TEXAS REGISTER

Volume 26 Number 45 November 9, 2001 *Pages 8917-9334*

PART III of III

This month's front cover artwork:

Artist: *Katherine Ross*
12th Grade
Rockwall High School

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

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

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

Texas Register, **(ISSN 0362-4781),** is published weekly, 52 times a year. Issues will be published by the Office of the Secretary of State, 1019 Brazos, Austin, Texas 78701. Subscription costs: printed, one year $150, six months $100. First Class mail subscriptions are available at a cost of $250 per year. Single copies of most issues for the current year are available at $10 per copy in printed format.

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

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

a section of the
Office of the Secretary of State
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Open Meetings

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

Notices are published in the electronic *Texas Register* and available on-line.
http://www.sos.state.tx.us/texreg

To request a copy of a meeting notice by telephone, please call 463-5561 if calling in Austin. For out-of-town callers our toll-free number is (800) 226-7199. Or fax your request to (512) 463-5569.

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

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

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

EMERGENCY RULES

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

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

TITLE 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 Pest Management Zone 5. The department is acting on behalf of cotton farmers in Zone 5, which includes Chambers, Colorado, Fayette, Galveston, Gonzales, Harris, Jefferson, Lavaca, Liberty, Orange, Waller, and Washington Counties.

The current cotton destruction deadline for Zone 5 is October 20. The cotton destruction deadline will be extended through November 19 for Zone 5. The department believes that changing the cotton destruction dates is both necessary and appropriate. This extension is effective only for the 2001 crop year.

Adverse weather conditions have created a situation compelling an immediate extension of the cotton destruction dates for Zone 5. The unusually wet weather prior to the cotton destruction period has prevented many cotton producers from destroying cotton by the October 20 deadline in Zone 5. A failure to act to extend the cotton destruction deadline could create a significant economic loss to Texas cotton producers in Zone 5 and the state's economy.

The emergency amendment to §20.22(a) changes the date for cotton stalk destruction for Zone 5 extending the deadline through November 19.

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 a pest management zone shall be destroyed, regardless of the method used, by the stalk destruction dates indicated for the zone. Destruction shall be accomplished by the methods described as follows:
Figure: 4 TAC §20.22 (a)

(b) - (c) (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 October 26, 2001.

TRD-200106610
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective Date: October 26, 2001
Expiration Date: November 15, 2001
For further information, please call: (512) 463-7588

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PROPOSED RULES

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

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

TITLE 1. ADMINISTRATION

PART 1. OFFICE OF THE GOVERNOR

CHAPTER 5. BUDGET AND PLANNING OFFICE

SUBCHAPTER B. STATE AND LOCAL REVIEW OF FEDERAL AND STATE ASSISTANCE APPLICATIONS

DIVISION 1. INTRODUCTION AND GENERAL PROVISIONS OF THE TEXAS REVIEW AND COMMENT SYSTEM

1 TAC §5.195

The Governor's Office proposes amendments to 1 TAC §5.195, concerning the Texas Review and Comment System. The proposed changes add 208 new programs for review, delete 32 programs no longer in existence or no longer of widespread interest and conform program numbers to current listings in the Catalog of Federal Domestic Assistance. The programs proposed to be added and deleted are based on responses to mailout questionnaires to all twenty-four regional councils of governments and all state agencies with TRACS coordinators.

Denise S. Francis, State Single Point of Contact, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state and local governments as a result of enforcing or administering the section.

Ms. Francis has determined that for each year of the first five years the section is in effect the public benefits anticipated as a result of enforcing or administering the section will be more effective use of public financial resources and increased information sharing and coordination among affected governmental entities. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to Denise S. Francis, State Single Point of Contact, Governor's Office of Budget and Planning, P.O. Box 12428, Austin, Texas 78711, (512) 463-1771, (e-mail dfrancis@governor.state.tx.us) for a period of 30 days following publication.

The amendments are proposed under the Government Code, Title 7, §772.004 and §772.005, and the Local Government Code, Chapter 391, (§391.008) which authorizes the Governor's Office to provide for review of state and local applications for grant and loan assistance and to establish policies and guidelines for review and comment. Chapter 391 of the Local Government Code requires certain applicants for state or federal assistance to submit their applications for review to the appropriate regional planning commissions and directs the governor to issue guidelines for carrying out such reviews.

No statutes are affected by these amendments.

§5.195. Program Coverage.

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

(c) Federal programs included for review under TRACS pursuant to these laws, plus selected other activities, including all direct federal and state development not specifically excluded by law, are shown, respectively, in Tables I and II. Copies of these tables may be obtained from the State Single Point of Contact, Governor's Budget and Planning Office, Post Office Box 12428, Austin, Texas 78711-2428 or may be accessed on the internet [~~Internet~~] at http://www.governor.state.tx.us/the_office/gts_tracs/TRACS/general_information.htm (This information is also available on the Governor's Office Internet site at www.governor.state.tx.us) [~~http://www.governor.state.tx.us/TRACS/index.html~~]. As required by state law (Government Code, §772.005), all state agencies must notify the Governor's Office when applying for federal funds.

Figure 1: 1 TAC §5.195(c)

Figure 2: 1 TAC §5.195(c)

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

Filed with the Office of the Secretary of State, on October 25, 2001.

TRD-200106467
Bob Pemberton
Assistant General Counsel
Office of the Governor
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 463-1771

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PART 2. TEXAS ETHICS COMMISSION

CHAPTER 7. FORMS

1 TAC §7.1

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

The Texas Ethics Commission proposes the repeal of 1 T.A.C. Chapter 7, §7.1, concerning forms and the adoption and revision of forms. The entire chapter is being repealed because the Commission has determined the information is redundant and unnecessary.

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

Ms. Lundquist also has determined that for each year of the first five years the repeal is in effect, the anticipated public benefit will be the removal of redundant and unnecessary rules from the Administrative Code.

Ms. Lundquist has also determined there will be no direct adverse effect on small businesses or micro-businesses because these rules do not apply to single businesses.

Ms. Lundquist has further determined there will be no economic costs to persons required to comply with the rules.

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

The repeal is proposed under Government Code, Chapter 571, Section 571.062, which provides authorization for the commission to adopt rules concerning the laws administered and enforced by the commission.

The proposed repeal of Chapter 7 affects no other codes, articles, or statutes.

§7.1. Adoption and Revision of Forms

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 October 31, 2001.

TRD-200106741
Tom Harrison
Executive Director
Texas Ethics Commission
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 463-5777

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CHAPTER 18. GENERAL RULES CONCERNING REPORTS

The Texas Ethics Commission proposes the repeal of 1 T.A.C. Chapter 18, regarding general rules concerning reports filed with the Texas Ethics Commission. The entire chapter is being deleted and replaced by new rules proposed concurrently with this notice of proposed repeal. The deletion will allow the Commission to propose new rules that will be consistent with the current requirements for filing reports with the Commission. The new chapter will be concise and easier to understand and apply by the Commission's filers and the general public.

Subchapter A (Forms and Reports, §§18.1, 18.3, 18.5, 18.7, 18.9, 18.11, 18.13, 18.15, 18.17, 18.19, 18.21, 18.23, and 18.25) contains general provisions regarding the adoption and revision of forms; the forms to be used by local filing authorities; notice requirements; substitution or replication of forms; the format for names, addresses, changes of address, telephone numbers, titles and designation of office; and the filing of duplicate reports. The Commission has determined that the scope and content of this subchapter is unnecessary and does not provide concise useful information for the Commission's filers and the general public. The subchapter will be replaced by new sections proposed concurrently with this repeal concerning the adoption and approval of forms; the provision of forms by local filing authorities; and the designation of office being sought or held.

Subchapter B (Corrected Reports, §§18.41, 18.43, 18.45, 18.47, and 18.49) contains general provisions on correcting a report filed with the Commission. The Commission has determined that the scope and content of this subchapter is unnecessary and does not provide concise useful information for the Commission's filers and the general public. The subchapter will be replaced by new sections proposed concurrently with this repeal concerning correcting reports and minor reporting errors.

Subchapter C (Late Reports, §§18.61, 18.63, 18.65, 18.67, and 18.69) contains general provisions concerning the determination, notification, and defense of late reports. The Commission has determined that the scope and content of this subchapter is unnecessary and does not provide concise useful information for the Commission's filers and the general public. The subchapter will be replaced by new sections proposed concurrently with this repeal concerning timely reports and complete reports and the filing of an affidavit of timely filing.

