5	3%	5	4%
(1)(E)	Development Location Ratio	8	4%	6*	5%
(2)	Housing Needs	20	10%	14*	12%
(3)(A)	Consolidated Plan Consistency	6	3%	6	5%
(3)(B)	Community Support Letters	6	3%	6	5%
(4)(A)	Square Footage Minimums	NA	NA	NA	NA
(4)(B)	Serving Families with Children	8	4%	8	7%
(4)(C)	Cost per Square Foot	1	1%	1	1%
(4)(D)	Unit Amenities	10	5%	10	8%
(4)(E)	Existing Residential Development	4	2%	0	0
(4)(F)	Operating Reserves	6	3%	6	5%
(4)(G)	Historic Property Designation	6	3%	0	0
(4)(H)	Small Development	5	3%	0	0
(4)(I)	HOPE VI, 202, 811	5	3%	0	0
(4)(J)	PHA Developments	5	3%	0	0
5(A) or (B)	HUB or Joint Venture	3	2%	3	3%
(6)(A)	Coordination with Texas Workforce	2	1%	2	2%
(6)(B)	Supportive Services	6	3%	6	5%
(7)	Transitional Housing	15	8%	0	0
(8)(A)	LI – Rents below Max TC Rents	12	6%	8**	7%
(8)(B)	LI – Units at 30, 40 & 50 of AMGI	37.5	19%	11.5**	10%
(9)	Affordability Period	14	7%	14	12%
(10)	Right of First Refusal	5	3%	5	4%
(11)	Pre-Application Points	7	4%	7	6%
(12)	Point Reductions	0	0%	0	0
	TOTAL	196.5	100%	118.5	100%

Figure 2: 10 TAC Chapter 49--Preamble

Selection Criteria Weighting in each Set-Aside by Points and Proportion Provided for the Highest Scoring Development in the Set-Aside and the Median Development in the Set-Aside																
		Rural Set-Aside				General Set-Aside				At-Risk Set-Aside				Nonprofit Set-Aside			
		High (#02046)		Median (#12153)		High (#02147)		Median (#02026)		High (#02056)		Median (#02165)		Median (#02099)		Median (#02068)	
2002 QAP Citation 49.7(f)	Issue	Pts. Awd.	% of Total	Pts. Awd.	% of Total	Pts. Awd.	% of Total	Pts. Awd.	% of Total	Pts. Awd.	% of Total	Pts. Awd.	% of Total	Pts. Awd.	% of Total	Pts. Awd.	% of Total
(1)(A/E)	Development Location	0	0%	5	5%	5	3%	5	4%	5	4%	5	4%	5	3%	5	4%
(1)(F)	Development Location Ratio	6	4%	0	0%	2	1%	2	2%	4	3%	4	3%	2	1%	4	3%
(2)	Housing Needs	17	11%	19	18%	17	10%	17	13%	18	13%	17	14%	17	12%	17	13%
(3)(A)	Consolidated Plan	6	4%	6	6%	6	4%	6	5%	6	4%	6	5%	6	4%	6	5%
(3)(B)	Community Support Letters	3	2%	2	2%	2	1%	0	0%	4	3%	2	2%	0	0%	3	2%
(3)(C)	Neighborhood Letters	1	1%	0	0%	0	0%	0	0%	2	1%	0	0%	2	1%	0	0%
(4)(A)	Square Footage Minimums	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
(4)(B)	Federally Assisted Building	5	3%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
(4)(C)	At-Risk Development	8	5%	0	0%	0	0%	0	0%	0	0%	8	7%	0	0%	0	0%
(4)(D)	Serving Families w/ Children	0	0%	0	0%	8	5%	0	0%	8	6%	8	7%	8	5%	8	6%
(4)(E)	Cost per Square Foot	1	1%	1	1%	1	1%	1	1%	1	1%	1	1%	1	1%	1	1%
(4)(F)	Unit Amenities	6	4%	8	8%	10	6%	10	8%	10	7%	10	8%	10	7%	10	8%
(4)(G)	Density	6	4%	6	6%	6	4%	6	5%	6	4%	6	5%	6	4%	0	0%
(4)(H)	Existing Development	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
(4)(I)	Mixed Income	0	0%	0	0%	8	5%	0	0%	0	0%	0	0%	4	3%	0	0%
(4)(J)	Historic Property	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
(4)(K)	Small Development	0	0%	5	5%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
(4)(L)	HOPE VI, 202, 811	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
(5)	HUB or Joint Venture	3	2%	3	3%	3	2%	0	0%	3	2%	3	3%	3	2%	3	2%
(6)	Supportive Services	7	4%	0	0%	7	4%	7	5%	5	4%	7	6%	7	5%	7	5%
(7)(A)	Elderly Developments	0	0%	8	8%	0	0%	8	6%	0	0%	0	0%	0	0%	0	0%
(7)(B)	Transitional Housing	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
(7)(C)	LI Units	54	34%	42	40%	58	35%	38	29%	34	24%	22	19%	42	29%	30	23%
(8)	Affordability Period	14	9%	0	0%	14	8%	14	11%	14	10%	14	12%	14	10%	14	11%
(9)	Right of First Refusal	5	3%	0	0%	5	3%	5	4%	5	4%	5	4%	5	3%	5	4%
(10)	Pre-Application Points	15	10%	0	0%	15	9%	15	11%	15	11%	0	0%	15	10%	15	12%
(11)	Point Reductions	0	0%	0	0%	0	0%	-2	2%	0	0%	0	0%	0	0%	0	0%
	TOTAL	157	100%	105	100%	167	100%	132	100%	140	100%	118	100%	147	100%	128	100%

Figure: 10 TAC §49.9(f)(8)(B)(iv)

% of AMGI	# of Rent Restricted Units (a)	Portion of Rent Restricted Units (a/b)		Weight A	OR	Weight B*	Points
50%	(a)	(c)	X	10		15	
40%	(a)	(c)	X	25		30	
30%	(a)	(c)	X	50		60	
TOTAL LI UNITS	(b)					TOTAL POINTS =	

Figure: 30 TAC §335.1(131)(D)(iv)

TABLE 1

	Use Constituting Disposal S.W. Def. (D)(i) (1)	Energy Recovery/Fuel S.W. Def. (D)(ii) (2)	Reclamation S.W. Def. (D)(iii) (3)[2]	Speculative Accumulation S.W. Def. (D)(iv) (4)
Spent materials (listed hazardous & not listed characteristically hazardous)	*	*	*	*
Spent materials (nonhazardous)[1]	*	*	*	*
Sludges (listed hazardous in 40 CFR §261.31 or §261.32)	*	*	*	*
Sludges (not listed characteristically hazardous)	*	*		*
Sludges (nonhazardous)[1]	*	*		*
By-products (listed hazardous in 40 CFR §261.31 or §261.32)	*	*	*	*
By-products (not listed characteristically hazardous)	*	*		*
By-products (nonhazardous)[1]	*	*		*
Commercial chemical products (listed, not listed characteristically hazardous, and nonhazardous)	*	*		
Scrap metal other than excluded scrap metal (see §335.17(9)) (hazardous)	*	*	*	*
Scrap metal other than excluded scrap metal (see §335.17(9)) (nonhazardous)[1]	*	*	*	*

NOTE: The terms "spent materials", "sludges", "by-products", "scrap metal" and "excluded scrap metal" are defined in §335.17 of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials).

[1]These materials are governed by the provisions of §335.24(h) only.

[2]Except as provided in 40 CFR §261.4(a)(17) for mineral processing secondary materials

Figure: 34 TAC Chapter 3--Preamble

Fiscal Year	Estimated Gain/(Loss) to the General Revenue Fund 0001
2003	$(815,000)
2004	(877,000)
2005	(933,000)
2006	(991,000)
2007	(1,051,000)

Figure: 34 TAC §3.161(b)(6)(E)

For Example:
Company X has a 60-day contract to rent 10-15 rooms each day. Under the terms of the contract Company X pays for the number of rooms occupied, but not less than 10 rooms per day.

Day	No. of Rooms Occupied	No. of Rooms Paid For	No. of Rooms Exempt
1-10	9	10	10*
11-25	12	12	10*
26-40	13	13	10*
41-55	13	13	12**
56-60	15	15	13***

* The minimum number of rooms in the range is exempt; the additional rooms above the minimum are not exempt because they have not been rented for 30 consecutive days.

** The two rooms above the minimum have been rented for 30 consecutive days and therefore are exempt beginning on the 31st consecutive day or day number 41.

*** The third room above the minimum has been rented for 30 consecutive days and therefore is exempt beginning on the 31st day or day number 56.

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 September 6, 2002, through September 12, 2002. Except as noted, the public comment period for these projects will close at 5:00 p.m. on October 18, 2002.

FEDERAL AGENCY ACTIONS:

Applicant: Port of Houston Authority.; Location: The project is located along the Bayport Ship Channel, approximately 30 miles southeast of downtown Houston in the City of Pasadena, between the cities of Shoreacres and Seabrook in Harris County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled League City, Texas and Bacliff, Texas. Approximate UTM Coordinates: Zone 15; Easting: 305000; Northing: 3277000. Project Description: The applicant proposes to develop a major marine terminal complex on approximately 1,043 acres along the south side of the Bayport Ship Channel. This development would include facilities for docking, loading and unloading container and cruise ships, container storage areas, an intermodal yard, warehousing facilities, and properties available for light-industrial development. The applicant has revised their project plans to reduce the number of proposed cruise berths from 5 to 3. This revision results in a reduction in the amount of area proposed to be dredged by 23.0 acres, a reduction in the amount of open water proposed to be filled by 21.3 acres, and a reduction in the amount of dredged material proposed to be placed off-site by 1,045,965 cubic yards. Under this revision, 18.3 acres of jurisdictional wetlands would be filled, 127.3 acres of open water would be dredged, and 3.1 acres of open water would be filled. In addition, the applicant has revised the proposed wetland mitigation plan to include the creation of 66.8 acres of emergent wetlands, enhancement of 12.0 acres of existing wetlands, preservation of 23.7 acres of forested/shrub habitat, and restoration of 71.0 acres of coastal prairie habitat. The entire mitigation site would ultimately be placed under a conservation easement. This mitigation would be preformed within a 173.5-acre tract of land located 2.4 miles southwest of the proposed project site and approximately .025-mile southeast of the intersection of Red Bluff Road and Bay Area Boulevard. CCC Project No.: 02-0226-F1; Type of Application: U.S.A.C.E. permit application #21520 (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). The Draft Environmental Impact Statement is available at http://www.swg.usace.army.mil/reg/pha. NOTE: The CMP consistency review for this project may be conducted by the Texas Commission on Environmental Control as part of its certification under §401 of the Clean Water Act.

Applicant: Exxon Land Development, Inc.; Location: The project is located on an approximately 182-acre tract of land south of Genoa-Red Bluff Road, between Beltway 8 and Red Bluff Road, south of the intersection of Jana Lane and Red Bluff Road in Harris County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled Pasadena, Texas. Approximate UTM Coordinates: Zone 15; Easting: 293000; Northing: 3279700. Project Description: The applicant has an existing Department of the Army Permit 21754 for which they are requesting an amendment to revise the mitigation plan. Due to the Supreme Court ruling (Solid Waste Agency of Northern Cook County vs U.S. Army Corps of Engineers, No. 99-1178, January 8, 2001) pertaining to the scope of regulatory jurisdiction under the Clean Water Act, the applicant requests that the Corps jurisdiction over the project be re-evaluated. The applicant proposes to mitigate for the fill of 1.23 acres of wetlands by preserving, enhancing, and restoring 30 acres of land on the Clear Point property that has been donated to Harris County and completing the creation of 23 acres of wet prairie habitat in detention basin B504-02-00. These elements of the approved mitigation plan are underway or have been completed. The last element of the mitigation was the restoration of 30 acres of prairie habitat in the Armand Bayou Nature Center. The applicant is requesting to be relieved of this element of the mitigation plan as a result of the change of jurisdiction. CCC Project No.: 02-0262-F1; Type of Application: U.S.A.C.E. permit application #21754(01) is being evaluated under §404 of the Clean Water Act (33 U.S.C.A. §125-1387).

Applicant: Larry's Harbor Investment Group; Location: The project is located at the old Scurlock boat basin southeast of the intersection of Scurlock Street and Stella Street in Port O'Connor, Calhoun County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled Port O'Connor, Texas. Approximate UTM Coordinates: Zone 14; Easting: 751000; Northing: 3147400. Project Description: The applicant proposes to install a 1,135.72-foot-long vinyl bulkhead along the shoreline of property facing the Gulf Intracoastal Waterway and the perimeter of an existing boat basin. Approximately 0.322 acre of shallow water habitat behind the bulkhead would be backfilled with 4,481 cubic yards of fill material to an elevation of approximately +4 feet mean sea level. A riprap wave break consisting of 4- to 9-inch-diameter rock would be installed adjacent to the bulkhead to prevent scouring of the adjacent water bottom and nearby seagrass beds. The boat basin and access channel would be mechanically dredged to a depth of -8 feet mean sea level, resulting in the removal of 8,319 cubic yards of material. The dredged material would be used to backfill behind the vinyl bulkhead. Any leftover material would be deposited on the applicant's property on the north side of Stella Street. An 8-foot-wide by 169.5-foot-long dock with seven 3- by 24-foot finger piers on each side would be constructed in the center of the harbor to provide covered boat slips. Seven additional finger piers along with mooring posts would be located along the east side of the harbor to provide 14 covered boat slips. An 8- by 80-foot walkway would extend from the bulkhead to the end of the covered area on this side. A 5- by 169.5-foot dock extending from a boat launch ramp would be constructed along the west side of the harbor. The purpose of the project is to reclaim property lost

to shoreline erosion and to construct a commercial boat docking facility for public use. Some fringe wetlands in the harbor basin consisting of smooth cordgrass would be filled. However, the applicant reports that no seagrass areas will be impacted by the project. CCC Project No.: 02-0281-F1; Type of Application: U.S.A.C.E. permit application #22739 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §125-1387).

FEDERAL AGENCY ACTIVITY:

Applicant: U.S. Army Corps of Engineers. Project Description: Submission of the Consistency Determination for improving the Corpus Christi Ship Channel and extending the La Quinta Ship Channel in Nueces and San Patricio counties, Texas. The applicant is also requesting incorporation, by reference, of the Draft Environmental Impact Statement (EIS) for this project entitled "Corpus Christi Ship Channel - Channel Improvements Project, Corpus Christi and Nueces Bays, Nueces and San Patricio counties, Texas" that was enclosed separately. The Consistency Determination may also be found in the Draft EIS as Section 6.0. Based on analysis and comments received during public coordination and resource agency review, through the interagency coordination team assembled for this project, of earlier versions of the Draft EIS and pursuant to 31 TAC §506.28(b), the applicant asserts that no changes to the Consistency Determination are needed. Upon fulfillment of 31 TAC §506.28(b), the Council intends to issue a consistency agreement for this project. CCC Project No.: 02-0180-F6; Type of Application: Submission of Consistency Determination and request to incorporate, by reference, the Draft Environmental Impact Statement (DEIS) for the project entitled "Corpus Christi Ship Channel - Channel Improvements Project, Corpus Christi and Nueces Bays, Nueces and San Patricio counties, Texas." The DEIS is available at http://www.swg.usace.army.mil/pe/Corpus. NOTE: The public comment period for this project will close at 5:00 p.m. on September 26, 2002.

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-200206082
Larry R. Soward
Chief Clerk, General Land Office
Coastal Coordination Council
Filed: September 18, 2002

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Comptroller of Public Accounts

Local Sales Tax Rate Changes Effective October 1, 2002

LOCAL SALES TAX RATE CHANGES EFFECTIVE OCTOBER 1, 2002

The 1% local sales and use tax will become effective October 1, 2002 in the cities listed below.

CITY NAME	LOCAL CODE	NEW RATE	TOTAL RATE
Cresson (Hood Co)	2111042	.010000	.077500
Cresson (Johnson Co)	2111042	.010000	.072500
Cresson (Parker Co)	2111042	.010000	.077500
Jarrell(Williamson Co)	2246139	.010000	.072500
Leary (Bowie Co)	2019090	.010000	.077500
Valentine (Jeff Davis Co)	2122012	.010000	.082500

An additional 1/4% city sales and use tax for Municipal Street Maintenance and Repair as permitted under Chapter 327 of the Texas Tax Code will become effective October 1, 2002, in the cities listed below.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
Bloomburg (Cass Co)	2034073	.012500	.075000
Castle Hills (Bexar Co)	2015049	.012500	.080000
Celeste (Hunt Co)	2116047	.012500	.080000
Grey Forest (Bexar Co)	2015110	.012500	.080000
Groesbeck (Limestone Co)	2147022	.017500	.080000
Kerens (Navarro Co)	2175027	.012500	.080000
Kirbyville (Jasper Co)	2121013	.012500	.075000
Liberty Hill (Williamson Co)	2246111	.012500	.075000
Lone Oak (Hunt Co)	2116083	.012500	.080000
Normangee (Leon Co)	2145024	.012500	.080000
Normangee (Madison Co)	2145024	.012500	.080000
Olmos Park (Bexar Co)	2015067	.012500	.080000
Ore City (Upshur Co)	2230020	.012500	.080000
Tatum (Panola Co)	2201034	.017500	.080000
Tatum (Rusk Co)	2201034	.017500	.080000
West Orange (Orange Co)	2181038	.012500	.080000

An additional 1/2% city sales and use tax for improving and promoting economic and industrial development as permitted under Article 5190.6, Section **4A** will become effective October 1, 2002 in the cities listed below.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
Justin (Denton Co)	2061060	.015000	.077500
Sinton (San Patricio Co)	2205049	.020000	.082500

An additional 1/2% city sales and use tax for improving and promoting economic and industrial development as permitted under Article 5190.6, Section **4B** will become effective October 1, 2002 in the cities listed below.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
Argyle (Denton Co)	2061104	.015000	.077500
Chico (Wise Co)	2249065	.015000	.082500
Morgans Point (Harris Co)	2101231	.015000	.077500
Morton (Cochran Co)	2040020	.015000	.077500
Orange (Orange Co)	2181029	.015000	.082500
Point (Rains Co)	2190028	.015000	.082500
Whiteface (Cochran Co)	2040011	.015000	.077500

An additional 1/2% sales and use tax for property tax relief will become effective October 1, 2002 in the city listed below.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
Waller (Harris Co)	2237032	.020000	.082500
Waller (Waller Co)	2237032	.020000	.082500

An additional 1/2% sales and use tax for Sports and Community Venue will become effective October 1, 2002 in the city listed below.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
Universal City (Bexar Co)	2015129	.020000	.082500

The additional 1/2% sales and use tax for property tax relief was reduced to 3/8% and an additional 1/8% sales and use tax for improving and promoting economic and industrial development as permitted under Article 5190.6, Section **4A** will become effective October 1, 2002 in the city listed below. There will be no change in the local rate or total rate.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
Greenville (Hunt Co)	2116029	.015000	.082500

The additional 1/2% sales and use tax for property tax relief was reduced to 1/4% and an additional 1/4% sales and use tax for improving and promoting economic and industrial development as permitted under Article 5190.6, Section **4B** will become effective October 1, 2002 in the city listed below. There will be no change in the local rate or total rate.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
Cleveland (Liberty Co)	2146014	.015000	.082500

The additional 1/2% sales and use tax for improving and promoting economic and industrial development as permitted under Article 5190.6, Section **4B** was reduced to 1/4% and an additional 1/4% sales and use tax for Municipal Street Maintenance and Repair as permitted under Chapter 327 of the Texas Tax Code will become effective October 1, 2002 in the city listed below. There will be no change in the local rate or total rate.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
Hollywood Park (Bexar Co)	2015138	.015000	.082500

An additional 1/2% city sales and use tax for improving and promoting economic and industrial development that includes an additional 1/4% as permitted under Article 5190.6, Section **4A** plus an additional 1/4% sales and use tax for Municipal Street Maintenance and Repair as permitted under Chapter 327 of the Texas Tax Code will become effective October 1, 2002 in the city listed below.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
Anna (Collin Co)	2043134	.020000	.082500
Crystal City (Zavala Co)	2254012	.020000	.082500

An additional 1/2% city sales and use tax for improving and promoting economic and industrial development that includes an additional 1/4% as permitted under Article 5190.6, Section **4B** plus an additional 1/4% sales and use tax for Municipal Street Maintenance and Repair as permitted under Chapter 327 of the Texas Tax Code will become effective October 1, 2002 in the cities listed below.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
Fort Stockton (Pecos Co)	2186015	.020000	.082500

An additional 3/4% city sales and use tax for improving and promoting economic and industrial development that includes an additional 1/2% as permitted under Article 5190.6, Section **4B** plus an additional 1/4% sales and use tax for Municipal Street Maintenance and Repair as permitted under Chapter 327 of the Texas Tax Code will become effective October 1, 2002 in the cities listed below.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
Marfa (Presidio Co)	2189012	.017500	.080000
Oak Leaf (Ellis Co)	2070158	.017500	.080000

An additional 3/4% city sales and use tax that includes an additional 1/4% sales and use tax as permitted under Article 5190.6, Section **4B,** an additional 1/4% sales and use tax for property tax relief and an additional 1/4% sales and use tax for Municipal Street Maintenance and Repair as permitted under Chapter 327 of the Texas Tax Code will become effective October 1, 2002 in the city listed below.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
Fritch (Hutchinson Co)	2117028	.017500	.082500
Fritch (Moore Co)	2117028	.017500	.082500

An additional 1% city sales and use tax that includes an additional 1/2% sales and use tax as permitted under Article 5190.6, Section **4B,** an additional 1/4% sales and use tax for property tax relief and an additional 1/4% sales and use tax for Municipal Street Maintenance and Repair as permitted under Chapter 327 of the Texas Tax Code will become effective October 1, 2002 in the city listed below.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
Bovina (Parmer Co)	2185025	.020000	.082500

The 1/2% special purpose district sales and use tax was abolished effective October 1, 2002 in the Special Purpose Districts listed below.

SPD NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
De Leon Hospital District	5047504	.000000	.062500
Denton Co. Development Dist No. 5	5061532	.000000	.062500
Denton Co. Development Dist No. 7	5061541	.000000	.062500
Parker Co. Development Dist No. 1	5184507	.000000	.062500

A 1/4% Special Purpose District sales and use tax will become effective October 1, 2002 in the Special Purpose Districts listed below.

SPD NAME	LOCAL CODE	NEW RATE	TOTAL RATE
Everman Crime Control District	5220692	.002500	SEE NOTE 1
Fritch Crime Control District	5117509	.002500	SEE NOTE 2

A 1% Combined Area sales and use tax became effective July 1, 2002 in the combined area listed below.

COMBINED AREA NAME	LOCAL CODE	NEW RATE	TOTAL RATE
Fort Worth/ Wise County	6249608	.010000	SEE NOTE 3

A 1 3/8% Combined Area sales and use tax became effective July 1, 2002 in the combined area listed below.

COMBINED AREA NAME	LOCAL CODE	NEW RATE	TOTAL RATE
Corpus Christi/ Kleberg County	6137603	.013750	SEE NOTE 4

A 1% Combined Area sales and use tax will become effective October 1, 2002 in the combined area listed below.

COMBINED AREA NAME	LOCAL CODE	NEW RATE	TOTAL RATE
Austin/ Dripping Springs Library District/ Hays County	6105601	.010000	SEE NOTE 5

NOTE 1: The boundaries of the Everman Crime Control and Prevention District are the same boundaries as the City of Everman. The City of Everman currently imposes a 1 ½% city sales tax. The total rate in the City of Everman will be .080000.

NOTE 2: The boundaries of the Fritch Crime Control and Prevention District are the same boundaries as the City of Fritch. The City of Fritch currently imposes a 1 ¾% city sales tax. The total rate in the City of Fritch will be .082500.

NOTE 3: The Fort Worth/Wise County combined area is the northwestern portion of the City of Fort Worth located in Wise County. The total rate in the combine area is .082500. Contact the city representative at 817/871-8004 for additional information.

NOTE 4: The Corpus Christi/Kleberg County combined area is the southern portion of the City of Corpus Christi located in Kleberg County. The total rate in the combine area is .082500. Contact the city representative at 361/880-3600 for additional information.

NOTE 5: The Austin/Dripping Springs Library District/Hays County combined area is the southern portion of the City of Austin located in Hays County. The total rate in the combine area will be .082500. Contact the city representative at 512/974-2022 for additional boundary information.

TRD-200206062
Martin Cherry
Deputy General Counsel for Taxation
Comptroller of Public Accounts
Filed: September 17, 2002

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in 303.003, 303.009, and 304.003, Tex. Fin. Code.

The weekly ceiling as prescribed by Sec. 303.003 and Sec. 303.009 for the period of 09/23/02 - 09/29/02 is 18% for Consumer [1]/Agricultural/Commercial [2]/credit thru $250,000.

The weekly ceiling as prescribed by Sec. 303.003 and Sec. 303.009 for the period of 09/23/02 - 09/29/02 is 18% for Commercial over $250,000.

The judgment ceiling as prescribed by Sec. 304.003 for the period of 10/01/02 - 10/31/02 is 10% for Consumer/Agricultural/Commercial/credit thru $250,000.

The judgment ceiling as prescribed by Sec. 304.003 for the period of 10/01/02 - 10/31/02 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.

TRD-200206040
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: September 17, 2002

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Credit Union Department

Application(s) to Amend Articles of Incorporation

Notice is given that the following application has been filed with the Credit Union Department and is under consideration:

An application for a name change was received for Austin Metropolitan Financial Credit Union, Austin, Texas. The proposed new name is Velocity Credit Union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200206096
Harold E. Feeney
Commissioner
Credit Union Department
Filed: September 18, 2002

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Application(s) to Expand Field of Membership

Notice is given that the following applications have been filed with the Credit Union Department and are under consideration:

An application was received from Port of Houston Credit Union, Houston, Texas to expand its field of membership. The proposal would permit employees of Greater Houston Port Bureau and Marine Exchange of the West Gulf and their families, to be eligible for membership in the credit union.

An application was received from Texans Credit Union, Richardson, Texas to expand its field of membership. The proposal would permit the employees and members of the Dallas Association of Young Lawyers (DAYL) to be eligible for membership in the credit union.

An application was received from Travis County Credit Union, Austin, Texas to expand its field of membership. The proposal would permit persons who live and/or work in and business entities in Travis County, Texas, to be eligible for membership in the credit union.

An application was received from U. S. Employees Credit Union, The Woodlands, Texas, to expand its field of membership. The proposal would permit employees of Westin Galleria and Westin Oaks Hotel, Houston, Texas, to be eligible for membership in the credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Credit unions that wish to comment on any application must also complete a Notice of Protest form. The form may be obtained by contacting the Department at (512) 837-9236 or downloading the form at http://www.tcud.state.tx.us/applications.html. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200206095
Harold E. Feeney
Commissioner
Credit Union Department
Filed: September 18, 2002

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Notice of Final Action Taken

In accordance with the provisions of 7 TAC Section 91.103, the Credit Union Department provides notice of the final action taken on the following application(s):

Application(s) to Expand Field of Membership - Approved

Texas Bay Area Credit Union, Pasadena, Texas -See *Texas Register* issue dated September 27, 2002.

Keystone Credit Union, Tyler, Texas -See *Texas Register* issue dated September 27, 2002.

GPS Community Credit Union, Galena Park, Texas - See *Texas Register* issue dated July 26, 2002.

Employees Credit Union, Dallas, Texas - See *Texas Register* issue dated July 26, 2002.

Government Employees Credit Union of El Paso, El Paso, Texas - See *Texas Register* issue dated July 26, 2002.

Medical Community, Odessa, Texas - See *Texas Register* issue dated June 28, 2002.

MemberSource Credit Union (2 applications), Houston, Texas - See *Texas Register* issue dated July 26, 2002.

Midwestern State University Credit Union, Wichita Falls - See *Texas Register* issue dated July 26, 2002.

NCE Credit Union (2 applications), Corpus Christi- See *Texas Register* issue dated July 26, 2002.

Neighborhood Credit Union, Dallas, Texas- See *Texas Register* issue dated July 26, 2002.

Premier Credit Union, Chatsworth, California - See *Texas Register* issue dated July 26, 2002.

Star One Credit Union, Sunnyvale, California - See *Texas Register* issue dated July 26, 2002.

Application(s) to Amend Articles of Incorporation - Approved

Tarrant County Employees, Fort Worth, Texas - See *Texas Register* issue dated June 28, 2002.

TRD-200206097
Harold E. Feeney
Commissioner
Credit Union Department
Filed: September 18, 2002

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Texas Deepwater Port Authority

Obsolete Rules

The Office of the Secretary of State intends to remove the following obsolete rules from the *Texas Administrative Code* in 30 days.

Title 31. Natural Resources and Conservation

Part 12. Texas Deepwater Port Authority

Chapter 381. Introductory Provisions

Chapter 383. General Rules

Chapter 385. Board Meetings

Chapter 387. Rulemaking Hearings

Chapter 389. Nonrulemaking Hearings

Chapter 391. Conduct of Hearings

Chapter 393. Procedure for Construction and Operation Contracting

Authorized by the Water Code, Chapter 19, the Texas Deepwater Port Authority was reported to be dissolved March 31, 1981. The text of the obsolete rules will be available in the Texas Administrative Code until October 28, 2002. After that date the text will continue to be available in the *Texas Register* office, 1019 Brazos, Room 245, Austin, Texas.

Written comments regarding the removal of the rules may be addressed to Office of the Secretary of State, Texas Register Section, P.O. Box 13824, Austin, Texas 78711-3824 or e-mail: subadmin@sos.state.tx.us.

TRD-200206061
David Roberts
General Counsel, Office of the Secretary of State
Texas Deepwater Port Authority
Filed: September 17, 2002

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Texas Commission on Environmental Quality

Notice of A Public Meeting and A Proposed General Permit Authorizing the Discharge of Storm Water and Certain Non-Storm Water Discharges from Construction Sites

The Texas Commission on Environmental Quality (TCEQ or commission) proposes to issue a general permit (Proposed General Permit Number TXR150000) covering eligible storm water and certain types of non-storm water discharges to surface water in the state in accordance with Texas Water Code (TWC), §26.040. The proposed general permit covers the entire State of Texas. Discharges to surface water in the state are conditionally authorized by the proposed general permit under TWC, §26.040. Where permit requirements and storm water pollution prevention plans are properly implemented, no significant degradation is anticipated.

DRAFT GENERAL PERMIT. The executive director (ED) has prepared a draft general permit that provides requirements for operators of small and large construction sites for the development, implementation, and maintenance of a storm water pollution prevention plan. Discharges by construction sites of storm water, and certain types of non-storm water, are eligible for authorization under the proposed general permit only if the construction project disturbs one or more acres of land, or is part of a greater plan of development or sale if the larger common plan will ultimately disturb one or more acres of land. Non-storm water discharges that are not specifically listed in the general permit are not authorized by the general permit.

The ED has reviewed this action for consistency with the goals and policies of the Texas Coastal Management Program (CMP) according to Coastal Coordination Council regulations, and has determined that the action is consistent with applicable CMP goals and policies.

A copy of the draft general permit and fact sheet are available for viewing and copying at the TCEQ Office of the Chief Clerk located at the TCEQ's Austin office, at 12100 Park 35 Circle, Building F. These documents are also available at the commission's 16 regional offices, and are available at: *http://www.tnrcc.state.tx.us/permitting/waterperm/wwperm/construct.html*.

PUBLIC COMMENTS/PUBLIC MEETING. You may submit public comments about this general permit in writing or orally at a public meeting held by the TCEQ. The purpose of a public meeting is to provide an opportunity to submit comments and to ask questions about the general permit. A public meeting is not a contested case hearing. The public comment period will end November 15, 2002. The commission will hold a public meeting on this general permit in Austin on November 7, 2002 at 7:00 p.m. at the TCEQ central office, Building F, 2nd Floor, Room 2210, located at 12100 Park 35 Circle.

Written comments must be submitted to the Texas Commission on Environmental Quality, Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087 by 5:00 p.m. on November 15, 2002.

APPROVAL PROCESS. After the comment period closes, the ED will consider all the public comments and prepare a response. The response to comments will be mailed to everyone who submitted a public comment or who requested to be on a mailing list for this general permit. The general permit will then be set for the commissioners' consideration at a scheduled commission meeting.

MAILING LISTS. In addition to submitting public comments, you may ask to be placed on a mailing list to receive future public notices mailed by the Office of the Chief Clerk. You may request to be added to: 1) the mailing list for this specific general permit; 2) the permanent mailing list for a specific applicant name and permit number; and/or 3) the permanent mailing list for a specific county. Clearly specify which mailing lists you wish to be added to and send your request to the TCEQ Office of the Chief Clerk at the address previously listed. Unless you specify otherwise, you will be included only on the mailing list for this specific general permit.