Subchapter D (Administrative Penalties, §§18.81, 18.83, 18.85, 18.87, 18.89, 18.91, 18.93, 18.95, and 18.97) contains general

provisions concerning the administrative penalties the Commission may impose for late reports; a provision on material reporting errors; and a provision on attorney's fees. The Commission has determined that the scope and content of this subchapter is unnecessary and does not provide concise useful information for the Commission's filers and the general public. The subchapter will be replaced by new sections proposed concurrently with this repeal concerning fines.

Subchapter E (Waiver of Fine, §§18.111, 18.113, and 18.115) contains general provisions concerning the Commission's jurisdiction to consider waiver requests; the administrative waiver of fines; and waiver of fines by the Commission. The Commission has determined that the scope and content of this subchapter is unnecessary and does not provide concise useful information for the Commission's filers and the general public. The subchapter will be replaced by new sections proposed concurrently with this repeal concerning the Commission's jurisdiction to consider waiver requests; the administrative waiver of fines; and waiver of fines by the Commission.

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

Ms. Lundquist also has determined that for each year of the first five years the repeal is in effect, the anticipated public benefit will be the deletion of rules that are confusing, redundant, or unnecessary.

Ms. Lundquist has also determined there will be no direct adverse effect on small businesses or micro-businesses because these rules do not apply to single businesses.

Ms. Lundquist has further determined there will be no economic costs to persons required to comply with the rule.

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

SUBCHAPTER A. FORMS AND REPORTS

1 TAC §§18.1, 18.3, 18.5, 18.7, 18.9, 18.11, 18.13, 18.15, 18.17, 18.19, 18.21, 18.23, 18.25

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

The repeal is proposed under Government Code, Chapter 571, Section 571.062, which provides authorization for the commission to adopt rules concerning the laws administered and enforced by the commission.

The proposed repeal of Chapter 18 affects no other codes or articles. It affects the statutes administered and enforced by the Commission as listed in Section 571.061, Government Code.

§18.1. Adoption and Revision of Forms.
§18.3. Forms Used by a Local Filing Authority.
§18.5. Notice.
§18.7. Notice of Forms To Be Used.
§18.9. Notice of Filing Obligations.
§18.11. Substitution or Replication of Forms.
§18.13. Names of Individuals.
§18.15. Address.
§18.17. Change of Address.
§18.19. Telephone Number.
§18.21. Title.
§18.23. Office.
§18.25. Required Filing of Duplicate Reports.

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 October 31, 2001.

TRD-200106736
Tom Harrison
Executive Director
Texas Ethics Commission
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 463-5787

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SUBCHAPTER B. CORRECTED REPORTS

1 TAC §§18.41, 18.43, 18.45, 18.47, 18.49

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

The repeal is proposed under Government Code, Chapter 571, Section 571.062, which provides authorization for the commission to adopt rules concerning the laws administered and enforced by the commission.

The proposed repeal of Chapter 18 affects no other codes or articles. It affects the statutes administered and enforced by the Commission as listed in Section 571.061, Government Code.

§18.41. Corrected Report.
§18.43. Voluntary Correction of Reporting Error.
§18.45. Required Correction of a Reporting Error.
§18.47. Notice of Reporting Error.
§18.49. Good Faith Affidavit.

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 October 31, 2001.

TRD-200106737
Tom Harrison
Executive Director
Texas Ethics Commission
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 463-5777

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SUBCHAPTER C. LATE REPORTS

1 TAC §§18.61, 18.63, 18.65, 18.67, 18.69

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

The repeal is proposed under Government Code, Chapter 571, Section 571.062, which provides authorization for the commission to adopt rules concerning the laws administered and enforced by the commission.

The proposed repeal of Chapter 18 affects no other codes or articles. It affects the statutes administered and enforced by the Commission as listed in Section 571.061, Government Code.

§18.61. Late Report.

§18.63. Preliminary Notice That Report Is Late.

§18.65. Determination That Report Is Late.

§18.67. Affidavit of Timely Report.

§18.69. Report More Than 30 Days Late.

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 October 31, 2001.

TRD-200106738
Tom Harrison
Executive Director
Texas Ethics Commission
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 463-5787

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SUBCHAPTER D. ADMINISTRATIVE PENALTIES

1 TAC §§18.81, 18.83, 18.85, 18.87, 18.89, 18.91, 18.93, 18.95, 18.97

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

The repeal is proposed under Government Code, Chapter 571, Section 571.062, which provides authorization for the commission to adopt rules concerning the laws administered and enforced by the commission.

The proposed repeal of Chapter 18 affects no other codes or articles. It affects the statutes administered and enforced by the Commission as listed in Section 571.061, Government Code.

§18.81. Material Reporting Error.

§18.83. No Fine for Certain Corrected Reports.

§18.85. Fine for a Late Report.

§18.87. Additional Fine for Title 15 Reports Filed Eight Days before an Election.

§18.89. Notice of Late Report and Fine.

§18.91. Additional Fine Assessed by the Commission.

§18.93. Report Must Be Filed.

§18.95. No Fine by a Local Filing Authority.

§18.97. Attorney's Fees.

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

Filed with the Office of the Secretary of State, on October 31, 2001.

TRD-200106739
Tom Harrison
Executive Director
Texas Ethics Commission
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 463-5787

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SUBCHAPTER E. WAIVER OF FINE

1 TAC §§18.111, 18.113, 18.115

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

The repeal is proposed under Government Code, Chapter 571, Section 571.062, which provides authorization for the commission to adopt rules concerning the laws administered and enforced by the commission.

The proposed repeal of Chapter 18 affects no other codes or articles. It affects the statutes administered and enforced by the Commission as listed in Section 571.061, Government Code.

§18.111. Jurisdiction To Consider Waiver Request.

§18.113. Administrative Waiver of Fine.

§18.115. Waiver by 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 October 31, 2001.

TRD-200106740
Tom Harrison
Executive Director
Texas Ethics Commission
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 463-5787

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CHAPTER 18. GENERAL RULES CONCERNING REPORTS

1 TAC §§18.1, 18.3, 18.5, 18.7, 18.9, 18.11, 18.13, 18.15, 18.17, 18.19, 18.21, 18.23, 18.25, 18.27

The Texas Ethics Commission proposes new 1 T.A.C. Chapter 18, §§18.1, 18.3, 18.5, 18.7, 18.9, 18.11, 18.13, 18.15, 18.17, 18.19, 18.21, 18.23, 18.25, and 18.27, regarding general rules concerning reports filed with the Texas Ethics Commission. The Commission has filed a proposed repeal of the current chapter concurrent with this new rule proposal. The current chapter contains confusing and unnecessary provisions. The new chapter will provide concise information that will be easier to understand and apply by the Commission's filers and the general public. The new provisions will cover the Commission's forms; provision of forms by local filing authorities; specification of office sought or held; timely reports; corrected reports; late reports; fines; and waiver of fines.

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

Ms. Lundquist also has determined that for each year of the first five years the rules are in effect, the anticipated public benefit will be clear, concise rules that are easy to understand and apply by the Commission's filers and the general public.

Ms. Lundquist has also determined there will be no direct adverse effect on small businesses or micro-businesses because these rules do not apply to single businesses.

Ms. Lundquist has further determined there will be no economic costs to persons required to comply with the rules.

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

The chapter is proposed under Government Code, Chapter 571, Section 571.062, which provides authorization for the commission to adopt rules concerning the laws administered and enforced by the commission.

The proposed new Chapter 18 affects no other codes or articles. It affects the statutes administered and enforced by the Commission as listed in Section 571.061, Government Code.

§18.1. Forms.

(a) The executive director shall prescribe forms for statements and reports required to be filed with the commission.

(b) The executive director may issue a certificate approving a form submitted to the commission for approval if the form:

(1) provides for the reporting of all information required on the prescribed form;

(2) is substantially similar in paper size and format to the prescribed form; and

(3) will not be confusing to those who use the form.

(c) A filer whose form has been approved by the executive director under Subsection (b) must submit a new form for approval if information required to be reported has changed since the original form was approved.

(d) A filer who files a report using computer software provided by the commission or using computer software that meets commission specifications for a standard file format must enter data for the report in accordance with the instructions provided for the software.

(e) A filer who files a report using computer software provided by the commission must use the most current version of the software.

§18.3. Provision of Forms by Local Filing Authority.

A local filing authority shall make the appropriate form available for use by persons required to file a report with that filing authority.