INFORMATION. For additional information about this permit application or the permitting process, please call the TCEQ Office of Public Assistance, at (800) 687-4040. General information can be found at the TCEQ website at *www.tceq.state.tx.us*. Further information may also be obtained by calling the TCEQ Storm Water Hotline at (512) 239-3700.

TRD-200206080
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: September 18, 2002

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Notice of Comment and Meeting Period on Draft Texas Emission Reduction Plan Report to the 78th Legislature

The Texas Commission on Environmental Quality (TCEQ) is providing an opportunity for public comment and meeting on the draft of the Texas Emission Reduction Plan (TERP) report to the 78th Legislature, 2002. The draft report contains a review of the TERP program and accomplishments, as required under Texas Health and Safety Code, §386.057.

Two public meetings are scheduled for the purpose of allowing any person who may wish to make formal comment on the draft TERP report to do so. A meeting will be held in Arlington on October 2, 2002 at 10:00 a.m. in the Transportation Board Room of North Central Texas Council of Governments, located at 616 Six Flags Drive, 3rd floor. A meeting will be held in Houston on October 3, 2002, at 10:00 a.m. in the City of Houston Bureau of Air Quality Control Auditorium, located at 7411 Park Place. Each meeting is structured for the receipt of oral or written comments by interested persons. A TCEQ staff member will provide a brief overview of the report, after which individuals may present statements when called upon. Open discussion within the audience will not occur during the public comment period; however, after public comments have been received and as time allows, TCEQ staff will be available to answer questions.

Copies of the draft TERP report may be obtained from the TCEQ website at *http://www.tceq.state.tx.us/oprd/sips/terp.html*. Copies may also be obtained by contacting Mr. Roger Jay at (512) 239-2272. Comments may be mailed to Mr. Jay at, Texas Commission on Environmental Quality, Strategic Assessment Division, MC 206, P.O. Box 13087, Austin, Texas 78711- 3087, faxed to (512) 239-4410; or emailed to *rjay@tceq.state.tx.us*. All comments should reference the draft TERP report. Comments must be received by 5:00 p.m., October 9, 2002.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the meetings should contact TCEQ at (512) 239-2272. Requests should be made as far in advance as possible.

TRD-200206049
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: September 17, 2002

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (commission) staff is providing an opportunity for written public comment on the listed Default Order (DO). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director (ED) of the commission in accordance with Texas Water Code (TWC), §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **October 27, 2002**. The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate a proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of the proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on October 27, 2002**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DO and/or the comment procedure at the listed phone numbers; however, comments on the DO should be submitted to the commission in **writing**.

(1) COMPANY: Clifford Glen Key; DOCKET NUMBER: 2000-1417-MSW-E; TCEQ ID NUMBER: 455100030; LOCATION: Harrison Street, 0.2 miles from the intersection of Loop 505 North and Lees Mill Road, Newton, Newton County, Texas; TYPE OF FACILITY: municipal solid waste; RULES VIOLATED: 30 TAC §111.201 and §330.5(d), and Texas Health and Safety Code (THSC), §382.085(b), by failing to obtain a permit or other written permission from the executive director prior to conducting outdoor burning; 30 TAC §330.5(a) and (c), by permitting the collection, storage, transportation, processing, or disposal of municipal solid waste without written authorization from the commission; PENALTY: $7,500; STAFF ATTORNEY: Shannon Strong, Litigation Division, MC 175, (512) 239-6201; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

TRD-200206042
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: September 17, 2002

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Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **October 27, 2002**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on October 27, 2002**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO should be submitted to the commission in **writing**.

(1) COMPANY: Abilene Food Mart, Inc.; DOCKET NUMBER: 2000-1051-PST-E; TCEQ ID NUMBER: 0035043; LOCATION: 784 Grape Street, Abilene, Taylor County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.48(c), by failing to conduct inventory control for all underground storage tanks (USTs) involved in the retail sales of petroleum substances used as a motor fuel; 30 TAC §334.49(a), and TWC, §26.3475, by failing to have corrosion protection for the UST system; 30 TAC §334.50(b)(1)(a), and TWC, §26.3475, by failing to monitor for releases at a frequency of at least once every month; 30 TAC §334.7(d)(3), by failing to amend, update, or change registration information; 30 TAC §334.93, by failing to demonstrate, at the time of inspection, the necessary financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of the USTs; PENALTY: $2,850; STAFF ATTORNEY: Troy Nelson, Litigation Division, MC R-5, (903) 525-0380; REGIONAL OFFICE: Abilene Regional Office, 1977 Industrial Boulevard., Abilene, Texas 79602-7833, (915) 698-9674.

(2)COMPANY: Fort Worth Boat Club; DOCKET NUMBER: 2000-1166-MWD-E; TCEQ ID NUMBER: 11123-001; LOCATION: 2 miles west of Farm-to-Market Road (FM) 1220 on Boat Club Road and on the east side of Eagle Mountain Reservoir, Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: wastewater treatment; RULES VIOLATED: 30 TAC §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number 11123-001, Effluent Limitations and Monitoring Requirements, Provision Number 2, and TWC, §26.121, by failing to comply with the total chlorine residual maximum concentration limit of 4.0 milligram per liter; 30 TAC §305.125(1), TPDES Permit Number 11123-001, Effluent Limitations and Monitoring Requirements, Provision Number 2, and TWC, §26.121, by failing to comply with the total chlorine residual maximum concentration limit of 1.0 milligram per liter; PENALTY: $ 3,000; STAFF ATTORNEY: Elisa Roberts, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2301 Gravel Drive, Forth Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: Joe Murillo dba Laguna Marble; DOCKET NUMBER: 2001-1561-AIR-E; TCEQ ID NUMBER: TA-4105-W; LOCATION: 2069 FM 1187, Suite M, Mansfield, Tarrant County, Texas; TYPE OF FACILITY: marble bath products manufacturing; RULES VIOLATED: 30 TAC §106.392(1)(A) and §116.110(a) and Texas Health and Safety Code (THSC), §382.085(b), by failing to meet the requirements of a permit by rule or by obtaining a permit; PENALTY: $4,000; STAFF ATTORNEY: Ed Wesley, Litigation Division, MC 175, (512) 239-0276; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2301 Gravel Drive, Forth Worth, Texas 76118-6951, (817) 588- 5800.

(4) COMPANY: Logan Boggs dba Sugar Pines Mobile Home Park; DOCKET NUMBER: 2001- 0076-PWS-E; TCEQ ID NUMBER: 1810103; LOCATION: near Vidor, Orange County, Texas; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.46(n)(2), by failing to provide an accurate, up-to-date map of the distribution system so that valves and mains may be easily located during emergencies; 30 TAC §290.43(c)(1), by failing to provide a properly installed vent on the 0.003 million gallon (MG) ground storage tank; 30 TAC §290.43(c)(2), by failing to provide a lock on the roof hatch of the 0.0150 MG ground storage tank; 30 TAC §290.43(c)(3), by failing to provide a properly designed overflow pipe on the 0.003 MG ground storage tank and failing to provide a proper flap valve on the overflow pipe of the 0.150 MG ground storage tank; 30 TAC §290.43(c)(4), by failing to provide a properly installed water level indicator on the 0.003 MG ground storage tank; 30 TAC §290.46(f), by failing to maintain annual inspection reports for the 0.003 MG ground storage tank; 30 TAC §290.43(c), by failing to provide an inspection ladder on the 0.003 MG ground storage tank; 30 TAC §290.46(d)(2), by failing to maintain a free chlorine residual of 0.2 milligram per liter in the distribution system; 30 TAC §290.45(b)(1)(C)(iii), by failing to provide two or more service pumps having a total capacity of 2.0 gallons per minute per connection; 30 TAC §290.46(v), by failing to install all water system electrical wiring in a securely mounted conduit; 30 TAC §290.41(c)(1)(F), by failing to secure sanitary control easements covering that portion of the land within 150 feet of the well location from all owners of such properties and to record the easements at the county courthouse to ensure that the well is protected from pollution hazards; 30 TAC §290.39(j), by failing to provide plans and specifications for the major improvements to the water system; PENALTY: $3,000; STAFF ATTORNEY: Troy Nelson, Litigation Division, MC R-5, (903) 525-0380; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Fwy., Beaumont, Texas 77703-1892, (409) 898-3838.

(5) COMPANY: Quadvest, Inc. dba Campwood Subdivision, Colony Mobile Home Subdivision, Telge Terrance, Sendera Ranch, Stonecrest Ranch, Westwood Subdivision, Indigo Lakes Subdivision, Windcrest Subdivision, Timberdale Mobile Home Subdivision, and Red Oak Ranch Subdivision; DOCKET NUMBER: 1999-0905-PWS-E; TCEQ ID NUMBERS: 1011805, 1011806, 1011810, 1700576, 1700577, 1700609, 1700611, 1700624, 1700404, 2370042; LOCATION: Harris, Montgomery, and Waller Counties, Texas; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.41(c)(3)(A) and §290.39(j), by failing to submit well completion data and by failing to notify the executive director prior to making significant changes or additions to the system's production, treatment, storage, or distribution facilities; 30 TAC §290.41(c)(1)(F), by failing to secure a sanitary easement for the well site; 30 TAC §290.41(c)(3)(K), by failing to provide a casing vent on the well; 30 TAC §290.41(c)(3)(M), by failing to provide a sampling tap on the well discharge line; 30 TAC §290.41(c)(3)(N), by failing to provide a flow meter on the well; 30 TAC §290.41(c)(3)(O), by failing to provide a properly constructed intruder-resistant fence; 30 TAC §290.42(e)(6), by failing to provide high level and floor level screened vents in the chlorinator room; 30 TAC §290.42(e)(7), by failing to properly house the hypochlorination solution containers; 30 TAC §290.43(c)(2), by failing to provide a properly designed roof hatch on the ground storage tank; 30 TAC §290.43(d)(3), by failing to provide the pressure tanks with facilities for maintaining the air-water volume at the design water level and working pressure; 30 TAC §290.44(h), by failing to have a check valve or back flow prevention device on the well; 30 TAC §290.45(b)(1)(A) and §291.93, and THSC, §341.0315(c), by failing to provide a well capacity of 1.5 gallons per minute per connection; 30 TAC §290.46(f), by failing to compile monthly operations reports and have them available for review by the inspector; 30 TAC §290.46(d)(2)(A), by failing to maintain free chlorine residual of 0.2 milligrams per liter; 30 TAC §290.41(c)(3)(K), by failing to initiate a maintenance program;

30 TAC §290.46(m)(4), by failing to keep distribution lines and equipment in a watertight condition; 30 TAC §290.46(t), by failing to post legible signs at each of the system's production, treatment, and storage facilities; 30 TAC §290.46(v), by failing to install electrical wiring in conduit; 30 TAC §290.118 and THSC, §341.031(a) and §341.0315(c), by failing to provide water which meets the secondary constituent levels for Iron and pH; 30 TAC §290.109(c)(2), by failing to submit water samples for bacteriological analysis; 30 TAC §290.117(c), by failing to collect and submit water samples for lead/copper analysis; PENALTY: $25,848; STAFF ATTORNEY: Lisa Lemanczyk, Litigation Division, MC 175, (512) 239- 5915; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue., Suite H, Houston, Texas 77023-1486, (713) 767-3500.

TRD-200206041
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: September 17, 2002

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Notice of Public Hearing

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive comments regarding revisions to 30 TAC Chapter 116 and to the SIP under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations, §51.102, of the United States Environmental Protection Agency regulations concerning SIPs. The commission proposes an amendment to §116.112, Distance Limitations. The amendment to Chapter 116 is proposed as a revision to the SIP.

The proposed amendment to §116.112 establishes a new distance requirement for concrete crushing facilities in accordance with House Bill (HB) 2912, §5.07. All equipment and stockpiles associated with a concrete crushing facility would have to be located at least 440 yards from any building used as a single or multi-family residence, school, or place of worship. This restriction would not apply to existing concrete crushing facilities, which are those facilities that were authorized and actually located or operating at the site as of September 1, 2001 (the effective date of the bill).

A public hearing on this proposal will be held in Austin on October 21, 2002 at 2:00 p.m. at the commission central office, Building F, Room 2210, located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

Comments may be submitted to Angela Slupe, MC 205, Texas Commission on Environmental Quality, Office of Environmental Policy, Analysis, and Assessment, P.O. Box 13087, Austin, Texas 78711-3087, or by fax to (512) 239-4808. All comments should reference Rule Log Number 2001-077-116-AI. Comments must be received by 5:00 p.m., October 28, 2002. Copies of the proposed rules can be obtained from the commission's website at *http://www.tceq.state.tx.us/oprd*. For further information, please contact Clifton Wise, Policy and Regulations Division, (512) 239-2263.

TRD-200205980
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: September 13, 2002

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Notice of Public Hearings on Proposed Revisions to 30 TAC Chapter 114

The Texas Commission on Environmental Quality (commission) will conduct public hearings to receive testimony concerning amendments to 30 TAC Chapter 114, Subchapter C, Division 1, concerning Control of Air Pollution from Motor Vehicles, and a revision to the state implementation plan (SIP) under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Subchapter B, Chapter 2001; and 40 Code of Federal Regulations, §51.102, of the United States Environmental Protection Agency regulations concerning SIPs. The amendments to Chapter 114 will be submitted as revisions to the SIP.

These proposed amendments to Chapter 114 and corresponding revisions to the Texas Inspection and Maintenance (I/M) SIP would revise the El Paso I/M program to convert on-board diagnostic testing from a requirement beginning January 1, 2003 to a contingency measure of the El Paso ozone SIP in support of the maintenance of the ozone national ambient air quality standard.

Public hearings on this proposal will be held on October 16, 2002, at 2:00 p.m. and 7:00 p.m., at the commission's regional office at 401 East Franklin Avenue, 5th floor conference room, Suite 570, El Paso. The hearings are structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not occur during the hearings; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearings, and answer questions before and after the hearings.

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.

Comments may be submitted to Joyce Spencer, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087; or by fax at (512) 239-4808. All comments must be received by 5:00 p.m. on October 16, 2002, although written comments will be accepted at the 7:00 p.m. hearing. All comments should reference Rule Log No. 2002-068-114-AI. For further information, please contact Alan J. Henderson at (512) 239-1510. Copies of the proposed rule can be obtained from the commission's website at *www.tceq.state.tx.us/oprd/rules/propadop.html* and SIP revisions can be obtained from the commission's website at *www.tceq.state.tx.us/oprd/sips/cover.html*, or by calling Ms. Spencer at (512) 239-5017.

TRD-200205991
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: September 13, 2002

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Notice of Three Public Meetings and A Proposed General Permit Authorizing the Discharge of Storm Water and Certain

Non-Storm Water Discharges from Small Municipal Separate Storm Sewer Systems

In accordance with Texas Water Code (TWC), §26.040, the Texas Commission on Environmental Quality (TCEQ or commission) proposes to issue a general permit (Proposed General Permit Number TXR040000) covering eligible storm water and certain types of non-storm water discharges to surface water in the state. The proposed general permit covers the entire State of Texas. Discharges to surface water in the state are conditionally authorized by the proposed general permit in TWC, §26.040. Where permit requirements and storm water management plans are properly implemented, no significant degradation is anticipated.

DRAFT GENERAL PERMIT. The executive director (ED) has prepared a draft general permit that provides requirements for regulated small municipal separate storm sewer system (MS4) operators for the development, implementation, and maintenance of a storm water management program. Discharges by small MS4s of storm water, and certain types of non-storm water, are eligible for authorization under the proposed general permit only if the small MS4 is located within an urbanized area, as defined by the United States Bureau of Census for the 1990 or 2000 Decennial Census. MS4s designated by the TCEQ as requiring authorization may also be permitted under the proposed general permit. Non-storm water discharges that are not specifically listed in the general permit are not authorized by the general permit.

The ED has reviewed this action for consistency with the goals and policies of the Texas Coastal Management Program (CMP) according to Coastal Coordination Council regulations, and has determined that the action is consistent with applicable CMP goals and policies.

A copy of the draft general permit and fact sheet are available for viewing and copying at the TCEQ, Office of the Chief Clerk, located at 12100 Park 35 Circle, Building F in Austin. These documents are also available at the TCEQ's 16 regional offices, and are available at *http://www.tnrcc.state.tx.us/permitting/waterperm/wwperm/ms4.html*.

PUBLIC COMMENTS/PUBLIC MEETING. Public comments concerning this general permit may be submitted in writing or orally at a public meeting held by the TCEQ. The purpose of a public meeting is to provide an opportunity to submit comments and to ask questions about the general permit. A public meeting is not a contested case hearing. The public comment period will end November 15, 2002. The TCEQ will hold three public meetings on this general permit: Monday, October 28, 2002 at 7:00 p.m., City of Arlington Council Chambers, Municipal Building, 101 West Abram Street, Arlington; Tuesday, October 29, 2002 at 7:00 p.m., Houston City Hall Council Chambers, 901 Bagby, 2nd Floor, Houston; and Monday, November 4, 2002 at 7:00 p.m., San Antonio River Authority Board Meeting Room, 100 East Guenther Street, San Antonio.

Written comments must be submitted to the Texas Commission on Environmental Quality, Office of the Chief Clerk, MC 105, P.O. Box 13087, Austin, Texas 78711-3087 by 5:00 p.m. on November 15, 2002.

APPROVAL PROCESS. After the comment period, the executive director will consider all the public comments and prepare a response. The response to comments will be mailed to everyone who submitted a public comment or who requested to be on a mailing list for this general permit. The general permit will then be set for the commissioners' consideration at a scheduled commission meeting.

MAILING LISTS. In addition to submitting public comments, you may ask to be placed on a mailing list to receive future public notices mailed by the Office of the Chief Clerk. You may request to be added to: 1) the mailing list for this specific general permit; 2) the permanent mailing list for a specific applicant name and permit number; and/or 3) the permanent mailing list for a specific county. Clearly specify which mailing lists you wish to be added to and send your request to the TCEQ Office of the Chief Clerk at the address previously listed. Unless specified otherwise, you will be included only on the mailing list for this specific general permit.

INFORMATION. If you need more information about this permit application or the permitting process, please call the TCEQ Office of Public Assistance, at (800) 687-4040. General information can be found at the TCEQ website at *www.tceq.state.tx.us*.

Further information may also be obtained by calling the TCEQ Storm Water Hotline at (512) 239-3700.

TRD-200206079
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: September 18, 2002

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Notice of Water Rights Application

Notices mailed during the period September 9, 2002 through September 12, 2002.

Application No. TA-8234; Sunoco Partners Marketing & Terminals, L.P., P.O. Box 758 Twin City Highway, Nederland, Texas 77627, applicant, seeks a Temporary Water Use Permit pursuant to TWC §11.138 and Texas Commission on Environmental Quality Rules 30 TAC §§295.1, et seq. Applicant seeks to divert and use not to exceed 158 acre-feet of water within a one year period from the Neches River, Neches River Basin, Jefferson County for industrial purposes (hydrotest of two new oil storage tanks) at a maximum diversion rate of 13.39 cfs (6,000 gpm). The diversion point is located at a point at or near the river crossing of State Highway 347, located 5 miles southeast of Beaumont and 2 miles northeast of Nederland in Jefferson County, Texas. Upon completion of the hydrotests, the aforesaid water will be returned to the Neches River. The application was received on July 1, 2002 and additional information was received on August 20, 2002. The application was declared administratively complete and accepted for filling on August 22, 2002. Written public comments and request for a public meeting should be submitted to the Office of the Chief Clerk, at the address provided in the information section below by October 1, 2002.

APPLICATION NO. 14-5471C; The City of Austin, P.O. Box 1088, Austin, Texas, 78767, seeks an amendment pursuant to Texas Water Code (TWC) §11.122, and Texas Commission on Environmental Quality Rules 30 Texas Administrative Code (TAC) §§295.1, et seq. Certificate of Adjudication No. 14-5471, as amended, authorizes the owner to maintain a dam (Longhorn Dam) and reservoir (Town Lake) on the Colorado River, Colorado River Basin, Travis County, and to divert, circulate, and re-circulate water from the perimeter of Town Lake at an unspecified rate for industrial (cooling) purposes. Owner is also authorized to divert and use water from a point on the Colorado River in Fayette County and from Cedar Creek Reservoir on Cedar Creek, for industrial (cooling) purposes at the Fayette Power Project, provided that no more than 24,000 acre-feet of water per annum is consumptively used for industrial (cooling) purposes from the aforesaid diversion points. Applicant seeks authorization to amend Certificate of Adjudication No. 14-5471, as amended, to add an additional point of diversion near the confluence of the Colorado River and Onion Creek for industrial (cooling) purposes. It is located at the Sand Hill Energy Center on land owned by the City of Austin on 12.148 acres out of the Santiago Dell Valle Grant at Latitude 30.213° N, Longitude 97.615°

W on the Colorado River, Colorado River Basin, Travis County. The applicant also seeks a bed and banks authorization to transport their water downstream to the new diversion point. No other changes are requested. Pursuant to 30 TAC §297.45 and TWC §11.122, granting of an application for an amendment to a water right shall not cause an adverse impact to an existing water right. The application was received on November 14, 2001. The Executive Director of the TCEQ has reviewed the application and has declared it to be administratively complete and has been filed with the Office of the Chief Clerk on July 15, 2002. Written public comments and requests for a public meeting should be received in the Office of Chief Clerk, at the address provided in the information section below, by October 11, 2002.

APPLICATION NO. 5785; Crown Oaks, LLP., 15444 Crown Oaks Drive, Montgomery, Texas 77316, applicant, seeks a Water Use Permit pursuant to Texas Water Code (TWC) §11.121, and Texas Commission on Environmental Quality Rules 30 TAC §§295.1, et seq. Applicant seeks authorization to construct and maintain a dam and reservoir on a tributary of Mound Creek, tributary of Lake Creek, tributary of the West Fork of the San Jacinto River, tributary of the San Jacinto River, San Jacinto River Basin, Montgomery County, Texas for in-place recreational purposes. The proposed on-channel reservoir has a capacity of 247.90 acre-feet of water with a surface area of 40.0 acres and is located 10.8 miles in a westerly direction from Conroe, Texas in the William P. Cartwright Original Survey, Abstract No. 134 in Montgomery County. Station 0+00 on the centerline of the dam is S 80° E, 1,212.83 feet from the southwest corner of the Alfred Dutcher Original Survey, Abstract No. 167, in Montgomery County, Texas, also being at Latitude 30.30°4 N, Longitude 95.637° W. Ownership of the land is evidenced by Warranty Deed No. 9896295, Pages 553-554 as recorded in the Montgomery County records. The application was received on June 13, 2002 and the additional information was received on August 19, 2002. The application was filed and declared to be administratively complete on August 22, 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. 5472A; Roy Leon Northen, 2098 Curry Loop, Belton, Texas 76513, and Carroll M. Northen, 2460 Curry Loop, Belton, Texas 76513, applicants, seek to amend Water Use Permit No. 5472 pursuant to Texas Water Code §11.122 and Texas Commission on Environmental Quality Rules 30 TAC §§295.1, et seq. Water Use Permit No. 5472 authorizes the owners to divert and use, with a priority date of February 14,1984, not to exceed 190 acre-feet of water per annum from the Leon River, tributary of the Little River, tributary of the Brazos River, in the Brazos River Basin for agricultural purposes to irrigate 110 acres of land out of a 123 acre tract in the A. Manchaca Survey, Abstract No. 12, approximately 5 miles southeast of Belton in Bell County. Diversion is authorized from any point on the right, or south, bank of the river between a point S 74° E, 5,700 feet and a point S 85° W, 8,800 feet from the northwest corner of the aforesaid survey at a maximum rate of 2.22 cubic-feet-per-second (1,000 gallons-per-minute). The most downstream point is also located at 31.018° N Latitude and 97.395° W Longitude. The permit includes stream flow restrictions and a special condition whereby the authorization to divert the water will expire on December 31, 2003. Applicants seek to amend Water Use Permit No. 5472 by extending or deleting the expiration date of December 31, 2003. The application was received on July 11, 2002. Additional information was received August 12, 2002. The application was determined to be administratively complete and was filed on August 14, 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. 4589C; The City of Abilene, P.O. Box 60, Abilene, Texas 79604-0060, applicant, seeks to amend Water Use Permit No. 4266, as amended, pursuant to Texas Water Code (TWC) §11.122 and §11.042, and Texas Commission on Environmental Quality Rules 30 TAC §§295.1, et seq. Water Use Permit No. 4266 (Application No. 4589), as amended, authorizes the owner to maintain an off-channel reservoir complex with a total capacity of 1003.6 acre-feet and to divert and use not to exceed 4,330 acre-feet per annum of treated wastewater effluent from nine diversion points for agricultural purposes to irrigate 2,245 acres of land in Jones and Shackleford Counties. The treated effluent is created by the City's municipal use of the water, authorized by Certificates of Adjudication Nos. 12-4139, as amended, 12-4142, 12-4150, as amended, 12-4161, as amended, and 12-4165, as amended. The effluent may be diverted directly from Deadman Creek, tributary of the Clear Fork Brazos River, tributary of the Brazos River in the Brazos River Basin to the fields for irrigation, or into the off-channel reservoir complex for subsequent diversion for irrigation use in Jones and Shackleford Counties, Texas. Applicant seeks to amend Water Use Permit No. 4266 (Application No. 4589), as amended, by adding a place of use as anywhere within the corporate boundaries of the City of Abilene, including Taylor, Jones and Shackleford Counties, authorizing storage of treated wastewater from the City's Hamby Wastewater Treatment Plant (WWTP) in Lake Kirby for subsequent diversion of up to 4,330 acre-feet of treated wastewater for agricultural purposes, and authorizing the use of the bed and banks of Lake Kirby for conveyance and subsequent diversion of the treated wastewater. Use of Lake Kirby is authorized in Certificate of Adjudication No. 12-4150, as amended, owned by the City of Abilene. Applicant proposes to convey, by pipeline from the Hamby WWTP, and discharge into Lake Kirby up to 4,330 acre-feet of treated effluent per annum at a maximum discharge rate of 6.2 cfs (2,778 gpm) for subsequent diversion for the uses authorized by Water Use Permit No. 4266 (Application No. 4589). The discharge point, and subsequent diversion point, for the effluent is located on the perimeter of Lake Kirby at 32.38° N Latitude and 99.73° W Longitude. Applicant proposes to divert the discharged effluent, less estimated losses of 17.4%, from the Lake Kirby for subsequent use at a maximum rate of 15.1 cfs (6,777 gpm). The application was received on March 28, 2002. The Executive Director reviewed the application and determined it to be administratively complete on August 12, 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.

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 TCEQ 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 TCEQ 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, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us.

TRD-200206076
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: September 18, 2002

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Proposal for Decision

The State Office Administrative Hearing issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality on **September 17, 2002, Executive Director of the Texas Commission on Environmental Quality, Petitioner v. Roden, Dairy Inc.; SOAH Docket No. 582-02-0697; TCEQ Docket No. 2001-0070-AGR-E**. In the matter to be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 North Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105 TCEQ, P.O. Box 13087, Austin Texas 78711-3087. If you have any questions or need assistance, please contact Doug Kitts, Chief Clerk's Office, (512) 239-3317.

TRD-200206077
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: September 18, 2002

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Texas Department of Health

Licensing Actions for Radioactive Materials

The Texas Department of Health has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout Texas" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Midland	Midland Cardiac Clinic	L05571	Midland	00	09/04/02
Throughout Tx	Superior Well Services LTD	L05599	Sequin	00	09/05/02

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Abilene	NC-SCHI Inc	L02434	Abilene	70	09/05/02
Abilene	Abilene Diagnostic Clinic PLLC	L05101	Abilene	08	09/03/02
Arlington	Open Imaging Arlington LLC	L05575	Arlington	03	09/05/02
Athens	East Texas Medical Center	L02470	Athens	30	09/05/02
Austin	Texas Cardiovascular Consultants PA	L05246	Austin	06	09/09/02
Bedford	Columbia North Hills Outpatient Imaging Center Subsidiary LP	L03455	Bedford	34	09/03/02
Bryan	St Joseph Health Center	L00573	Bryan	60	09/10/02
Carrollton	Tenet Health System Hospitals Dallas Inc	L03765	Carrollton	37	09/06/02
Corpus Christi	Spohn Health System Corporation	L00265	Corpus Christi	74	09/09/02
Corpus Christi	Driscoll Childrens Hospital	L04606	Corpus Christi	24	09/06/02
Corpus Christi	Citgo Refining and Chemicals Company L P	L00243	Corpus Christi	34	09/09/02
Dallas	Dallas Cardiology Associates PA	L04607	Dallas	36	08/29/02
Dallas	Doctors Hospital	L01366	Dallas	42	09/05/02
Dallas	Tenet Health System Hospitals Dallas Inc	L02314	Dallas	47	09/07/02
Dallas	Texas Hematology/Oncology Center PA	L05397	Dallas	02	09/06/02
Deer Park	Clean Harbors Deer Park LP	L02870	Deer Park	18	09/05/02
Denton	Network Cancer Care of Denton	L05348	Denton	11	09/04/02
Denton	Denton Hospital Inc	L04003	Denton	27	09/12/02
Diboll	Temple Inland Forest Products Corporation	L00935	Diboll	24	09/10/02
Duncanville	Duncanville Medical Center Inc	L05471	Duncanville	04	09/04/02
El Paso	The University of Texas at El Paso	L00159	El Paso	45	09/06/02
El Paso	El Paso Healthcare System LTD	L02715	El Paso	50	09/09/02
Fort Worth	All Saints Advanced Imaging Center	L05251	Fort Worth	03	09/12/02
Fort Worth	Baylor Medical Center Cityview	L04105	Fort Worth	14	09/12/02
Georgetown	Georgetown Healthcare System	L03152	Georgetown	27	09/05/02
Houston	Kellogg Brown & Root Inc	L03660	Houston	10	09/05/02
Houston	Cardiology Associates	L05500	Houston	04	09/04/02
Houston	Baylor College of Medicine	L00680	Houston	76	09/09/02
Houston	Ben Taub General Hospital	L01303	Houston	54	09/06/02
Houston	Institute for Research Inc	L00516	Houston	20	09/10/02
Houston	Syncor Advanced Isotopes LLC	L05536	Houston	01	09/06/02
Houston	Schlumberger Technology Corporation	L03303	Houston	15	09/10/02

CONTINUED AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Houston	Memorial Hermann Hospital System	L00439	Houston	83	09/12/02
Houston	Petnet Houston LLC	L05542	Houston	01	09/13/02
Irving	Cor Specialty Associates of North Texas PA	L05373	Irving	05	09/05/02
Lubbock	Methodist Diagnostic Imaging	L03948	Lubbock	28	09/04/02
Lubbock	University Medical Center	L04719	Lubbock	52	09/06/02
Lubbock	Covenant Health System	L01547	Lubbock	72	09/12/02
McAllen	McAllen Hospital LP	L01713	McAllen	64	09/04/02
McAllen	Advanced Nuclear Imaging Inc	L05467	McAllen	01	09/09/02
McKinney	Taysir F Jarrah MD PA Cardiology	L05464	McKinney	01	09/13/02
North Richland Hills	Columbia North Hills Hospital Subsidary LP	L02271	North Richland Hills	41	09/03/02
Orange	Inland Paperboard and Packaging Inc	L01029	Orange	48	09/10/02
Plano	Presbyterian Hospital of Plano	L04467	Plano	24	09/04/02
Richardson	Richardson Diagnostic Imaging I LP	L05468	Richardson	02	09/05/02
San Antonio	Cardiology Clinic of San Antonio PA	L04489	San Antonio	21	09/03/02
San Antonio	Radiology Associates of San Antonio PA	L04305	San Antonio	30	09/10/02
San Antonio	Methodist Healthcare System of San Antonio LTD	L03810	San Antonio	29	09/04/02
San Antonio	Trinity University	L01668	San Antonio	34	08/30/02
San Antonio	UTSCSA Research Imaging Center	L05556	San Antonio	01	09/04/02
San Antonio	Cardiology Clinic of San Antonio PA	L04489	San Antonio	22	09/05/02
San Antonio	Radiology Associates of San Antonio PA	L04927	San Antonio	18	09/06/02
San Antonio	Methodist Healthcare System of San Antonio	L00594	San Antonio	167	09/10/02
Texarkana	Texarkana Imaging Institute LP	L05495	Texarkana	01	08/30/02
Texarkana	New Hope Enterprises LTD	L05560	Texarkana	01	09/06/02
Texarkana	Texarkana Memorial Hospital Inc	L02486	Texarkana	33	09/06/02
Throughout Tx	X-Ray Inspection Inc	L05275	Beaumont	21	08/30/02
Throughout Tx	X-Ray Inspection Inc	L05275	Beaumont	22	09/03/02
Throughout Tx	Fugro South Inc	L04322	Channelview	58	09/07/02
Throughout Tx	Computalog Wireline Products Inc	L00747	Fort Worth	65	09/03/02
Throughout Tx	Real Inspection Training Services	L05136	Houston	06	08/30/02
Throughout Tx	Stork Southwestern Laboratories Inc	L05269	Houston	03	08/30/02
Throughout Tx	Washington Group International Inc	L02662	Houston	84	09/04/02
Throughout Tx	Metco	L03018	Houston	125	09/05/02
Throughout Tx	H & G Inspection company Inc	L02181	Houston	152	09/09/02
Throughout TX	H & G Inspection Company Inc	L02181	Houston	153	9/13/02
Throughout Tx	Perf-O-Log Inc	L05478	Iowa Colony	02	09/09/02
Throughout Tx	RCOA Imaging Services Inc	L05329	Kingwood	05	09/06/02
Throughout Tx	Eagle X-Ray	L03246	Mont Belvieu	73	09/03/02
Throughout Tx	Eagle X-Ray	L03246	Mont Belvieu	74	09/11/02
Throughout Tx	Texas Gamma Ray LLC	L05561	Pasadena	06	08/30/02
Throughout Tx	Texas Gamma Ray LLC	L05561	Pasadena	07	09/12/02
Throughout Tx	Nova Consulting Group Inc	L05322	San Antonio	02	08/30/02
Throughout Tx	GCT Inspection Inc	L02378	South Houston	67	09/10/02