§18.5. Specification of Office.

When a filer is required to identify the office sought by a candidate or held by an officeholder, the filer shall list the title of the public office, including the district and, if the office is an office of a political subdivision, the name of the political subdivision.

§18.7. Timely Reports and Complete Reports.

(a) A report is timely if it is complete and is filed by the applicable deadline using the reporting method required by law.

(b) A report is late if it is:

(1) incomplete;

(2) not filed by the applicable deadline; or

(3) not filed by computer diskette, modem, or other means of electronic transfer and the filer is required by law to file using one of these methods.

§18.9. Corrected Reports.

(a) A filer may correct a report filed with the commission or a local filing authority at any time.

(b) A corrected report must clearly identify how the corrected report is different from the report being corrected.

(c) Except as provided by section 18.29(b), the late fine for a report that is corrected, other than a report due eight days before an election, is waived if:

(1) the original report was filed by the applicable filing deadline;

(2) the corrected report is complete and accurate; and

(3) the filer establishes, in accordance with subsection (e), that the original report was incomplete or incorrect because of a good-faith error.

(d) Except as provided by section 18.29(b), the late fine for a report due eight days before an election that is corrected is waived if:

(1) the requirements for waiver under subsection (c) are satisfied; and

(2) the corrected report corrects minor errors only.

(e) A filer who files a corrected report may submit an affidavit to establish that the original report was incomplete or incorrect because of a good-faith error. The affidavit must:

(1) explain the nature of the error that led to the filing of an incomplete report;

(2) state that the corrected report was filed promptly after the error became known to the filer; and

(3) establish that the filer did not intend to violate a reporting requirement at the time of filing the original report.

§18.11. Minor Reporting Error.

The following errors on a report are minor:

(1) one or more instances of an incorrectly reported or missing contribution required to be reported, if the total of correctly reported contributions does not vary more than five percent from the incorrect amount reported on the original report;

(2) one or more instances of an incorrectly reported or missing expenditure required to be reported, if the total of correctly reported expenditures does not vary more than five percent from the incorrect amount reported on the original report; or

(3) one or more reporting errors that the commission determines in context are minor.

§18.13. Fine for a Late Report.

(a) Except for a report due eight days before an election, the fine is $100 for:

(1) a late report required to be filed with the commission under Election Code chapter 254 or 257, Government Code chapter 302, Government Code chapter 305, or Government Code chapter 572; or

(2) a late report filed with the commission under Local Government Code chapter 159, subchapter C.

(b) The fine for a report due eight days before an election is $100 for each day that the report is late, up to a maximum fine of $10,000.

(c) A fine assessed under this chapter is in addition to any other sanction assessed under other law.

§18.15. Additional Fine.

(a) In addition to any other fine assessed under this chapter, the commission may vote to impose a fine against a filer whose report is more than 30 days late or who has not paid an assessed fine within 10 days after receiving the commission notice of lateness.

(b) A fine under this section is calculated by multiplying $1,000 by each 30-day period that the report is late.

(c) The aggregate amount of a fine assessed for one late report under this section may not exceed $10,000.

§18.17. Report Must be Filed.

The payment of a civil or criminal fine for failure to file a report, or for filing a report late, does not satisfy a filer's obligation to file the report. Late fines continue to accrue until the report is filed.

§18.19. Affidavit of Timely Filing.

A filer who has been notified by the commission that a report is late but who filed the report on or before the deadline may submit an affidavit to the executive director swearing that the report was timely filed.

§18.21. Jurisdiction to Consider Waiver Request.

A filer must file a complete report before the executive director or commission will consider a request to waive or reduce a fine assessed for failure to file a timely report.

§18.23. Administrative Waiver of Fine.

(a) A filer may request the executive director to waive a late fine by submitting an affidavit to the executive director that states facts that establish that:

(1) the report was filed late because of a medical emergency or condition that involved the filer, a family member or relative of the filer, a member of the filer's household, or a person whose usual job duties include preparation of the report;

(2) the filer is not an elected official, a candidate for election, or a salaried public servant, and the late report:

(A) was the first personal financial disclosure report required to be filed by the filer under Government Code chapter 572; and

(B) was filed no later than 30 days after the individual was notified that the report appeared to be late;

(3) the filer:

(A) had filed all previous reports by the applicable deadline;

(B) had no contributions, expenditures, or loans to report; and

(C) filed the report no later than 30 days after the filer was notified that the report appeared to be late;

(4) the filer reasonably relied on incorrect information given to the filer by the agency; or

(5) other administrative error by the agency.

(b) If, in the executive director's discretion, the affidavit establishes grounds for a waiver under this section, the executive director shall waive the fine.

§18.25. Waiver by Commission.

(a) A filer may request the commission to waive or reduce a late fine by submitting an affidavit to the executive director that states the filer's reasons for requesting a waiver or reduction.

(b) The commission may waive or reduce a late fine if the commission finds that a waiver or reduction is in the public interest and in the interest of justice. The commission shall consider the following before acting to waive or reduce a fine:

(1) the facts and circumstances supporting the filer's request for a waiver or reduction;

(2) the seriousness of the violation, including the nature, circumstances, consequences, extent, and gravity of the violation, and the amount of the fine;

(3) any history of previous violations by the filer;

(4) the demonstrated good faith of the violator, including actions taken to rectify the consequences of the violation;

(5) the fine necessary to deter future violations; and

(6) any other matter that justice may require.

(c) After hearing the waiver request, the commission by majority vote may affirm, reduce, or waive the fine.

§18.27. Sworn Complaints.

(a) The commission may consider the fine amounts established by this chapter in determining the amount of a fine to be assessed in a sworn complaint proceeding.

(b) The commission is not required to waive the fine for a respondent who files a corrected report but may consider the correction to be a mitigating factor in determining the amount of any fine.

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 October 31, 2001.

TRD-200106742
Tom Harrison
Executive Director
Texas Ethics Commission
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 463-5787

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PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 371. MEDICAID FRAUD AND ABUSE PROGRAM INTEGRITY

SUBCHAPTER E. OPERATING AGENCY RESPONSIBILITIES RULE

1 TAC §371.1002

The Texas Health and Human Services Commission (HHSC) proposes an amendment to §371.1002 in chapter 371, concerning the minimum collection goal for the Texas Department of Human Services that specifies the percentage of the amount of benefits granted by the department in error under the food stamp program or the program of financial assistance under chapter 31, Human Resources Code. Section 531.050 of the Texas Government Code directs the Health and Human Services Commission to set the minimum collection goal for each year. The amended §371.1002 sets out the minimum collection goal for state fiscal year 2002.

Mr. Don Green, Chief Financial Officer, has determined that for each year of the first five years the section is in effect, there will be no fiscal implications for the state or local governments as a result of administering or enforcing the section.

Mr. Green has also determined that for each year of the first five years that the section is in effect, the public benefit anticipated as a result of enforcing the section will be the determination of the minimum collection of overissuances in the Food Stamp and Temporary Assistance to Needy Families Programs that the Texas Department of Human Services will strive to collect. There will be no cost to small businesses or persons complying with the section as proposed. There will be no impact on local employment.

Comments may be submitted in writing to Sherry McCulley, Office of Investigations and Enforcement, Texas Health and Human Services Commission, P. O. Box 13247, Austin, Texas 78711, or e-mail at Sherry.McCulley@hhsc.state.tx.us. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The amended rule is proposed under the Texas Government Code, §531.033, which authorizes the Commissioner of Health and Human Services to adopt rules necessary to carry out the Health and Human Services Commission's duties under Chapter 531.

The amended rule implements Texas Government Code, §531.050.

§371.1002. Minimum Collection Goal.

(a) This rule sets the Texas Department of Human Services's minimum collection goal of the amount of benefits granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code, for the 2001 [~~2000~~] and 2002 [~~2001~~] state fiscal years.

(b) The minimum collection goal for state fiscal year 2001 [~~2000~~] is thirty percent (30%) [~~twenty-five percent (25%)~~] of the amount of benefits granted in error in both the food stamp and public assistance programs.

(c) The minimum collection goal for state fiscal year 2002 [~~2001~~] is thirty percent (30%) of the amount of benefits granted in error in both the food stamp and public assistance programs.

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 October 29, 2001.