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Pasadena	Syngenta Crop Protection Inc	L02216	Pasadena	25	09/04/02

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Austin	Goodrich Aerospace Component	L03372	Austin	09	09/15/02
Fort Worth	Bell Helicopter Textron Inc	L05340	Fort Worth	03	08/30/02
Perryton	Ochiltree General Hospital	L03250	Perryton	09	09/09/02
San Antonio	Methodist Healthcare System of San Antonio LTD	L05440	San Antonio	04	09/10/02
Throughout Tx	Dynamic Wireline Inc	L05177	Sequin	02	09/12/02

LICENSE EXEMPTION ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Austin	Columbia St Davids Healthcare System LP	L03273	Austin		09/09/02
Pasadena	Air Products Manufacturing Corporation	L04560	Pasadena		09/09/02

In issuing new licenses, amending and renewing existing licenses, or approving exemptions to Title 25 Texas Administrative Code (TAC) Chapter 289, the Texas Department of Health, Bureau of Radiation Control, has determined that the applicants are qualified by reason of training and experience to use the material in question for the purposes requested in accordance with 25 TAC Chapter 289 in such a manner as to minimize danger to public health and safety or property and the environment; the applicants' proposed equipment, facilities and procedures are adequate to minimize danger to public health and safety or property and the environment; the issuance of the new, amended, or renewed license (s) or the issuance of the exemption (s) will not be inimical to the health and safety of the public or the environment; and the applicants satisfy any applicable requirements of 25 TAC Chapter 289.

This notice affords the opportunity for a hearing on written request of a licensee, applicant, or person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A licensee, applicant, or person affected may request a hearing by writing Richard A. Ratliff, P.E., Chief, Bureau of Radiation Control (Director, Radiation Control Program), Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189. For information call (512) 834-6688.

TRD-200206078
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: September 17, 2002

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Notice of Public Hearing for Proposed Rules Concerning the Regulation of Device Salvage Establishments and Brokers

A public hearing will be held by the Texas Department of Health (department) on October 10, 2002, at 1:00 p.m., at the main headquarters of the department in the Tower Building, Room T-607, 1100 West 49th Street, Austin, Texas.

The department will accept additional comments on the proposed new sections for 25 Texas Administrative Code, §§229.601 - 229.614 as published in the August 9, 2002, issue of the *Texas Register* (27 TexReg 6998).

Questions or requests for additional information may be directed to Tom Brinck, Director of Programs, Medical Devices Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, telephone (512) 719-0237, facsimile (512) 719-0261, or e-mail: tom.brinck@tdh.state.tx.us.

TRD-200206075
Susan Steeg
General Counsel
Texas Department of Health
Filed: September 18, 2002

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Texas Health and Human Services Commission

Public Hearing and Notice of Proposed Nursing Facility Payment Rate for the Pediatric Care Facility Special Reimbursement Class

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on October 2, 2002, to receive public comment on a proposed facility-specific payment rate for the Truman W. Smith Children's Care Center, a nursing facility that is a member of the pediatric care facility special reimbursement class. The hearing will be held in compliance with Title 1 of the Texas Administrative Code (TAC) §355.105(g), which requires public hearings on proposed payment rates for medical assistance programs. The public hearing

will be held on October 2, 2002, at 9:00 a.m. in the Llano Estacado Conference Room, room number R3.2F.01, on the second floor of the Riata Building III, at 12555 Riata Vista Circle, Austin, Texas 78727-6404.

Written comments regarding the proposed payment rate may be submitted in lieu of testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Tony Arreola, HHSC Rate Analysis, MC Y-995, 1100 West 49th Street, Austin, Texas 78756-3101. Express mail can be sent, or written comments can be hand delivered, to Mr. Arreola, HHSC Rate Analysis, MC Y-995, Riata Building III, 12555 Riata Vista Circle, Austin, Texas, 78727-6404. Alternatively, written comments may be sent via facsimile to Mr. Arreola at (512) 685-3104. Interested parties may request to have mailed to them or may pick up a briefing package concerning the proposed payment rate by contacting Mr. Arreola.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Mr. Arreola, by September 30, 2002, so that appropriate arrangements can be made.

Proposal. HHSC proposes a per day payment rate for the nursing facility pediatric care facility special rate class for Truman W. Smith Children's Care Center in the amount of $164.08. This payment rate is proposed to be effective September 1, 2002.

Methodology and justification. The proposed rate was determined in accordance with the proposed rate setting methodology for the nursing facility pediatric care facility special rate class at Title 1 of the Texas Administrative Code, Chapter 355, Subchapter C (relating to Reimbursement Setting Methodology for Nursing Facilities), §355.307(c).

TRD-200206081
Marina Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Filed: September 18, 2002

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Department of Information Resources

Notice of Request for Proposals

In compliance with the provisions of Chapter 2156, Subchapter C, Texas Government Code, the Department of Information Resources (DIR) announces this Request for Proposals (RFP #DIR-LEGAL IP - 03) for provision of Legal Services for Intellectual Property Law Matters.

Eligible Proposers. DIR is requesting proposals from qualified law firms and individual attorneys. Historically underutilized businesses (HUBs) are encouraged to submit a proposal.

Description. DIR seeks full service legal representation in the area of Intellectual Property Law. Services may include providing research and advice regarding all aspects of existing and proposed Intellectual Property assets, representing DIR's interests before administrative bodies such as the US Trademark Office, with the consent of the Office of the Attorney General and DIR, filing appropriate actions against alleged infringers, and negotiating appropriate contract language to protect DIR's Intellectual Property interests. DIR has been authorized by the Office of the Attorney General to issue this RFP to seek legal representation in the area of Intellectual Property law. The Attorney General must approve DIR's selection.

Dates of Project. All services related to this proposal will be conducted within specified dates. The contract should commence on or about November 4, 2002, and end September 30, 2003. There is a single one-year extension option in the contract. The Attorney General must approve any contract extension.

Project Amount. One contractor will be selected to receive a contract valued at an annual not-to-exceed amount of $60,000.

Selection Criteria. The selected contractor shall have the highest scoring proposal from among responsive proposals submitted, based on qualifications, experience and reputation of the firm to provide the services described in the RFP, the experience and qualifications of the attorneys, staff and others proposed to perform the work, satisfactory client references and overall price and value of the proposal. DIR reserves the right to conduct interviews with up to the top three scoring firms, at its discretion. If conducted, the interviews will be scored. DIR is not obligated to execute a contract, provide funds or endorse any proposal submitted in response to the RFP. DIR reserves the right to amend, withdraw or cancel this RFP at any time. DIR shall not be responsible for any costs incurred by proposers in developing responses to this RFP. The issuance of this RFP does not obligate DIR to award a contract.

Requesting the Proposal. A complete copy of the RFP # DIR-LEGAL IP - 03 may be obtained by writing: Bill Miller, Support Services Manager, Department of Information Resources, Garage R, 1706 San Jacinto Blvd., Austin, TX 78701, by faxing (512) 463-8234, or by calling (512) 463-3358. As of September 27, 2002, the RFP has been posted in its entirety on the *Texas Marketplace*.

Further Information. For clarifying information about the RFP, contact Renee Mauzy, General Counsel, Department of Information Resources, (512) 475-4750.

Deadline for Receipt of Proposals. Proposals must be received in Support Services Division Office at 1706 San Jacinto Blvd., Garage R, DIR by 4:00 PM (CST), Friday, October 28, 2002, to be considered. Proposers are responsible for the timely delivery of proposals. The clock in Garage R is the official clock for determining timeliness of proposals.

TRD-200205974
Renee Mauzy
General Counsel
Department of Information Resources
Filed: September 13, 2002

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Texas Department of Insurance

Amended Notice of Public Hearing

Notice of hearing for docket number 2531 regarding the Texas Health Reinsurance System Plan of Operation, scheduled for October 2, 2002, in room 100 has been moved to room 102. Notice of the hearing was published in the September 13, 2002, issue of the *Texas Register* (27 TexReg 8810).

TRD-200206094
Gene C. Jarmon
Acting General Counsel and Chief Clerk
Texas Department of Insurance
Filed: September 18, 2002

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Company Licensing

Application to change the name of PROVIDENT NATIONAL ASSURANCE COMPANY to ALLSTATE ASSURANCE COMPANY a foreign life, accident and/or health company. The home office is in Northbrook, Illinois.

Application to change the name of CONSECO DIRECT LIFE INSURANCE COMPANY to COLONIAL PENN LIFE INSURANCE COMPANY, a foreign life, accident and/or health company. The home office is in Philadelphia, Pennsylvania..

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-200206089
Gene C. Jarmon
Acting General Counsel and Chief Clerk
Texas Department of Insurance
Filed: September 18, 2002

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Notice of Public Hearing

The Commissioner of Insurance will hold a public hearing under Docket No. 2533 at 9:30 a.m., October 4, 2002 in Room 100 of the William B. Hobby Jr. State Office Building, 333 Guadalupe Street in Austin, Texas 78701. The hearing is to consider new sections 21.3401-21.3409 concerning the collection and reporting of data related to mandated benefits and offers of coverage.

The proposed new sections and the statutory authority for the proposed new sections were published in the August 2, 2002, issue of the *Texas Register* (27 TexReg 6798).

TRD-200205966
Gene C. Jarmon
Acting General Counsel and Chief Clerk
Texas Department of Insurance
Filed: September 12, 2002

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for incorporation in Texas of Accountable Partners Healthcare System, LP, a domestic third party administrator. The home office is El Paso, Texas.

Any objections must be filed within 20 days after this notice was filed with the Secretary of State, addressed to the attention of Charles M. Waits, MC 107-5A, 333 Guadalupe, Austin, Texas 78714-9104.

TRD-200206090
Gene C. Jarmon
Acting General Counsel and Chief Clerk
Texas Department of Insurance
Filed: September 18, 2002

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Texas Department of Licensing and Regulation

Vacancies on Architectural Barriers Advisory Committee

The Texas Commission of Licensing and Regulation announces vacancies on the Architectural Barriers Advisory Committee established by Texas Civil Statutes, Article 9102, Architectural Barriers. The pertinent rules may be found in 16 TAC §68.65. The purpose of the Architectural Barriers Advisory Committee is to review rules and Technical Memoranda relating to the Architectural Barriers program and recommend changes in the rules and Technical Memoranda to the Commission and the Executive Director.

The Committee is appointed by the Texas Commission of Licensing and Regulation and is composed of building professionals such as architects, engineers, interior designers and landscape architects, and persons with disabilities who are familiar with architectural barrier problems and solutions. This announcement is for the positions of (2) consumers with a disability and one (1) building professional.

Interested persons should request an application from the Texas Department of Licensing and Regulation by telephone (512) 463-7348 or (512) 463-7357, FAX (512) 475-2872 or Email caroline.jackson@license.state.tx.us. Applications may also be downloaded from the Department website at: www.license.state.tx.us. Applications must be returned to the Department of Licensing and Regulation no later than October 14, 2002.

Applicants may be asked to appear for an interview, however any required travel for an interview would be at the applicant's expense.

TRD-200205976
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Filed: September 13, 2002

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Vacancies on Property Tax Consultants Advisory Council

The Texas Commission of Licensing and Regulation announces vacancies on the Property Tax Consultants Advisory Council established by Texas Civil Statutes, Article 8886, Registration of Property Tax Consultants. The pertinent rules may be found in 16 TAC §66.65. The purpose of the Property Tax Consultants Advisory Council is to advise the commissioner on standards of practice, conduct, and ethics for registrants, fees, examination contents and standards of performance for senior property tax consultant examinations, recognition of continuing education programs and courses, and establishing educational requirements for initial applicants.

The Council is composed of six members, appointed by the Texas Commission of Licensing and Regulation. Three of the members are registered property tax consultants and three are consumers. Applications are being accepted for one (1) registered property tax consultant position and one (1) consumer position. Applicants for consumer membership must utilize the services of property tax consultants to be considered. To be eligible for consideration for the registered property tax consultant membership, applicants must: be a registered senior property tax consultant; be a member of a nonprofit, voluntary trade association that has a membership primarily composed of individuals who perform property tax consulting services in this state or who engage in property tax management in this state for other persons, has written requirements of experience and examination as a prerequisite for an individual's membership, and subscribes to a code of professional conduct or ethics; be a resident of this state for the five years preceding the date of the appointment; and have performed or supervised the performance of property tax consulting services as the individual's primary occupation continuously for the five years preceding the date of the appointment.

Interested persons should request an application from the Texas Department of Licensing and Regulation by telephone (512) 463-7348 or

(512) 463-7357, FAX (512) 475-2872 or Email caroline.jackson@license.state.tx.us. Applications may also be downloaded from the Department website at: www.license.state.tx.us. Applications must be returned to the Department of Licensing and Regulation no later than October 14, 2002.

Applicants may be asked to appear for an interview with members of the Texas Commission of Licensing and Regulation, however any required travel for an interview would be at the applicant's expense.

TRD-200205977
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Filed: September 13, 2002

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Texas Lottery Commission

Instant Game No. 321 "Pay Me!"

1.0 Name and Style of Game.

A. The name of Instant Game No. 321 is "PAY ME!". The play style is "key number match".

Figure 1: GAME NO. 321 - 1.2D

PLAY SYMBOL	CAPTION
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$25.00	TWY FIV
$50.00	FIFTY
$100	ONE HUND
$7,000	SVN THOU

E. Retailer Validation Code - Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Figure 2: GAME NO. 321 - 1.2E

CODE	PRIZE
ONE	$1.00
TWO	$2.00
FOR	$4.00
FIV	$5.00
TEN	$10.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 321 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 321.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: $1.00, $2.00, $4.00, $5.00, $10.00, $25.00, $50.00, $100, and $7,000.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Table 1 of this section Figure 1:16 TAC GAME NO. 321 - 1.2D

Table 2 of this section. Figure 2:16 TAC GAME NO. 321 - 1.2E

bottom row of play data in the scratched-off play area. The format will be : 0000000000000.

G. Low-Tier Prize - A prize of $1.00, $2.00, $4.00, $5.00, $10.00.

H. Mid-Tier Prize - A prize of $25.00, $50.00, $100, $500.

I. High-Tier Prize - A prize of $7,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine

(9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (321), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 249 within each pack. The format will be: 321-0000001-000.

L. Pack - A pack of "PAY ME!" Instant Game tickets contain 250 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 000-004 will be on the first page, tickets 005-009 will be on the next page and so forth with tickets 245-249 on the last page. Tickets 000 and 249 will be folded down to expose the pack-ticket number through the shrink-wrap.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "PAY ME!" Instant Game No. 321 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "PAY ME!" Instant Game is determined once the latex on the ticket is scratched off to expose 10 (ten) play symbols. If any of the player's YOUR PRIZE match the WINNING PRIZE, in the same game, the player will win that amount. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 10 (ten) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 10 (ten) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 10 (ten) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 10 (ten) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No duplicate non-winning "Winning Prize" symbols on a ticket.

C. No duplicate non-winning "Your Prize" symbols.

2.3 Procedure for Claiming Prizes.

A. To claim a "PAY ME!" Instant Game prize of $1.00, $2.00, $4.00, $5.00, $10.00, $25.00, $50.00, $100, or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00, $100, or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under

the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "PAY ME!" Instant Game prize of $7,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "PAY ME!" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "PAY ME!" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "PAY ME!" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 12,095,250 tickets in the Instant Game No. 321. The approximate number and value of prizes in the game are as follows:

Table 3 of this section Figure 3:16 TAC GAME NO. 321- 4.0

Figure 3: GAME NO. 321 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$1.00	1,354,564	8.93
$2.00	629,000	19.23
$4.00	241,990	49.98
$5.00	145,162	83.32
$10.00	120,910	100.04
$25.00	28,944	417.88
$50.00	12,946	934.28
$100	1,046	11,563.34
$500	125	96,762.00
$7,000	29	417,077.59

*The number of actual prizes may vary based on sales, distribution, testing, and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.77. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 321 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 321, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200205968
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: September 12, 2002

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Instant Game No. 327 "Break the Bank"

1.0 Name and Style of Game.

A. The name of Instant Game No. 327 is "BREAK THE BANK". The play style is a key number match".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 327 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 327.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, DOLLAR BILL STACK, $1.00, $2.00, $4.00, $6.00, $10.00, $20.00, $50.00, $200, $1,000, $3,000, and $30,000.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 327 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$6.00	SIX$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$200	TWO HUND
$1,000	ONE THOU
$3,000	THR THOU
$30,000	30 THOU
DOLLAR BILL STACK	WIN$

E. Retailer Validation Code - Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Figure 2: GAME NO. 327 - 1.2E

CODE	PRIZE
TWO	$2.00
FOR	$4.00
SIX	$6.00
EGT	$8.00
TEN	$10.00
TWL	$12.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the

bottom row of play data in the scratched-off play area. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $2.00, $4.00, $6.00, $8.00, $10.00, $12.00, or $20.00.

H. Mid-Tier Prize - A prize of $50.00 or $200.

I. High-Tier Prize - A prize of $1,000, $3,000, or $30,000

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A thirteen (13) digit number consisting of the three (3) digit game number (327), a seven (7) digit pack number and a three (3) digit ticket number. Ticket numbers start with 000 and end with 249 within each pack. The format will be: 327-0000001-000.

L. Pack - A pack of "BREAK THE BANK" Instant Game tickets contain 250 tickets, which are packed in plastic shrink-wrapping and fan-folded in pages of two. Tickets 000 to 001 are on the top page, tickets 002 to 003 are on the next page, and so forth with tickets 248 to 249 on the last page. Ticket 249 will be folded down to expose the pack-ticket number through the shrink-wrap.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "BREAK THE BANK" Instant Game No. 327 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "BREAK THE BANK" Instant Game is determined once the latex on the ticket is scratched off to expose 19 (nineteen) play symbols. If any of the player's YOUR NUMBERS match one of the three (3) LUCKY NUMBERS, the player will win the prize amount shown for that number. If the player gets a dollar bill stack symbol, the player will win that prize automatically. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 19 (nineteen) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 19 (nineteen) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 19 (nineteen) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 19 (nineteen) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. Non-winning prize symbols will not match a winning prize symbol on a ticket.

C. No duplicate Lucky Numbers on a ticket.

D. There will be no correlation between the matching symbols and the prize amount.

E. The auto win symbol will never appear more than once on a ticket.

F. No duplicate non-winning play symbols on a ticket.

2.3 Procedure for Claiming Prizes.

A. To claim a "BREAK THE BANK" Instant Game prize of $2.00, $4.00, $6.00, $8.00, $10.00, $12.00, $20.00, $50.00, or $200, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00 or $200 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "BREAK THE BANK" Instant Game prize of $1,000, $3,000, or $30,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "BREAK THE BANK" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "BREAK THE BANK" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "BREAK THE BANK" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 50,483,000 tickets in the Instant Game No. 327. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 327 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$2	4,644,371	10.87
$4	2,978,428	16.95
$6	858,165	58.83
$8	201,932	250.00
$10	454,416	111.09
$12	504,826	100.00
$20	353,383	142.86
$50	187,202	269.67
$200	41,597	1,213.62
$1,000	1,057	47,760.64
$3,000	153	329,954.25
$30,000	24	2,103,458.33

*The number of actual winners may vary based on sales, distribution, and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.94. The individual odds of winning for a particular prize level may vary based on sales, distribution, and number of prized claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 327 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 327, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200206048
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: September 17, 2002

♦ ♦ ♦

Instant Game No. 357 "Harvest Moon"

1.0 Name and Style of Game.

A. The name of Instant Game No. 357 is "HARVEST MOON". The play style is "key symbol match".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 357 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 357.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: $2.00, $3.00, $5.00, $10.00, $20.00, $50.00, $70.00, $100, $500, $1,000, $25,000, PIGGY BANK SYMBOL, ACORN SYMBOL, MUSHROOM SYMBOL, STACK OF COINS SYMBOL, PUMPKIN SYMBOL, CLOVER SYMBOL, APPLE SYMBOL, POT OF GOLD SYMBOL, SUN SYMBOL, CORN SYMBOL, STACK OF BILLS SYMBOL, HAY SYMBOL, FLOWER SYMBOL, HORSESHOE SYMBOL, and MONEY BAG SYMBOL.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 357 - 1.2D

PLAY SYMBOL	CAPTION
$2.00	TWO$
$3.00	THREE$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$70.00	SEVENTY
$100	ONE HUND
$500	FIVE HUND
$1,000	ONE THOU
$25,000	25 THOU
PIGGY BANK SYMBOL	PGYBNK
ACORN SYMBOL	ACORN
MUSHROOM SYMBOL	MSHRM
STACK OF COINS SYMBOL	COINS
PUMPKIN SYMBOL	PMPKIN
CLOVER SYMBOL	CLVR
APPLE SYMBOL	APPLE
POT OF GOLD SYMBOL	GOLD
SUN SYMBOL	SUN
CORN SYMBOL	CORN
STACK OF BILLS SYMBOL	CASH
HAY SYMBOL	HAY
FLOWER SYMBOL	FLWR
HORSESHOE SYMBOL	HRSHOE
MONEY BAG SYMBOL	MNYBAG

E. Retailer Validation Code - Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Figure 2: GAME NO. 357 - 1.2E

CODE	PRIZE
TWO	$2.00
THR	$3.00
FIV	$5.00
TEN	$10.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be : 0000000000000.

G. Low-Tier Prize - A prize of $2.00, $3.00, $5.00, $10.00, $20.00.

H. Mid-Tier Prize - A prize of $50.00, $70.00, $100, $500.

I. High-Tier Prize - A prize of $1,000, $25,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine

(9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (357), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 249 within each pack. The format will be: 357-0000001-000.

L. Pack - A pack of "HARVEST MOON" Instant Game tickets contain 250 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of two (2). Tickets 000-001 will be shown on the front of the pack; the backs of tickets 248 and 249 will show. Every other book will be opposite.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "HARVEST MOON" Instant Game No. 357 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "HARVEST MOON" Instant Game is determined once the latex on the ticket is scratched off to expose 24 (twenty-four) play symbols. If the player's Your Symbol matches the Lucky Symbol within the same game, the player will win the prize shown for that game. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 24 (twenty-four) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 24 (twenty-four) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 24 (twenty-four) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 24 (twenty-four) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets within a book will not have identical patterns.

B. No ticket will contain two (2) or more identical non-winning games (i.e. the same Your Symbol and the same Lucky Symbol).

C. On winning tickets, all non-winning prize amounts to be different from winning prize amounts.

D. Non-winning tickets will not have more than two (2) identical "Your Symbols".

E. Non-winning tickets will not have more than two (2) identical "Lucky Symbols".

2.3 Procedure for Claiming Prizes.

A. To claim a "HARVEST MOON" Instant Game prize of $2.00, $3.00, $5.00, $10.00, $20.00, $50.00, $70.00, $100, or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00,

$70.00, $100, or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "HARVEST MOON" Instant Game prize of $1,000 or $25,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "HARVEST MOON" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "HARVEST MOON" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "HARVEST MOON" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 10,214,500 tickets in the Instant Game No. 357. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 357 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$2.00	776,291	13.16
$3.00	572,001	17.86
$5.00	490,303	20.83
$10.00	326,855	31.25
$20.00	51,078	199.98
$50.00	25,519	400.27
$70.00	18,119	563.75
$100	3,185	3,207.06
$500	206	49,584.95
$1,000	82	124,567.07
$25,000	8	1,276,812.50

*The number of actual prizes may vary based on sales, distribution, testing, and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.51. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 357 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 357, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200205967
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: September 12, 2002

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Instant Game No. 358 "Winner Wonderland"

1.0 Name and Style of Game.

A. The name of Instant Game No. 358 is "WINNER WONDERLAND". The play style is "match 3 of 9".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 358 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 358.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: $1.00, $2.00, $4.00, $5.00, $8.00, $10.00, $15.00, $20.00, $40.00, $50.00, $100, $200, $400, and $1,000.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 358 - 1.2D

PLAY SYMBOL	CAPTION
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$8.00	EIGHT$
$10.00	TEN$
$15.00	FIFTEEN
$20.00	TWENTY
$40.00	FORTY
$50.00	FIFTY
$100	ONE HUND
$200	TWO HUND
$400	FOUR HUND
$1,000	ONE THOU

E. Retailer Validation Code - Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Figure 2: GAME NO. 358 - 1.2E

CODE	PRIZE
ONE	$1.00
TWO	$2.00
FOR	$4.00
FIV	$5.00
EGT	$8.00
TEN	$10.00
FTN	$15.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be : 0000000000000.

G. Low-Tier Prize - A prize of $1.00, $2.00, $4.00, $5.00, $8.00, $10.00, $15.00, $20.00.

H. Mid-Tier Prize - A prize of $40.00, $50.00, $100, $200, $400.

I. High-Tier Prize - A prize of $1,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (358), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 249 within each pack. The format will be: 358-0000001-000.

L. Pack - A pack of "WINNER WONDERLAND" Instant Game tickets contain 250 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 000-004 will be on the top page, tickets 005-009 will be on the next page and so forth with tickets 245-249 on the last page. Tickets 000 and 249 will be folded down to expose the pack-ticket number through the shrink-wrap.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "WINNER WONDERLAND" Instant Game No. 358 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "WINNER WONDERLAND" Instant Game is determined once the latex on the ticket is scratched off to expose nine (9) play symbols. If the player matches three (3) like dollar amounts, the player will win that amount. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly nine (9) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly nine (9) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the nine (9) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the nine (9) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets within a book will not have identical patterns.

B. No ticket will have four (4) or more like Prize symbols n a ticket.

C. No more than two pairs of like prize symbols will appear on a ticket.

2.3 Procedure for Claiming Prizes.

A. To claim a "WINNER WONDERLAND" Instant Game prize of $1.00, $2.00, $4.00, $5.00, $8.00, $10.00, $15.00, $20.00, $40.00, $50.00, $100, $200, or $400, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00, $100, $200, or $400 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "WINNER WONDERLAND" Instant Game prize of $1,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "WINNER WONDERLAND" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the

claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "WINNER WONDERLAND" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "WINNER WONDERLAND" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 8,059,250 tickets in the Instant Game No. 358. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 358 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$1.00	886,552	9.09
$2.00	483,519	16.67
$4.00	128,984	62.48
$5.00	96,747	83.30
$8.00	48,320	166.79
$10.00	32,204	250.26
$15.00	16,118	500.02
$20.00	8,076	997.93
$40.00	6,715	1,200.19
$50.00	5,047	1,596.84
$100	1,508	5,344.33
$200	406	19,850.37
$400	201	40,095.77
$1,000	25	322,370.00

*The number of actual prizes may vary based on sales, distribution, testing, and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.70. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 358 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 358, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200205969
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: September 12, 2002

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Public Hearing on October 10, 2002 @ 10:00 a.m.

A public hearing to receive public comments regarding proposed new rule, 16 TAC §402.558, relating to bingo/card paper at 10:00 a.m. on October 10, 2002, at the Texas Lottery Commission, Commission Auditorium, First Floor, 611 E. Sixth Street, Austin, Texas 78701. Notice of Assistance at Public Meetings. Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or braille, are requested to contact Michelle Guerrero at (512) 344-5113 at least four (4) work days prior to the meeting so that appropriate arrangements can be made.

TRD-200205997
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: September 13, 2002

♦ ♦ ♦

Manufactured Housing Division

Notice of Administrative Hearing

Wednesday, October 16, 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 Gilbert Vera regarding denial of a license pursuant to Sections 7(j)(8) and 7(k) of the Act and Section 80.123(j) of the Rules. SOAH 332-03-0034. Department MHD2002001572-RH.

Contact: Jim R. Hicks, P.O. Box 12489, Austin, Texas 78711-2489, (512) 475-3589, jhicks@tdhca.state.tx.us

TRD-200205995
Bobbie Hill
Executive Director
Manufactured Housing Division
Filed: September 13, 2002

♦ ♦ ♦

Notice of Public Hearing (Hearing Date: October 28, 2002)

Notice is hereby given of a public hearing to be held by the Manufactured Housing Division of the Texas Department of Housing and Community Affairs (the "Department") at 9:00 a.m. on Monday, October 28, 2002 at 507 Sabine Street, 4th Floor Boardroom, Austin, Texas 78701. The public hearing is to accept comments on new §80.136 to rule 10 Texas Administrative Code, §80 (West Pamphlet 2002) ("Rules"), concerning manufactured housing. The proposed new section is published in the September 20, 2002, Texas Register.

All interested parties are invited to attend such public hearing to express their views with respect to the proposed manufactured housing rules. Questions or requests for additional information may be directed to Sharon S. Choate at the Manufactured Housing Division of the Texas Department of Housing and Community Affairs, 507 Sabine Street, 10th Floor, Austin, Texas 78701, telephone (512) 475-2206, or email at schoate@tdhca.state.tx.us.

Persons who intend to appear at the hearing and express their views are invited to contact Sharon S. Choate in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their comments in writing to Sharon S. Choate prior to the date scheduled for the hearing. Written comments may be sent to the Manufactured Housing Division of the Texas Department of Housing and Community Affairs, P. O. Box 12489, Austin, Texas 78711-2489 or comments may be faxed to (512) 475-4250.

This notice is published and the above described hearing is to be held in satisfaction of the requirements of the Texas Manufactured Housing Standards Act, Tex. Rev. Civ. Stat. Ann. art. 5221f (Vernon 2002) and 10 Texas Admin. Code (West Pamphlet 2002).

Individuals who require auxiliary aids for this meeting should contact Gina Arenas, ADA Responsible Employee, at (512) 475-3943, or Relay Texas at 1 (800) 735-2989 at least two days prior to the meeting so that appropriate arrangements can be made.

TRD-200206088
Bobbie Hill
Executive Director
Manufactured Housing Division
Filed: September 18, 2002

♦ ♦ ♦

North Central Texas Council of Governments

Request for Proposals for a Rail Corridor Study - Engineering Services

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 (NCTCOG) is seeking proposals from qualified firms or individuals to assist NCTCOG staff with engineering services for the implementation of passenger rail service recommendations identified in the Mobility 2025 Update: The Metropolitan Transportation Plan. The consultant effort should result in a level of design that allows an accurate estimate of project costs and impacts. The resultant technical and financial information will be a basis for subsequent funding and implementation decisions. An objective of the work is to investigate the merits of sound configurations and designs. These investigations require in-depth analysis of all components, their interrelationships, and their costs. In addition, environmental requirements are completed. Contracts are being negotiated with consultants in the areas of legal/rail operations and planning/public participation. NCTCOG will be responsible for the fourth major area of work associated with the project, the travel demand forecasting. NCTCOG will serve as the overall project manager in partnership with the transportation authorities.

Due Date

Proposals must be submitted no later than 5 p.m. Central Daylight Time on Friday, October 18, 2002, to Barbara Maley, 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 Barbara Maley, (817) 695-9278.

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-200206001
R. Michael Eastland
Executive Director
North Central Texas Council of Governments
Filed: September 16, 2002

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Texas Parks and Wildlife Department

Request for Proposals

Texas Parks and Wildlife Department (TPWD) is requesting Section 6 proposals for fiscal year 2003. Section 6 grants are federal aid funds administered through the Endangered Species Program of the U.S. Fish and Wildlife Service. Projects must concern a species (or a suite of species) that is federally listed as threatened or endangered or that is a species of concern for listing. Topics considered high priority include 1) research concerning the management of rare species in relation to habitat change and fragmentation, including the management and protection of rare species on private lands, (2) status surveys, habitat characterization and ecological studies leading to specific recommendations for the management of rare plants and animals and (3) innovative projects addressing endangered species education and outreach.

The amount of funding available for individual projects varies; however, most projects average $25,000 per year and are 1-3 years in length (private consultant contracts are limited to less than $10,000 per year). Section 6 funds are made available on 3:1 matching basis (federal:state). TPWD requires its contractors to provide the 25% match. The match may be in the form of salaries, in-kind services, etc., and may exceed 25%. TPWD may circulate proposals received (without author's name if requested) for peer review. TPWD staff

may then work with the proposal author to modify the project to both parties' satisfaction.