TRD-200106619
Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 424-6576

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION

SUBCHAPTER A. GENERAL POLICIES AND PROCEDURES

10 TAC §1.7, §1.8

The Texas Department of Housing and Community Affairs (TDHCA) proposes new §1.7 and §1.8 to establish a process whereby the program funding decisions of TDHCA staff may be appealed to the executive director and to TDHCA's board of directors and whereby such decisions of the executive director may be appealed to the board. The new sections are necessary to comply with §2306.0321 of the Texas Government Code, as added by Senate Bill 322, 77th Session of the Texas Legislature.

Ruth Cedillo, Acting 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. Cedillo 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 more checks and balances for TDHCA funding decisions. There will be no effect on persons, small businesses or micro-businesses. There are no anticipated economic costs to persons, small businesses or micro-businesses who are required to comply with the sections as proposed.

Comments may be submitted to Anne O. Paddock, Deputy General Counsel, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas, 78711-3941 or by e-mail at the following address: apaddock@tdhca.state.tx.us.

The new sections are proposed under the Texas Government Code, Chapter 2306.

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

§1.7. Staff Appeals Process.

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

(1) Appeal file--The written record of an appeal that contains the applicant's appeal; the responses of Department staff, the executive director, and the board, as applicable; and the final decision.

(2) Applicant--A person who submits, or is preparing to submit, to the Department an application for Department funds or other assistance.

(3) Application--The written request for Department funds or other assistance in the format required by the Department including any exhibits or other supporting material.

(4) Board--The board of directors of the Texas Department of Housing and Community Affairs.

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

(6) Low-income housing tax credit--The credit against federal income tax as provided for in §42 of the Internal Revenue Code (42 U.S.C. §42.)

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

(b) Grounds. An applicant for funding or other assistance from the Department, other than low-income housing tax credits, may only appeal the disposition of its application by Department staff based on one or more of the following grounds.

(1) Misplacement of an application. All or a portion of the application is lost, misfiled, or otherwise misplaced by Department staff resulting in unequal consideration of the applicant's proposal.

(2) Mathematical error. In rating an application, the score on any selection criteria is incorrectly computed by the Department due to human or computer error.

(3) Procedural error. The application is not processed by Department staff in accordance with the application and selection rules in effect for the current application cycle.

(c) Appeal to the executive director. An applicant must file a written appeal with the Department not later than the fourteenth day after the date the Department publishes notice on its website of the results of the application evaluation process or, in the case of private activity mortgage revenue bond programs, after written notice has been provided to the applicant, whichever is earlier. The notice must include specific information relating to the disposition of each application, including the reasons for disqualification or summaries detailing the points awarded. The applicant must specifically identify the applicant's grounds for the appeal based on the disposition of its application. Upon receipt of an appeal, staff shall prepare an appeal file for the executive director's review. The executive director shall respond in writing to the appeal not later than the fourteenth day after the date of receipt of the appeal. The executive director may take one of the following actions.

(1) Concur with the appeal and make the appropriate adjustments to the staff's decision; or

(2) Disagree with the appeal and provide the basis for rejecting the appeal to the applicant.

(d) Appeal to the Board. If the applicant is not satisfied with the executive director's response to the appeal, the applicant may appeal in writing directly to the board within sixty days after the date of the executive director's response. The executive director shall prepare an appeal file for the board's review. The board may not review any information not submitted by the applicant at least seven days before the board meeting.

(e) Possible actions. In instances in which the appeal if sustained by the board could have resulted in an award to the applicant, the application shall be approved by the board contingent on the availability of funds. If no funds are available in the current year's funding cycle, then the applicant shall be awarded funds from the next year's available funding or from the pool of deobligated funds. In the case of private activity mortgage revenue bond programs, the applicant shall be encouraged to reapply in the next year's program funding cycle. If the appeal is rejected, the Department shall notify the applicant of its decision, including the basis for final denial.

(f) Final Decision. Appeals not submitted in accordance with this section are dismissed and shall not be granted an extension to refile if the time period for filing an appeal has expired. The decision of the board is final.

§1.8. Board Appeals Process.

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

(1) Appeal file--The written record of an appeal that contains the applicant's appeal; the responses of Department staff, the executive director, and the board, as applicable; and the final decision.

(2) Applicant--A person who submits, or is preparing to submit, to the Department an application for Department funds or other assistance.

(3) Application--The written request for Department funds or other assistance in the format required by the Department including any exhibits or other supporting material.

(4) Board--The board of directors of the Texas Department of Housing and Community Affairs.

(5) Board Appeals Committee--A committee of three board members appointed by the presiding officer of the board to handle appeals of board actions.

(6) Committee--The Board Appeals Process Committee.

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

(8) Low-income housing tax credit--The credit against federal income tax as provided for in §42 of the Internal Revenue Code (42 U.S.C. §42.)

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

(b) Grounds. An applicant for funding or other assistance from the Department, other than low-income housing tax credits, may only appeal the disposition of its application by the board based on an action taken by the board which was allegedly not made in accordance with the applicable rules.

(c) Appeal to the Board Appeals Process Committee. An applicant must file a written appeal with the Department not later than the fourteenth day after the date of the board meeting at which the award decision appealed was made. The applicant must specify the alleged error and provide a detailed explanation of the alleged error, including any supporting documentation. The specific rule must be cited as well as an explanation of the manner in which the alleged error adversely affects the applicant's ability to receive funds. Upon receipt of the appeal, the executive director shall prepare a file for the Committee to consider at the next regularly scheduled meeting of the board. The Committee may not review any information not submitted by the applicant at least seven days before the Committee meeting. The Committee shall make a final recommendation for the entire board to consider based on the reviewed findings.

(d) Possible Actions. In instances in which the appeal if sustained by the board would have resulted in an award to the applicant, the application shall be approved by the board contingent on the availability of funds. If no funds are available in the current year's funding cycle, then the applicant shall be awarded funds from the next year's available funding or from the pool of deobligated funds. In the case of private activity mortgage revenue bond programs, the applicant shall be encouraged to reapply in the next year's funding cycle. If the appeal is rejected, the Department shall notify the applicant of its decision, including the basis for final denial.

(e) Final Decision. Appeals not submitted in accordance with this section are dismissed and shall not be granted an extension to refile if the time period for filing an appeal has expired. The decision of the board is final.

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 October 23, 2001.

TRD-200106421
Ruth Cedillo
Acting Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 475-3916

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 1. PRACTICE AND PROCEDURE

SUBCHAPTER I. PERMIT PROCESSING

16 TAC §1.201

The Railroad Commission of Texas withdraws the proposed amendments to §1.201, relating to Time Periods for Processing Applications and Issuing Permits Administratively, published in the August 24, 2001, issue of the *Texas Register* (26 TexReg 6218), and proposes different amendments to the rule. The Commission proposes the amendments in order to conform Table 1 in §1.201 with proposed substantive changes in §3.14 and §3.78, which the Commission is proposing in a separate rulemaking, Docket No. 20-0228899, as a result of changes made to the Texas Natural Resources Code by Senate Bill (SB) 310, 77th Legislature (2001), and with other changes to Commission fees required by SB 310. The Commission has also withdrawn the original proposed amendments to §§3.14 and 3.78 and has proposed different amendments which are being submitted for publication for a 14-day comment period.

Texas Natural Resources Code, §81.0521, as amended by SB 310, authorizes the Commission to collect a fee of $150 with each exception to any Commission rule. Texas Natural Resources Code, §85.2021, as amended by SB 310, authorizes the Commission to collect a fee of $200 for each application under §3.38, relating to Well Densities. Texas Natural Resources Code, §91.1013, as amended by SB 310, authorizes the Commission to collect a fee of $200 with each application for a fluid injection well permit and a fee of $300 for each application to discharge to surface water. The Commission proposes to amend Table 1 in §1.201 only to identify the new amount of the filing fee required for the specific applications subject to the provisions of §1.201.

In Table 1 of §1.201, application fees for permits under Commission rule §3.8 to discharge hydrostatic test water; produced water to inland waters; produced water to the Gulf of Mexico from a non-land based facility; and gas plant effluent will increase from the current $200 to $300. The application fee for an exception under §3.9 for a disposal well permit (Form W-14) will increase from the current $50 to $150. The application fee for a density exception under §3.38 will increase from the current $50 to $200. Application fees for injection permits under §3.46 (Forms H-1, H-1A, H-7, and H-1S) will change from the current $100 to $200; fees for other exceptions will increase from the current $50 to $150.

The Commission also proposes to amend subsection (c)(5) to clarify the wording. As currently written, there could be an overlap of the initial review period and the final review period. The Commission intends that the final review period not begin until the conclusion of the initial review period; the proposed amendment makes that clarifying correction.

Mary Ross McDonald, Deputy General Counsel, Office of General Counsel, has determined that for each year of the first five years that the conforming amendments to §1.201 will be in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amended rule. The proposed changes to §1.201 are being made for administrative convenience, to clarify applicable time periods, and to ensure

consistency between Commission rules concerning application fees which are imposed under other Commission rules.

Ms. McDonald has also estimated that there will be no increased cost of compliance with the proposed amendments for the individual, small business or micro-business producer because of the proposed amendments. The imposition of the increase in Commission filing fees is being made in §3.78 as a result of the statutory changes made by SB 310.

Ms. McDonald has determined that for each year of the first five years that the amended section will be in effect, the primary public benefit will be the consistency of Commission rules with respect to application fees.

Comments on the proposed amendments may be submitted to Mary Ross McDonald, Deputy General Counsel, Office of General Counsel, Railroad Commission of Texas, P. O. Box 12967, Austin, Texas 78711-2967 or via electronic mail to polly.mcdonald@rrc.state.tx.us. Comments will be accepted for 14 days after publication in the *Texas Register*, to correspond with the comment period for proposed changes to §3.78. For further information, call Ms. McDonald at 512-463-7008.

The Commission proposes the amendments to §1.201 pursuant to Texas Government Code, §§2005.001 - 2005.007, which require the Commission to adopt procedural rules for processing permit applications and issuing permits and to establish by rule a complaint procedure allowing permit applicants to complaint directly to the chief administrator of the agency; Texas Government Code, §2001.004, which requires agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures; 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 Texas Natural Resources Code, §§81.0521 and 91.1013, as amended by SB 310.

Texas Government Code, §2001.004 and §§2005.001-2005.007, and Texas Natural Resources Code, §§81.051, 81.052, 81.0521, 91.1013, as amended by SB 310, are affected by the proposed amendments.

Issued in Austin, Texas on October 23, 2001.

§1.201. Time Periods for Processing Applications and Issuing Permits Administratively.

(a) Applicability. This rule applies to the permits listed in Column A of Table 1 of this section. For purposes of this rule, the term "permit" includes any authorization issued administratively by the Commission, through the Oil and Gas Division, the Gas Services Division, the Surface Mining and Reclamation Division, or the Rail Division, and required by the Commission either to engage in or conduct a specific activity or to deviate from requirements, standards, or conditions in statutes or Commission rules and for which the median processing time exceeds seven days.

Figure: 16 TAC §1.201(a)

(b) (No change.)

(c) Time periods.

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

(5) The Final Review Period, shown in Column G of Table 1, begins on the date the division or section makes a determination under paragraph (3)(A) of this subsection [~~receives the last item necessary to complete an application~~] and ends on the date the permit is:

(A) administratively granted;

(B) administratively denied; or

(C) docketed as a contested case proceeding if the application is neither administratively granted nor administratively denied.

(6) - (7) (No change.)

(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.

Filed with the Office of the Secretary of State, on October 26, 2001.

TRD-200106507
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 475-1295

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CHAPTER 3. OIL AND GAS DIVISION

16 TAC §3.14, §3.78

The Railroad Commission of Texas withdraws the proposed amendments to §3.14, relating to Plugging, and §3.78, relating to Fees, Performance Bonds and Alternate Forms of Financial Security Required to be Filed, published in the August 10, 2001, issue of the *Texas Register* (26 TexReg 5919) and proposes additional amendments to those rules. The Commission proposes the amendments as a result of changes to the Texas Natural Resources Code made by Senate Bill 310, 77th Legislature (2001), which became effective September 1, 2001.

In a new amendment from the original proposal, the Commission proposes the amendments to §3.78(b)(4) under the provisions of Texas Natural Resources Code, §81.0521, as amended by Senate Bill 310, which authorizes the Commission to collect a fee of $150 with each exception to any Commission rule. The amendments to §3.78(b)(4) reflect the statutory authorization to collect the $150 fee.

Also in a new amendment, the Commission proposes the amendments to §3.78(b)(5) under the provisions of Texas Natural Resources Code, §85.2021, as amended by Senate Bill 310, which now authorizes the Commission to collect a fee of $200 with each exception to §3.37, relating to Statewide Spacing Rule (Statewide Rule 37) and §3.38, relating to Well Densities (Statewide Rule 38). The amendments to §3.78(b)(5) reflect the statutory authorization to collect the $200 fee.

The Commission also proposes the amendments to §3.78(b)(12) under the provisions of Texas Natural Resources Code, §81.0522, which authorizes the Commission to collect a fee of up to $150 with each application for a well category determination under the Natural Gas Policy Act (15 U.S.C. §§3301 - 3432). The amendments to §3.78(b)(12) reflect the statutory authorization to collect the $150 fee.

The Commission also proposes the amendments to §3.78(b)(1), (3), and (6) under the provisions of Texas Natural Resources Code, §85.2021, which authorizes the Commission to collect a fee with each application or materially amended application for a

permit to drill, deepen, plug back, or reenter a well of: (1) $200 if the total depth of the well is 2,000 feet or less; (2) $225 if the total depth of the well is greater than 2,000 feet but less than or equal to 4,000 feet; (3) $250 if the total depth of the well is greater than 4,000 feet but less than or equal to 9,000 feet; or (4) $300 if the total depth of the well is greater than 9,000 feet. Additionally, amended Texas Natural Resources Code, §85.2021, authorizes the Commission to collect a fee of $150 when an applicant requests the Commission expedite an application for a permit to drill, deepen, plug back, or reenter a well, and a fee of $300 for each application for an extension of time to plug a well pursuant to Commission rules. The amendments to §3.78(b)(1), (3), and (6) reflect the statutory authorization to collect the increased fees.

The Commission also proposes the amendments to §3.78(b)(8) and (9) under the provisions of Texas Natural Resources Code, §91.1013, which now authorizes the Commission to collect a fee of $200 with each application for a fluid injection well permit and authorizes the Commission to collect a fee of $300 for each application to discharge to surface water. The amendments to §3.78(b)(8) and (9) reflect the statutory authorization to collect the increased fees.

The Commission also proposes the amendments to §3.78 under the provisions of Texas Natural Resources Code, §91.104, which now requires operators to file financial security or alternate forms of financial security. The amended provisions of Texas Natural Resources Code, §91.104: (1) allow operators to submit a cash deposit to the Commission in the same amount that would be required for a bond or letter of credit; (2) add a new determination on the availability of bonds at reasonable prices before an operator with an acceptable record of compliance can choose to file a $1,000 annual fee in lieu of posting other acceptable forms of financial security; (3) increase the annual fee for operators with an acceptable record from $100 to $1,000; (4) eliminate the option of an operator meeting its financial security requirement by providing the Commission with a first lien on equipment; and (5) increase the nonrefundable cash alternative fee from 3% of the amount that would be required for a bond or letter of credit to 12.5%.

Commission records show that in the approximately six-month period between January 18, 2001, and June 26, 2001, an additional 117 operators have filed organizational bonds. This increase appears to be directly correlated to the Commission's previous amendment of §§3.14 and 3.78 to adopt financial security requirements for inactive wells effective November 1, 2000. The increase in operators filing organizational bonds also reflects a general availability of bonds for operators. Based on this increase in the number of operators filing organizational bonds, the Commission has determined that bonds are available at reasonable prices. This determination is included in proposed §3.78(f)(1) to satisfy the statutory requirement that the Commission make such a determination.

The Commission further recognizes that while this determination is generally applicable to operators throughout the state, there may be specific operators who are unable to obtain bonds at a reasonable price. Accordingly, the Commission has included as proposed §3.78(f)(2) the opportunity for an operator to request a hearing to determine that it cannot obtain a bond at a reasonable price. Proposed §3.78(f)(2) also sets forth the minimum required evidentiary burden of proof to be submitted by the operator to support a determination that bonds are not obtainable at reasonable prices. After the amendments were originally proposed, the Commission determined that the minimum evidentiary showing should include: (1) evidence that no fewer than three companies which have issued a bond filed with the Commission in the past 12 months will not issue a bond to the requesting operator for an annual fee less than 12% of the face amount of the bond; and (2) evidence that the operator is otherwise eligible to file the $1,000 nonrefundable annual fee.