Proposal Guidelines

Proposals should provide the following information:

1. Need. State the problem which needs to be solved wholly or in part by this research. Include a brief discussion of the literature review relative to the problem.

2. Objective. State precisely the intended outputs from the effort, indicating the quality and the time of accomplishment.

3. Expected Results or Benefits. Describe how the results will be used and how their use will resolve the need described.

4. Approach. Describe how the research will be carried out. Include the methods(s) to be employed and the schedule to be followed. If the work (or major portion of the work) will be performed under an agreement with a third party, such as a university, identify the performer. Also, include the name of the principal investigator.

5. Location. Identify where the work will be done. If the research involves field work, provide the location of the field work in addition to the location of the research facility.

6. Estimated Cost. Provide the estimated cost, by year, for completion of the objective.

The deadline for receipt of proposals is November 1, 2002.

Proposals should be sent to Gareth Rowell, Texas Parks and Wildlife Department, 3000 IH 35, South, Suite 100, Austin, TX 78704; (512) 912-7011; e-mail (gareth.rowell@tpwd.state.tx.us).

TRD-200206014
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Filed: September 16, 2002

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Texas Department of Protective and Regulatory Services

Notice of Opportunity for Public Comment

The Texas Department of Protective and Regulatory Services (PRS) will receive public testimony on Friday, September 27, 2002, from 8:30 a.m. until noon at the John H. Winters Building, Room 125E, 701 West 51st Street, Austin Texas on the following proposed rules: 40 TAC, Chapters 746 and 747-rules setting forth new Minimum Standards for Child-Care Centers and Homes; 40 TAC, Chapter 745, Subchapter P-new rules setting forth requirements for a Day Care Administrator's Credential Program; and 40 TAC, Chapter 745, Subchapter Q-new rules setting forth requirements for a High School Alternative Certificate in Child Care. These rules were published in the *Texas Register* on August 16, 2002 (27 TexReg 7389) and can be found at: http://texinfo.library.unt.edu/texasregister/2002.html. They also appear on the PRS website at: http://www.tdprs.state.tx.us/Child_Care/Child_Care_Standards_&_Regulations/.

In lieu of or in addition to oral testimony, the public may comment by September 30 as follows: e-mail to msc@tdprs.state.tx.us; telephone 512-438- 3262; or write to PRS Attn: CCL-Adams; Mail Code E-550; PO Box 149030; Austin TX 78714-9030.

TRD-200206052
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Filed: September 17, 2002

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Public Utility Commission of Texas

Application for Approval of Transmission Cost of Service and Wholesale Transmission Service Charge

Notice is given to the public of the filing with the Public Utility Commission of Texas of a application for approval of transmission cost of service and wholesale transmission service charge.

Docket Title and Number: Application of Magic Valley Electric Cooperative, Inc. for Approval of Transmission Cost of Service and Wholesale Transmission Service Charge, Docket Number 26181.

Persons who wish to comment on the action sought should contact the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than August 16, 2002. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136. All comments should reference Docket Number 26181.

TRD-200206066
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 17, 2002

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Notice of Amendment to Interconnection Agreement

On September 13, 2002, Southwestern Bell Telephone, LP doing business as Southwestern Bell Telephone Company and Lone Star Telephone, 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 26641. 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 26641. 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 October 16, 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 26641.

TRD-200206063
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 17, 2002

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Notice of Amendment to Interconnection Agreement

On September 13, 2002, Southwestern Bell Telephone, LP doing business as Southwestern Bell Telephone Company and SBC Advanced Solutions, 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 26640. 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 26640. 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 October 16, 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 26640.

TRD-200206065
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 17, 2002

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Notice of Application for a Certificate of Convenience and Necessity for a Proposed Transmission Line

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application filed on September 6, 2002, for a certificate of convenience and necessity to construct a double-circuit 345 kV transmission line in Ellis County, Texas. The name of this project is the Mustang Creek-Ennis-Tractebel II 345 kV Transmission Line Project.

Docket Style and Number: Application of Oncor Electric Delivery Company (Oncor) for Certificate of Convenience and Necessity for Proposed 345 kV Transmission Line in Ellis County. Docket Number 26608.

The Application: Oncor proposes to construct a double-circuit 345 kV transmission line connecting its proposed Mustang Creek Switching Station located north of U.S. Highway 287 and west of Old Boyce Road to its proposed Ennis-Tractebel II Project located south of U.S. Highway 287 near Bardwell Lake in Ellis County, Texas.

Tractebel Power Inc. (Tractebel) is constructing a 687 MW power plant (Ennis-Tractebel II) in Ennis, Texas. The plant is expected to go into trial operation on or before June 1, 2005 with commercial operation by January 1, 2006. Tractebel has requested an interconnection with Oncor's transmission system in order to transmit electric power from the plant to the customers. Oncor proposes the construction of Mustang Creek Switching Station (Mustang Creek) in the Limestone-Watermill

345 kV line and a double-circuit 345 KV line from Mustang Creek to Ennis Tractebel II to provide the requested interconnection. The proposed interconnection will allow Ennis-Tractebel II to transmit power from the plant to electric customers in Texas.

The recommended preferred route lies entirely within Ellis County, Texas in a predominantly rural area located just to the west of approaching urban development associated with the City of Ennis. Oncor proposes to use a self-supporting, double-circuit tangent single pole design (concrete or steel, or a combination of the two) with davit arms. The typical structure height will be 105 feet but could vary between 100 to 150 feet depending upon terrain. The length of the proposed transmission line will be approximately four to five miles.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll- free) 1-800-735-2989. All comments should reference Docket Number 26608.

TRD-200205970
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 12, 2002

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Notice of Application for a Certificate to Provide Electric Service

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on September 13, 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 APS Energy Services for Retail Electric Provider (REP) certification, Docket Number 26638 before the Public Utility Commission of Texas.

Applicant's requested service area by customers includes Pinnacle West Capital Corporation, Arizona Public Service Company, Pinnacle West Energy, SunCor Development Company, and El Dorado Investment Company.

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 October 4, 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 No. 26638.

TRD-200206009
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 16, 2002

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On September 9, 2002, Central Texas Communications, Inc. filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60243. Applicant intends to discontinue basic local telephone service in the City of San Angelo.

The Application: Application of Central Texas Communications, Inc. for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 26558.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than October 2, 2002. Hearing and speech-impaired individuals with text telephones (TTY) may contact the Commission at (512) 936-136 or toll free at 1-800-735-2989. All comments should reference Docket Number 26558.

TRD-200205956
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 11, 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 September 10, 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 Adirondack Area Network for a Service Provider Certificate of Operating Authority, Docket Number 26625 before the Public Utility Commission of Texas.

Applicant intends to provide T1-Private Line, Switch 56 KBPS, Frame Relay, and Fractional T1 services.

Applicant's requested SPCOA geographic area includes the entire State of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-800-782-8477 no later than October 2, 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 26625.

TRD-200205971
Rhonda Dempsey
Rules Coordinator
Public Commission of Texas
Filed: September 12, 2002

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Notice of Intent to File Pursuant to Public Utility Commission of Texas Substantive Rule §26.215

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission), a long run incremental cost (LRIC) study pursuant to the commission's Substantive Rule 26.215

Docket Title and Number. Southwestern Bell Telephone Company Application for Approval of LRIC Study for Primary Rate ISDN Smart-Trunk 2 B Channel Transfer and Redirected Number Features Pursuant

to the commission's Substantive Rule §26.215 on September 23, 2002, Docket Number 26633.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 26633. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Customer Protection Division at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200205993
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 13, 2002

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Notice of Interconnection Agreement

On September 12, 2002, United Telephone Company of Texas, Inc. doing business as Sprint, Central Telephone Company of Texas doing business as Sprint, and Universal Telecom, Inc., collectively referred to as applicants, filed a joint application for approval of interconnection agreement under Section 252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2002) (PURA). The joint application has been designated Docket Number 26634. The joint application and the underlying interconnection agreement is available for public inspection at the Public Utility Commission of Texas (commission) offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 26634. 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 October 13, 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 26634.

TRD-200205994
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 13, 2002

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Notice of Interconnection Agreement

On September 13, 2002, Valor Telecommunications of Texas, LP and Metro Teleconnect Companies, Inc., collectively referred to as applicants, filed a joint application for approval of an 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 26639. The joint application and the underlying interconnection agreement are available for public inspection at the Public Utility Commission of Texas (commission) offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 26639. 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 October 16, 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 26639.

TRD-200206064
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 17, 2002

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Project No. 25819 Notice of Workshop Concerning Transmission Constraints Affecting Wind Power Generators

The Public Utility Commission of Texas seeks public input on determining how much economically viable wind power potential exists in West Texas, and on options for ensuring that transmission service is adequate to deliver wind power to customers. The commission will conduct a public workshop on this topic on Monday, October 21, 2002 beginning at 9:30 a.m. in the Commissioners' Hearing Room, 7th floor, William B. Travis State Office Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 25819, *PUC Proceeding to Address Transmission Constraints Affecting West Texas Wind Power Generators.*

The commission seeks public comment on the following questions.

1. What factors determine a site's economic viability for wind power? Wherever possible, please discuss how each factor may be quantified. Please list only those factors that tend to vary from one site to another. Do not include the production tax credit or renewable energy credits. Assume adequate transmission availability.

2. Using the following table, please assign weights to the factors you listed in response to Question 1. Distribute the weights so that the sum is 1.

Factor	*Weight*
1.	
2.	
(Add as needed)	
Sum of weights:	1.0

In order to ensure the confidentiality of competitively sensitive information, responses to Question 2 may be submitted under the protective order filed in this project. Responses will be aggregated and released in a manner that does not permit identification of any individual company's weighting strategy.

3. What site conditions would be necessary for wind power to be economically viable without the production tax credit? Please answer using three scenarios: one assuming current natural gas prices, one assuming natural gas prices of $5/MMBtu, and one assuming natural gas prices of $7/MMBtu. Assume adequate transmission availability in each case.

4. In your estimation, how many megawatts (MW) of wind power could be developed in an economically sustainable manner in Texas assuming extension of the federal production tax credit through 2006? What is the basis of this estimate? How would your estimate change assuming no extension past 2004?

5. Please describe a methodology for (a) estimating a region's economically viable potential wind power, in MW, and (b) determining the geographic distribution of this potential. The methodology should be capable of obtaining a regional MW capacity estimate by aggregating local MW estimates, with local estimates based on observable inputs such as topography, land use, climate, etc. Assume adequate transmission availability.

6. The Public Utility Regulatory Act (PURA) §39.203(e) permits the commission to require an electric utility or a transmission and distribution utility to construct or enlarge facilities to ensure safe and reliable service for the state's electric markets. Does PURA §39.203(e) or any other statutory provision give the commission authority to order the planning and construction of transmission to serve areas with significant economic potential for wind power *in the absence of an interconnection agreement with a specific developer?* To what extent, if any, is this authority affected by the Legislature's goal to have 2,000 MW of new renewable generating capacity installed in Texas by 2009?

7. Does the commission have authority to pre-certify the need for additional transmission lines and/or transmission routes? What interim steps (e.g., purchase of right-of-way) should be included in pre-certification to facilitate system planning and the ultimate construction of the transmission facilities, and how should their costs be treated?

8. What transmission, market or other issues limit the further development of wind power in areas outside of ERCOT?

Responses to these questions should be filed in Central Records no later than 3:00 p.m. Monday, October 14, 2002. Responses filed under the protective order in effect for these proceedings should comport with commission Procedural Rule §22.71, relating to Filing of Pleadings, Documents and Other Materials. Further inquiries should be directed to David Hurlbut, senior economist, Market Oversight Division, at 512-936-7387. Hearing and speech- impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Project Number 25819.

TRD-200206037
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 16, 2002

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Project Number 26470 Notice of Workshop on Rate Filing Package for Transmission and Distribution Investor-Owned Utilities

The Public Utility Commission of Texas (commission) will hold a workshop regarding the development of a rate filing package for transmission and distribution investor- owned utilities pursuant to §22.243(b) relating to Rate Change Proceedings on Friday, October 11, 2002 at 9:00 a.m. in the Commissioner's Hearing Room, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 26470, *Rate Filing Package for Transmission and Distribution Investor-Owned Utilities*, has been established for this proceeding.

By September 30, 2002, the commission staff will make available in Central Records under Project Number 26470 a copy of a draft rate filing package for discussion at the workshop.

Questions concerning the workshop or this notice should be referred to Ruth Stark, Director of Accounting, Financial Review Division, (512)936-7460 or ruth.stark@puc.state.tx.us. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200206067
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 17, 2002

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Stephen F. Austin State University

Notice of Consultant Contract Amendment

In compliance with the provisions of Chapter 2254, Subchapter B, Texas Government Code, Stephen F. Austin State University furnishes this notice of amendment to the University's contract with consultant Dr. John W. Moore of Penson-Strawbridge, 924 Summerbrooke Drive, Tallahassee, Florida 32312. The original contract was in the sum of $7,000 plus expenses. The contract was amended in an additional sum of $22,000 plus expenses.

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) 468-2201.

TRD-200206069
R. Yvette Clark
General Counsel
Stephen F. Austin State University
Filed: September 17, 2002

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Notice of Consultant Contract Availability

This request for consulting services is filed under the provisions of the Government Code, Chapter 2254.

Stephen F. Austin State University, Nacogdoches, Texas, requests proposals from real estate firms to undertake the sale of University property known as the Dairy Farm

The property is located on the north side of the road, 1.28 miles from Loop 224 on Hwy. 21 East, Nacogdoches County, Nacogdoches, TX. The legal description of the Dairy Farm is as follows: 215.16 acres of the Vital Flores Grant #31 and City Block 82. Approximately 15 acres are in the city limits of Nacogdoches. The property includes a small brick farmhouse and several barns and storage sheds. Improvements are of limited value.

The consultant selected for this project must provide evidence of the skills, qualifications, knowledge and experience necessary to complete the sale of the property. The proposal should include references for real estate sales similar in size and scope, fee proposal, the agent to be assigned to the project and the proposed agent's skills, qualifications and knowledge showing experience with property sales of this size and type. The firm or individual selected to perform this project will be chosen on the basis of competitive proposals received in response to this request for proposals.

Proposals must be received in the office of the Director of Purchasing, Stephen F. Austin State University, P. O. Box 13030, 2124 Wilson Drive, Nacogdoches, Texas 75962 by 5:00pm October 21, 2002 in order to be considered. Please contact John Rulfs 936/468-4341 for additional information about the property.

TRD-200206038
R. Yvette Clark
General Counsel
Stephen F. Austin State University
Filed: September 16, 2002

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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 Dr. David McFarland of the consultant firm Penson-Strawbridge, 924 Summerbrooke Drive, Tallahassee, Florida 32312. The original contract was in the sum of $8,900 plus expenses. The contract will be renewed in an additional sum of $7,800 plus expenses.

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) 468-2803.

TRD-200206068
R. Yvette Clark
General Counsel
Stephen F. Austin State University
Filed: September 17, 2002

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Texas Department of Transportation

Request for Proposals - Highway Safety Plan

In accordance with 43 TAC §25.901, et seq., the Texas Department of Transportation is requesting project proposals to support the traffic safety goals and strategies of the program areas listed. These goals and strategies are the basis for the FY 2004 Highway Safety Performance Plan. As alcohol-related crashes are the leading cause of traffic fatalities in Texas, proposals to directly reduce driving while impaired are

especially sought. Projects to improve occupant protection use are also highly desired. Proposals for occupant protection projects that will provide a 50% cost share in year 1 and 75% cost share in years 2 and 3 will be eligible for special funding. Each proposal must state which goal(s) and strategy(ies) for the Highway Safety Plan (HSP) program area it will support. Projects to develop an employer-based traffic safety education network are desired. Eligible organizations are state and local governments, educational institutions, and public or non-profit organizations. Eligible, non-governmental organizations are subject to a pre-award audit prior to any grant approval. Proposals are due no later than 5 p.m., December 16, 2002.