The proposed amendments to §3.78(l) also establish conditions for cash deposits. The Commission will place any cash deposits in a special account within the Oil Field Clean Up Fund Account. Any interest accruing on cash deposits will be deposited into the Oil Field Clean Up Fund pursuant to Texas Natural Resources Code, §91.111(c)(8). Cash deposits will not be refunded until an operator ceases all Commission-regulated activity or another form of financial security is accepted by the Commission.

The Commission also proposes the amendments to §3.14(b)(2) and (3) and §3.78(n) under the provisions of Texas Natural Resources Code, §91.107, as amended by Senate Bill 310, which requires operators acquiring an active or inactive well to file either an individual performance bond or a blanket performance bond with the Commission before operatorship of the well is transferred. The statutory amendments require changes to Commission rules which did not specify the type of financial security required to transfer a well. Prior Commission rules did not require the operator obtaining wells through a transfer to file a specific type of financial security. The proposed amendments to §3.14(b)(2) and (3) and §3.78(n) simply incorporate the statutory amendments.

The Commission also proposes the amendments to §3.78(c) under the provisions of Texas Natural Resources Code, §91.142, which requires operators filing an organization report with the Commission to submit a fee not to exceed $1,000 to be calculated as follows: (1) for an operator of not more than 25 wells, $300; (2) for an operator of more than 25 but not more than 100 wells, $500; (3) for an operator of more than 100 wells, $1,000; (4) for an operator of one or more natural gas pipelines, $100; (5) for an operator of one or more service activities or facilities, including liquids pipelines, who does not operate any wells, an amount to be determined by the Commission, but not less than $300 or more than $500; (6) for an operator of one or more service activities or facilities, including liquids pipelines, who also operates one or more wells, an amount to be determined by the Commission, but not less than $300 or more than $1,000; and (7) for an entity not currently performing operations under the jurisdiction of the Commission, $300. The amendments reflect the statutory authorization to collect an annual organization report fee based on the number of wells, service activities or facilities operated by the operator.

The required filing fee for operators who operate one or more service activities but no wells was set at $300 for pollution cleanup contractors, directional surveyors, approved cementers for plugging wells, and operators physically moving or storing crude or condensate. All other operators of other service activities or facilities, including liquids pipelines, are required to submit a fee of $500. The required filing fee for operators who operate both wells and one or more service activities or pipelines is based on the sum of any fee associated with the number of wells operated plus the separate fee charged for each category of service activity, facility or pipeline.

The Commission also proposes an amendment to §3.78(b)(15) requiring operators who submit a check that is not honored on presentment to submit any subsequent payments in the form of

a credit card, cashier's check, or cash for a period of 24 months. The proposed amendment will promote administrative efficiency by reducing the number of dishonored checks submitted to the Commission.

The Commission also notes that under the provisions of Texas Natural Resources Code, §91.1041 and §91.1042, as amended by Senate Bill 310, the Commission is required to adopt rules setting a reasonable amount of financial security for each bay or offshore well above the base amount of financial security required to be submitted by each operator. The amount of financial security for each bay or offshore well above the base amount will be the subject of a separate rulemaking. The Commission has included in the proposed amendments to §3.78 definitions of bay, offshore and land wells in anticipation of the future amendments.

The proposed amendments to §§3.14 and 3.78 implement statutory changes made to financially strengthen and to better use the state's Oil Field Clean Up Fund ("OFCUF"). The statutory changes were recommended during the agency review process of the Commission by the Sunset Advisory Commission.

The financial strength of the OFCUF is increased by statutory changes and corresponding rule amendments raising the required amount for filing fees and by adding an annual organization report filing fee. Broadened financial security requirements will ensure that sufficient financial security is in place to adequately fund clean up and plugging operations. The expanded financial security requirements will allow the Commission to more effectively use a fiscally stronger OFCUF.

In addition to the substantive changes previously discussed, the Commission proposes to reorganize and clarify §3.78. The new format groups together in §3.78 both the existing and the amended provisions relating to fees charged by the Commission. Additionally, the new format of §3.78 incorporates the references in §3.14 to individual well bonds and letters of credit, and groups these references with the existing and the amended provisions related to financial security requirements in §3.78. Finally, proposed §3.78(p) is clarified by noting that the requirements date from the original enactment of the subsection.

The substantive changes in filing fees and financial security requirements are made in §3.78. The amendments to §3.14(a)(1)(F) and (M) and §3.14(b)(2) and (3) are proposed to conform with the substantive changes in §3.78. Other changes in §3.14(a)(1) are made to conform the definitions in this rule to *Texas Register* format requirements.

Leslie Savage, Planning and Administration, Oil and Gas Division, has determined that for the first year the amendments will be in effect, there will be no net fiscal implications for state government as a result of enforcing or administering the amendments. Senate Bill 310 amended Texas Natural Resources Code, §81.0522, which authorizes the Commission to collect a fee with each application for a well category determination under the Natural Gas Policy Act, 15 U.S.C. §§3301-3432 ("NGPA"), to allow the Commission to set the amount of the fee not to exceed $150 to recoup the Commission's costs. The proposed amendments in §3.78(b)(12) reflect the change in the statute by increasing the fee amount from $50 to $150 to cover the costs. These fees will be deposited into General Revenue and appropriated to the Commission to cover the cost of administering the well category determination program. Revenue for fiscal year 2002 is estimated to be $120,000. Expenses for fiscal year 2002 are estimated at $110,000 for contract employees and approximately $10,000 in other expenses. For fiscal year 2003, Ms. Savage estimates that the revenue will total approximately $60,000, and expenses will be approximately $60,000 ($55,000 for contract employees and $5,000 for other associated costs). The well category determination program under the Natural Gas Policy Act is currently scheduled to end June 2003.

The remaining changes impact the Commission's Oil Field Cleanup Fund. Ms. Savage estimates that the proposed amendments implementing the statutory changes will increase the revenue to the Oil Field Cleanup Fund by approximately $4,560,000 in each of the fiscal years 2002 and 2003. In the original proposal, this dollar amount was $4,471,000.

During the first year of implementation of the proposed amendments (fiscal year 2002), the Commission will expend money from these revenues to make the necessary changes described in subsequent paragraphs and to enforce the new requirements. The total expenditure during the first year of implementation (fiscal year 2002) is estimated to be approximately $225,578. This includes $79,756 for staff involved with document revision, process analysis, and processing of additional documents (letters of credit, cash deposits, and new P-5 organization fee). Costs will also be incurred for computer programming: to implement the changes to the fees; to implement new fees; to enable staff to determine the status and financial security required for wells that are transferred from one operator to another; to calculate fee and bonding/letter of credit or cash deposit amounts; and to modify the P-5 financial security options fact sheet. The technology costs are estimated to be a maximum of 1,000 hours at $120 per hour for contract programming for a total of $120,000. However, the Commission has not determined whether to use contract programmers and may be able to complete this work at a smaller cost using internal resources, if available. An estimated cost of approximately $145,822 will be incurred as a result of the proposed amendments for field staff compliance inspections and enforcement activity to respond to complaints resulting from an anticipated initial increase in noncompliance.

The fiscal year 2003 and 2004 costs include $74,256 for staff processing of additional documents (individual well bonds, letters of credit, and cash deposits) and $94,822 for field staff compliance inspections and enforcement activity to respond to complaints resulting from an anticipated initial increase in noncompliance each year for a total of $169,078.

Additional statutory changes enacted under the provisions of Section 3, Senate Bill 310, 77th Legislature (2001) establish financial security requirements which will not become effective until September 1, 2004. Revenue estimates will change as a result of these amendments and expenditures for activity in the areas noted above will again increase during the first year of implementation (fiscal year 2005). Staff will estimate the potential fiscal impacts at the time the Commission proposes the rule amendments implementing these statutory changes.

All of the new statutory fees (with the exception of the NGPA application fee) will be deposited into the OFCUF. The increased activity and resulting expenditures by the Commission for the first year of implementation of the amendments resulting from the statutory changes will be funded through the OFCUF. As this activity and the resulting incremental expenditures decrease in subsequent years, these funds will be available for well plugging and cleanup activity. Therefore, there is no net fiscal impact to state government.

There will be no effect on local government.

Ms. Savage has estimated that the cost of compliance with the proposed amendments for the individual, small business, or micro- business producer will be an increase in the fees for filing applications with the Commission as provided for by the statutory changes. An additional cost of compliance will result from the addition of the new organization report fee required from all operators subject to the Commission's jurisdiction. Finally, for those operators that have not previously opted to file an individual or blanket performance bond with the Commission, those operators may incur an additional business expense in the premium for the bond obtained. The Commission also anticipates that the premium expense may be offset by savings for those operators with inactive wells who had previously relied on alternative financial security provisions, because any operator who now opts to file an individual or blanket performance bond will no longer be required to file a separate fee to obtain plugging extensions for each inactive well. Additionally, operators who request a hearing to rebut the presumption that bonds are available at reasonable prices may incur costs associated with preparing for and attending the hearing, including but not limited to costs for hiring legal counsel and other experts, preparing documents and other evidence, and traveling to Austin for the hearing.

Mark Helmueller, Hearings Examiner, Oil and Gas Section, Office of General Counsel, has determined that for each year of the first five years that the amended sections will be in effect, the primary public benefit will be the implementation of the fee changes required by the Legislature, which should allow the Commission to plug more wells and to accelerate clean up and plugging operations in the areas of greatest need.

Mr. Helmueller has also determined that there is a public benefit in eliminating any potential confusion by amending §3.14 and §3.78 to group similar provisions. The new format will promote administrative efficiency and facilitate implementation of the statutory changes by clarifying requirements under both §3.14 and §3.78.

Comments may be submitted to Mark Helmueller, Hearings Examiner, Oil and Gas Section, Office of General Counsel, Railroad Commission of Texas, P. O. Box 12967, Austin, Texas 78711-2967 or via electronic mail to mark.helmueller@rrc.state.tx.us. Comments will be accepted for 14 days after publication in the *Texas Register* and should refer to the docket number of this rulemaking proceeding: 20-0228899. For further information, call Mr. Helmueller at 512- 463-6802. The Commission has determined that a 14-day comment period is reasonable because the Commission previously published amendments to these rules consistent with the legislative changes made by Senate Bill 310. Comments were previously accepted by the Commission from August 10, 2001 through September 10, 2001.

The Commission proposes the amendments to §3.14 and §3.78 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 §§81.0521, 81.0522, 85.202, 85.2021, 88.011, 91.101, 91.1013, 91.103, 91.104, 91.1041, 91.1042, 91.105-91.108, 91.111-91.113, and 91.142.

Texas Natural Resources Code, §81.051, 81.052, 81.0521, 81.0522, 85.202, 85.2021, 88.011, 91.101, 91.1013, 91.103, 91.104, 91.1041, 91.1042, 91.105-91.108, 91.1091, 91.111-91.113, and 91.142 are affected by the proposed amendments.

Issued in Austin, Texas on October 23, 2001.

§3.14. Plugging.

(a) Definitions and application to plug.

(1) The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise [~~As used in this section~~]:

(A) Active operation--Regular [~~"Active operation" means regular~~] and continuing activities related to the production of oil and gas for which the operator has all necessary permits. In the case of a well that has been inactive for 12 consecutive months or longer and that is not permitted as a disposal or injection well, the well remains inactive for purposes of this section, regardless of any minimal activity, until the well has reported production of at least 10 barrels of oil for oil wells or 100 mcf of gas for gas wells each month for at least three consecutive months.

(B) Bay well--Any [~~"Bay well" means any~~] well under the jurisdiction of the Commission [~~commission~~] for which the surface location is either:

(i) located in or on a lake, river, stream, canal, estuary, bayou or other inland navigable waters of the state; or,

(ii) located on state lands seaward of the mean high tide line of the Gulf of Mexico in water of a depth at mean high tide of not more than 100 feet that is sheltered from the direct action of the open seas of the Gulf of Mexico.

(C) Delinquent inactive well--An [~~"Delinquent inactive well" means an~~] unplugged well that has had no reported production, disposal, injection, or other permitted activity for a period of greater than 12 months and for which, after notice and opportunity for hearing, the Commission [~~commission~~] has not extended the plugging deadline.

(D) Funnel viscosity--Viscosity [~~"Funnel viscosity" means viscosity~~] as measured by the Marsh funnel, based on the number of seconds required for 1,000 cubic centimeters of fluid to flow through the funnel.

(E) Good faith claim--A [~~"Good faith claim" means a~~] factually supported claim based on a recognized legal theory to a continuing possessory right in a mineral estate, such as evidence of a currently valid oil and gas lease or a recorded deed conveying a fee interest in the mineral estate.

(F) Individual well bond--A bond or letter of credit issued: [~~"Individual well bond" means a bond or letter of credit issued on a commission-approved form, with a third party surety, insurance company or financial institution as principal, that has been approved by the Commission and is conditioned on the timely and proper plugging of a specified well or wells and remediation of the well (sites), in accordance with Commission rules.~~]

(i) on a Commission-approved form;

(ii) by a third party surety, insurance company, or financial institution approved by the Commission; and

(iii) to secure the timely and proper plugging of a specified well and remediation of the wellsite in accordance with Commission rules.

(G) Land well--Any [~~"Land well" means any~~] well subject to Commission jurisdiction for which the surface location is not in or on inland or coastal waters.

(H) Offshore well--Any [~~"Offshore well" means any~~] well subject to Commission jurisdiction for which the surface location is on state lands in or on the Gulf of Mexico, that is not a bay well.

(I) Operator designation form--A [~~"Operator designation form" means a~~] certificate of transportation authority and compliance or an application to drill, deepen, recomplete, plug back, or reenter which has been completed, signed and filed with the Commission [~~commission~~].

(J) Productive horizon--Any [~~"Productive horizon" means any~~] stratum known to contain oil, gas, or geothermal resources in producible quantities in the vicinity of an unplugged well.

(K) Reported production--Production [~~"Reported production" means production~~] of oil or gas, excluding production attributable to well tests, accurately reported to the Commission [~~commission~~] on a monthly producer's report.

(L) To serve surface notice--To [~~To "serve surface notice" means to~~] hand deliver a written notice identifying the well to be plugged and the projected date the well will be plugged to the intended recipient at least three days prior to the day of plugging or to mail the notice by first class mail, postage pre-paid, to the last known address of the intended recipient at least seven days prior to the day of plugging.

(M) Unbonded operator--An [~~"Unbonded operator" means an~~] operator that has a current and active organization report on file with the Commission but that does not have a current individual performance bond, blanket performance bond, [~~or~~] letter of credit, or cash deposit as its [~~organizational~~] financial security under §3.78 of this title (relating to Fees, Performance Bonds, and Alternate Forms of Financial Security Required to be Filed [~~filed~~]) (Statewide Rule 78).

(N) Usable quality water strata--All [~~"Usable quality water strata" means all~~] strata determined by the Texas Natural Resource Conservation Commission to contain usable quality water.

(O) Written notice--Notice [~~"Written notice" means notice~~] actually received by the intended recipient in tangible or retrievable form, including notice set out on paper and hand- delivered, facsimile transmissions, and electronic mail transmissions.

(2) The operator shall give the Commission [~~commission~~] notice of its intention to plug any well or wells drilled for oil, gas, or geothermal resources or for any other purpose over which the Commission [~~commission~~] has jurisdiction, except those specifically addressed in §3.100(f)(1) of this title (relating to Seismic Holes and Core Holes) (Statewide Rule 100), prior to plugging. The operator shall deliver or transmit the written notice to the district office on the appropriate form.

(3) The operator shall cause the notice of its intention to plug to be delivered to the district office at least five days prior to the beginning of plugging operations. The notice shall set out the proposed plugging procedure as well as the complete casing record. The operator shall not commence the work of plugging the well or wells until the proposed procedure has been approved by the district office. The operator shall not initiate approved plugging operations before the date set out in the notification for the beginning of plugging operations unless authorized by the district director. The operator shall notify the district office at least four hours before commencing plugging operations and proceed with the work as approved. The district director may grant exceptions to the requirements of this paragraph concerning the timing of notices when a workover or drilling rig is already at work on location, ready to commence plugging operations. Operations shall not be suspended prior to plugging the well unless the hole is cased and casing is cemented in place in compliance with Commission [~~commission~~] rules.

(4) The landowner and the operator may file an application to condition an abandoned well located on the landowner's tract for usable quality water production operations, provided the landowner assumes responsibility for plugging the well and obligates himself, his heirs, successors, and assignees as a condition to the Commission's [~~commission's~~] approval of such application to complete the plugging operations. The application shall be made on the form prescribed by the Commission [~~commission~~]. In all cases, the operator responsible for plugging the well shall place all cement plugs required by this rule up to the base of the usable quality water strata.