Project Selection Process: The Texas HSP is developed through a strategic performance planning process, with the selection of projects based on problem identification, project selection, and review of proposals. Traffic safety managers will review and evaluate each proposal for applicability to Texas' traffic safety problems. Each qualifying project proposal will be scored against a number of selected criteria. Criteria include strength of problem identification supported with verifiable, current, and applicable documentation of the state or local traffic safety problem (limited to a maximum of 350 words); quality of the proposed solution plan (limited to a maximum of 350 words); realistic performance goals; time-framed action plan; cost eligibility; amount of matching funding proposed, and necessity and reasonableness of budget. 100% match is required for proposals that include the purchase and distribution of child passenger safety seats or other occupant protection devices and supplies. Proposals for Comprehensive and Safe & Sober Selective Traffic Enforcement Projects (STEPs) must not include more than 50% speed enforcement. Proposals for education, training, or presentations using public schools must include written support from target schools that the end product will be included in curriculum and verification of coordination and commitment from the Texas Education Agency. Proposals for the development or implementation of educational or offender courses must be submitted by the responsible state agency or responsible training organization. Separate documents with information pertaining to the submitting agency's qualifications, commitment, availability of external resources, task force associations, or previous traffic safety or related experience may also be attached or included with the proposal. Once the scoring process is complete, proposed projects are assigned priority for available funding. Selected proposals will become projects in the Texas HSP expected to begin in federal fiscal year 2004 (October 1, 2003). Eligible and worthwhile projects may be initiated prior to this date if sufficient funding is available. Proposals selected for inclusion in the FY 2004 HSP become cost reimbursable grants-in-aid agreements, and contracts. Contracts with vendors will be made through the state purchasing process, not through this request for proposal process. All information resource-related activities will be subject to TxDOT information resource procurement procedures.

HSP Review and Approval: The HSP will be submitted to the Transportation Commission for approval. Upon approval, the HSP is submitted to the Governor's Office and forwarded to the federal government for review and comment.

HSP Implementation: The HSP becomes operational on October 1 of every year. Funds are to be used to support state problem identification, planning and implementation of a program to reduce crashes, deaths and injuries on Texas roadways. The traffic safety program is designed to implement worthwhile projects to be assumed by the sponsoring agency, not as financial support for continuing operation. Therefore, in an effort to preserve the "seed" money concept, Texas Traffic Safety Program project grant agreements supported with non-dedicated federal funds are limited to the length of the proposed grant period and usually do not receive extended funding beyond three years. Also, "supplanting" (use of federal funds to support personnel or an activity that is already supported by local or state funds) is prohibited. Funding is also provided from state, local, and other federal and private sources.

HSP Program Areas and Goals: Proposals are being solicited for the following program areas, goals and strategies:

1. Police Traffic Services: selective traffic enforcement projects to apprehend reckless drivers, enforce posted speed limits and other traffic law violations, and specialized training for traffic law enforcement officers and judicial system officials. Proposals are specifically sought for projects to establish and maintain a liaison between the Texas Department of Transportation and local law enforcement agencies.

* Goal:

To increase effective enforcement and adjudication of traffic safety related laws to reduce fatal and serious injury crashes

To increase enforcement of traffic laws for commercial vehicles

* Strategies:

Increase enforcement of traffic safety-related laws and the adjudication of all traffic law violations

Increase training in traffic law enforcement (TLE) and adjudication

Increase TLE technical and managerial support to local enforcement agencies and highway safety professionals

2. Alcohol and Other Drug Countermeasures: STEPs to apprehend impaired drivers, specialized law enforcement and judicial training, public information programs on impaired driving, various youth alcohol education programs promoting traffic safety. Proposals are specifically sought for drug impairment training for educational professionals, and training in evaluation and classification of drug impaired drivers for law enforcement officers

* Goals:

To decrease the number of drivers under age 21 involved in DWI-related crashes

To reduce DWI-involved crashes, fatalities and injuries

* Strategies:

Increase alcohol and other drug traffic safety enforcement

Increase alcohol and other drug detection awareness training for traffic safety advocates

Enhance the state alcohol offender education programs

Coordinate and/or conduct public information and education

Improve the coordination and administration of DWI by between law enforcement and the judiciary at the community level

3. Emergency Medical Services: traffic safety related training for rural emergency medical service providers, public education, and injury prevention

* Goal:

To improve EMS care and support provided to motor vehicle crash trauma victims in rural areas

* Strategies:

To increase the availability of EMS training in rural areas

Increase EMS involvement in local community safety efforts

4. Occupant Protection: STEPs and comprehensive programs to promote correct usage of safety belts and child safety seats, use surveys, and evaluations

* Goal:

To increase overall and correct occupant protection use

* Strategies:

Increase enforcement of occupant protection laws

Provide occupant protection training and education

Promote and support occupant protection projects at the community level

Increase public information and education campaigns

Conduct evaluation of results of occupant protection use

5. Traffic Records: single or joint efforts to improve the collection and dissemination of state or local traffic safety data

* Goals:

To improve the timeliness, accuracy, quality, and availability of crash record data.

To improve linkages between traffic records databases

To improve the data collection of trauma data statewide

* Strategies:

Develop a new traffic crash records information system

Support traffic crash analysis efforts

Support implementation of an EMS data system and data links to traffic records

6. Roadway Safety: traffic safety and/or traffic engineering education.

* Goals:

To decrease work zone traffic crash-related fatalities and injuries by identifying roadway safety problems

To increase knowledge of roadway safety and current technologies among people involved in engineering, construction, and maintenance areas at both the state and local level

* Strategies:

Provide traffic safety problem identification and training to local jurisdictions

Conduct program assessment of Roadway Safety

7. Motorcycle Safety: public education to increase helmet use and reduce the number of motorcycle crashes

* Goal:

To reduce the number of motorcycle-related fatalities and serious injuries

* Strategies:

Conduct public information and education efforts

Evaluate, assess, and communicate motorcycle injury and fatality trends

8. Planning and Administration: Effective and efficient management of the Texas Traffic Safety Program

* Goals:

Provide the operation and administration of the Texas Traffic Safety Program in compliance with state and federal laws, regulations and procedures

Ensure the TxDOT policies and procedures for operation of the Traffic Safety Program are current

* Strategies:

Provide and comply with procedures for highway safety planning, project and program development, and program implementation

9. Safe Communities: traffic safety problem identification, plan development, and program implementation for selected cities and counties

* Goal:

To prevent traffic related fatalities and injuries through establishing integrated community traffic safety programs

* Strategies:

Provide training programs on how to initiate and conduct community based programs

Support the Safe Communities process

Provide management support to implement community traffic safety programs

10. Driver Education and Behavior: driver education, and public information and education efforts to reduce risky traffic behaviors likely to endanger people or property

* Goal:

To increase public knowledge, perception, and understanding of traffic safety

* Strategies:

Develop and implement public information and education efforts on traffic safety issues and programs

Provide assistance to update driver's education curriculum

Conduct and assist local, state, and national traffic safety campaigns

Provide opportunities for traffic safety advocates to increase their knowledge of programs and issues

11. Pedestrian/Bicycle Safety: traffic law enforcement, public education and community programs

* Goals:

To decrease motor vehicle-related pedestrian and bicycle fatalities and injuries

To increase pedestrian and bicycle safety knowledge and awareness

* Strategies:

Identify problem locations/areas where conflict between motor vehicles and pedestrians/bicycles is high.

Promote public information and education efforts and training to lessen the motor vehicle/pedestrian/bicycle potential for conflict

12. Commercial Vehicle Safety: traffic law enforcement and public education programs dealing with large commercial vehicles

* Goals:

To increase traffic safety knowledge, perception, understanding, and skills for sharing the roadway with commercial vehicles

To increase enforcement of traffic laws for commercial vehicles.

* Strategies:

Provide information and education materials to educate the public on sharing the road with commercial vehicles

Incorporate commercial vehicle Public Information and Education (PI&E) materials into the driver-training curriculum

Develop partnerships with commercial vehicle industry to increase traffic safety

Increase enforcement of traffic safety laws for commercial vehicles

Project Proposals: Current project proposal application forms and instructions, plus other related documents are available at the TxDOT internet site:

www.dot.state.tx.us/trafficsafety/grants

or upon request by contacting the Traffic Operations Division, Traffic Safety Section, attention Mr. Bill Strawn at 512/416-2613 or from the Traffic Safety Specialist at the nearest TxDOT district office. Proposals may be submitted in writing, or electronically under the electronic signature key of an authorized official, to the nearest TxDOT District Office, Attention: Traffic Safety Specialist or mailed directly to Susan N. Bryant, Traffic Operations Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483.

Authority and Responsibility: The traffic safety grant derives from the National Highway Safety Act of 1966 (23 USC §401, et seq.), and the Texas Traffic Safety Act of 1967 (Transportation Code, Chapter 723). An integral part of the Texas Department of Transportation and working through the department's 25 districts for local projects, the program is administered at the state level by the department's Traffic Operations Division. The executive director of the department is the designated Governor's Highway Safety Representative.

TRD-200206083
Richard D. Monroe
General Counsel
Texas Department of Transportation
Filed: September 18, 2002

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Texas Water Development Board

Request for Proposals for Flood Protection Planning

The Texas Water Development Board (Board) requests, pursuant to 31 Texas Administrative Code (TAC) §355.3, the submission of proposals leading to the possible award of contracts to develop flood protection plans for areas in Texas from political subdivisions with the legal authority to plan for and abate flooding and which participate in the National Flood Insurance Program.

Flood protection planning applications may be submitted by eligible political subdivisions from any area of the State and will be considered and evaluated. In addition, applicants must supply a map of the geographical planning area to be studied.

Description of Planning Purpose and Objectives. The purpose of the flood protection planning grant program is for the State to assist local governments to develop flood protection plans for entire major or minor watersheds (as opposed to local drainage areas) that provide protection from flooding through structural and non-structural measures as described in 31 TAC §355.2. Planning for flood protection will include studies and analyses to determine and describe problems resulting from or relating to flooding and the views and needs of the affected public relating to flooding problems. Potential solutions to flooding problems will be identified, and the benefits and costs of these solutions will be estimated. From the planning analysis, feasible solutions to flooding problems will be recommended. The flood protection planning study should also include an assessment of the environmental and cultural resources of the planning area as necessary to evaluate the flood control alternatives being considered. Solutions for localized drainage problems are not eligible for grant funding.

Description of Funding Consideration. Up to $671,250 has been initially authorized for FY 2003 assistance for flood protection planning from the Board's Research and Planning Fund. Up to 50 percent funding may be provided to individual applicants, with up to 75 percent funding available to areas identified in 31 TAC §355.10(a) as economically disadvantaged. In the event that acceptable proposals are not submitted, the Board retains the right to not award contract funds.

Deadline, Review Criteria, and Contact Person for Additional Information. Ten double-sided copies on recycled paper of a complete flood protection planning grant application including the required attachments must be filed with the Board prior to 5:00 p.m., December 15, 2002. Proposals can be directed either in person to Ms. Phyllis Thomas, Room 445, Texas Water Development Board, Stephen F. Austin Building, 1700 North Congress Avenue, Austin, Texas or by mail to Ms. Phyllis Thomas, Texas Water Development Board, P.O. Box 13231 - Capitol Station, Austin, Texas 78711-3231.

Applications will be evaluated according to 31 TAC 355.5. All potential applicants can contact the Board to obtain these rules and an application instruction sheet. Requests for information, the Board's rules and instruction sheet covering the Research and Planning Fund may be directed to Ms. Phyllis Thomas at the preceding mailing address, or by email at phyllis.thomas@TWDB.state.tx.us or by calling (512) 463-7926. This information can also be found on the Internet at the following address: http://www.twdb.state.tx.us.

TRD-200206050
Suzanne Schwartz
General Counsel
Texas Water Development Board
Filed: September 17, 2002

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Request for Proposals for Regional Facility Planning

The Texas Water Development Board (Board) requests, pursuant to 31 Texas Administrative Code (TAC) §355, Subchapter A, (as amended September 11, 2002), the submission of planning proposals leading to the possible award of contracts for regional facility planning. This planning will evaluate and determine the most feasible alternatives to meet water supply and/or wastewater facility needs, estimate the costs associated with implementing feasible water supply and/or wastewater facility alternatives, and identify institutional arrangements to provide water supply and/or wastewater services for areas in Texas. In order to receive a grant, the applicant must have the authority to plan, implement, and operate regional water supply and/or wastewater facilities.

Planning applications may be submitted by eligible political subdivisions from any area of the State. To be eligible for funding at least two political subdivisions must participate in the proposed study and more than one service area must be evaluated for feasibility of regional facilities. In addition, applicants must supply a map of the geographical planning area to be studied.

Description of Planning Purpose and Objectives. Note: Studies related to the development of regional water supply plans, the evaluation of water supply alternatives, and drought response plans as defined in Senate Bill 1, 75th Session, Texas Legislature are not eligible for funding under this Request for Proposals. The purpose of this program is for the State to assist local governments to prepare plans that document water supply and/or wastewater service facility needs, identify feasible regional alternatives to meet water supply and/or wastewater facility needs, and present estimates of costs associated with providing

regional water supply facilities and distribution lines and/or regional wastewater treatment plants and collection systems. The study should, at a minimum, include the following steps: Develop Problem Statement, Inventory Existing Conditions and Forecast Future Conditions and Needs, Formulate Planning Alternatives, Evaluate and Compare Each Planning Alternative, and Select Best Planning Alternative.

A water conservation plan and a drought management plan must be developed to ensure that existing and future sources are used efficiently and as a basis for confirming demand projections of future need. The Board's population and water demand projections will be considered in preparing projections. Discrete phases to implement regional water supply and/or wastewater facilities to meet projected needs will be identified. Environmental, social, and cultural factors for possible solutions identified in the plan should be evaluated. Cost estimates will be made for each respective implementation phase to determine the capital, operation, and maintenance requirements for a 30-year planning period. Separate cost estimates will be made for each regional water supply and/or wastewater system component, including the water conservation program.

Description of Funding Consideration. Up to $1,000,000 has been initially authorized for FY 2002 and FY 2003 assistance for regional facility planning from the Board's Research and Planning Fund. Up to 50 percent funding may be provided to individual applicants, with up to 75 percent funding available to areas identified in 31 TAC 355.10(a), as amended, as economically disadvantaged. In the event that acceptable proposals are not submitted, the Board retains the right to not award contract funds.

Deadline, Review Criteria, and Contact Person for Additional Information. Ten double-sided copies on recycled paper of a complete regional facility planning grant application including the required attachments must be filed with the Board prior to 5:00 p.m., November 6, 2002. Proposals can be directed either in person to Ms. Phyllis Thomas, Room 445, Texas Water Development Board, Stephen F. Austin Building, 1700 North Congress Avenue, Austin, Texas or by mail to Ms. Phyllis Thomas, Texas Water Development Board, P.O. Box 13231 - Capitol Station, Austin, Texas 78711-3231.

Applications will be evaluated according to 31 TAC §355.5, as amended. All potential applicants can contact the Board to obtain these rules and an application instruction sheet. Requests for information, the Board's rules and instruction sheet covering the Research and Planning Fund may be directed to Ms. Phyllis Thomas at the preceding mailing address, or by e-mail at phyllis.thomas@TWDB.state.tx.us or by calling (512) 463-7926. This information can be found on the Internet at the following address: http://www.twdb.state.tx.us.

TRD-200206051
Suzanne Schwartz
General Counsel
Texas Water Development Board
Filed: September 17, 2002

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Texas Workforce Commission

Plan Modification of the Strategic Five Year Workforce Investment Plan for the Title I Workforce Investment Act of 1998 and the Wagner-Peyser Act

The Texas Workforce Commission (Commission) is modifying the Strategic Five Year State Workforce Investment Plan (Plan) for the Title I Workforce Investment Act of 1998 (WIA) and the Wagner-Peyser Act.

This notice of the Plan modification provides the public, local workforce development board (board) chairs, board members, board staff, chief elected officials, local partners, other state agencies, representatives of businesses, representatives of labor organizations and other interested parties an opportunity to comment.

The draft of the Plan modification will be available for public inspection on September 27, 2002. You may view the draft at 101 East 15th Street Room 440T, Austin, Texas, or you may request a hard copy by calling Billie O'Dowdy, at (512) 936-0390. An electronic copy will be available on September 27, 2002 on the Texas Workforce Commission web site at: http://www.texasworkforce.org. From this site, select "WIA Plan Modification" under the News heading.

The Commission welcomes and invites all interested parties to provide input on the draft Plan modification. All comments must be submitted in writing. The deadline for submitting all comments is October 28, 2002 at 5:00 p.m. Comments may be submitted to: 101 East 15th Street, Room 440T, Attention: Billie O'Dowdy, Austin, Texas 78778-0001, faxed to 512-463-7379, or e-mailed to Ms. O'Dowdy at billie.o'dowdy@twc.state.tx.us.

TRD-200206098
John Moore
Assistant General Counsel
Texas Workforce Commission
Filed: September 18, 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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