(5) The operator of a well shall serve surface notice on the surface owner of the well site tract, or the resident if the owner is absent, before the scheduled date for beginning the plugging operations. A representative of the surface owner may be present to witness the plugging of the well. Plugging shall not be delayed because of the lack of actual notice to the surface owner or resident if the operator has served surface notice as required by this paragraph. The district director may grant exceptions to the requirements of this paragraph concerning the timing of notices when a workover or drilling rig is already at work on location ready to commence plugging operations.

(b) Commencement of plugging operations and extensions.

(1) The operator shall complete and file in the district office a duly verified plugging record, in duplicate, on the appropriate form within 30 days after plugging operations are completed. A cementing report made by the party cementing the well shall be attached to, or made a part of, the plugging report. If the well the operator is plugging is a dry hole, an electric log status report shall be filed with the plugging record.

(2) Plugging operations on each dry or inactive well shall be commenced within a period of one year after drilling or operations cease and shall proceed with due diligence until completed. Plugging operations on delinquent inactive wells shall be commenced immediately unless the well is restored to active operation. For good cause, a reasonable extension of time in which to start the plugging operations may be granted pursuant to the following procedures.

(A) Wells that have been inactive for less than 36 months.

(i) The Commission [~~commission~~] or its delegate may administratively grant an extension of up to one year of the deadline for plugging a well that is operated by an unbonded operator and has been inactive, without a return to active operation, for a period of less than 36 months if the following criteria are met:

(I) The well and associated facilities are in compliance with all other laws and Commission rules;

(II) The operator's organization report is current and active;

(III) The operator has, and upon request provides evidence of, a good faith claim to a continuing right to operate the well;

(IV) The operator has paid the proper fee as provided in §3.78 of this title (relating to Fees, Performance Bonds, and Alternative Forms of Financial Security Required To Be Filed) (Statewide Rule 78);

(V) The operator has tested the well in accordance with the provisions of subparagraph (E) of this section and files with its application proof of either:

(-a-) a fluid level test conducted within 90 days prior to the application for a plugging extension demonstrating that any fluid in the wellbore is at least 250 feet below the base of the deepest usable quality water strata; or,

(-b-) a hydraulic pressure test conducted during the period the well has been inactive demonstrating the mechanical integrity of the well; and,

(VI) The requested plugging extension will not extend beyond the thirty-sixth month of inactivity

(ii) A plugging extension granted under this subparagraph may not extend the period of inactivity beyond 36 months.

(B) Wells that have been inactive for 36 months or longer [~~and transfer wells~~].

(i) The Commission or its delegate may administratively grant an extension of up to one year of the deadline for plugging a well [~~that is being transferred to an unbonded operator or~~] that is operated by an unbonded operator and has been inactive, without a return to active operation, for a period of 36 months or longer if the criteria set out in subclauses (I)-(IV) of subsection (b)(2)(A)(i) of this section are met, and, in addition:

(I) The operator has tested the well in accordance with the provisions of subparagraph (E) of this paragraph and files with its application proof of either:

(-a-) a fluid level test conducted within 90 days prior to the application for a plugging extension demonstrating that any fluid in the wellbore is at least 250 feet below the base of the deepest usable quality water strata, or,

(-b-) a hydraulic pressure test conducted during the period the well has been inactive and not more than four years prior to the date of application demonstrating the mechanical integrity of the well; and,

(II) The operator files an individual well bond in the amount provided for in subsection (m) of §3.78 of this title (relating to Fees, Performance Bonds, and Alternative Forms of Financial Security Required To Be Filed) (Statewide Rule 78). [~~face amount of the estimated plugging cost of the well for which a plugging extension is requested. The estimated plugging cost for wells for which a plugging extension is sought will be presumed to be as follows:~~]

[~~(-a-) for land wells, the product of the total depth of the well multiplied by $3 per foot;~~]

[~~(-b-) for bay wells, $60,000; and,~~]

[~~(-c-) for offshore wells, $250,000.~~]

(ii) An operator may rebut the presumed estimated plugging costs for a specific well for which a plugging extension is sought at hearing by clear and convincing evidence establishing a higher or lower prospective plugging cost for the well. The operator, Commission staff, or any owner of the surface or mineral estate on which the well is located may initiate a hearing on the prospective plugging cost for a well for the purpose of setting the amount of an individual well bond by filing a request for hearing.

~~*[(ii)* The presumptive estimated plugging costs for a specific well for which a plugging extension is sought may be rebutted at hearing by clear and convincing evidence establishing a higher or lower prospective plugging cost for the well. A hearing concerning the prospective plugging cost for a well for purposes of setting the amount of an individual well bond may be initiated by the operator, Commission staff, or any owner of the surface or mineral estate on which the well is located.]~~

~~*[(iii)* Once an individual well bond is required for a well under the terms of this subparagraph, an individual well bond must be continuously maintained for the well until it is plugged or returned to active operation, unless the operator posts a valid, Commission-approved individual performance bond, blanket performance bond, or letter of credit as provided in §3.78 of this title (relating to Fees, Performance Bonds, and Alternate Forms of Financial Security Required to be Filed) (Statewide Rule 78) as its organizational financial assurance.]~~

(C) Plugging of inactive wells operated by bonded operators. An operator that maintains valid, Commission-approved [~~organizational~~] financial security [~~assurance~~] in the form of an individual performance bond, blanket performance bond, [~~or~~] letter of credit, or cash deposit as provided in §3.78 of this title (relating to Fees, Performance Bonds, and Alternate Forms of Financial Security Required to be Filed) (Statewide Rule 78) will be granted a one-year plugging extension for each well it operates that has been inactive for 12 months or more at the time its annual organizational report is approved by the Commission if the following criteria are met:

(i) The well and associated facilities are in compliance with all laws and Commission rules; and,

(ii) The operator has, and upon request provides evidence of, a good faith claim to a continuing right to operate the well.

(D) Revocation or denial of plugging extension.

(i) The Commission or its delegate may revoke a plugging extension if the operator of the well that is the subject of the extension fails to maintain the well and all associated facilities in compliance with Commission rules; fails to maintain a current and accurate organizational report on file with the Commission; fails to provide the Commission, upon request, with evidence of a continuing good faith claim to operate the well; or fails to obtain or maintain a valid individual well bond or organizational bond or letter of credit as required by this subsection.

(ii) If the Commission or its delegate declines to grant or continue a plugging extension or revokes a previously granted extension, the operator shall either return the well to active operation or, within 30 days, plug the well or request a hearing on the matter.

(E) The operator of any well more than 25 years old that becomes inactive and subject to the provisions of this paragraph and the operator of any well for which a plugging extension is sought under the terms of subparagraph (A) or (B) of this paragraph shall plug or test such well to determine whether the well poses a potential threat of harm to natural resources, including surface and subsurface water, oil and gas.

(i) In general, a fluid level test is a sufficient test for purposes of this subparagraph. The operator must give the district office written notice specifying the date and approximate time it intends to conduct the fluid level test at least 48 hours prior to conducting the test; however, upon a showing of undue hardship, the district office may grant a written waiver or reduction of the notice requirement for a specific well test. The Commission [~~commission~~] or its delegate may require alternate methods of testing if the Commission [~~commission~~] deems it necessary to ensure the well does not pose a potential threat of harm to natural resources. Alternate methods of testing may be approved by the Commission [~~commission~~] or its delegate by written application and upon a showing that such a test will provide information sufficient to determine that the well does not pose a threat to natural resources.

(ii) No test other than a fluid level test shall be acceptable without prior approval from the district office. The district office shall be notified at least 48 hours before any test other than a fluid level test is conducted. Mechanical integrity test results shall be filed with the district office and fluid level test results shall be filed with the Commission [~~commission~~] in Austin. Test results shall be filed on

a Commission-approved [~~commission-approved~~] form, within 30 days of the completion of the test. Upon request, the operator shall file the actual test data for any mechanical integrity or fluid level test that it has conducted.

(iii) Notwithstanding the provisions of clause (ii) of this subparagraph, a hydraulic pressure test may be conducted without prior approval from the district office, provided that the operator gives the district office written notice specifying the date and approximate time for the test at least 48 hours prior to the time the test will be conducted, the production casing is tested to a depth of at least 250 feet below the base of usable quality water strata, or 100 feet below the top of cement behind the production casing, whichever is deeper, and the minimum test pressure is greater than or equal to 250 psig for a period of at least 30 minutes.

(iv) If the operator performs a hydraulic pressure test in accordance with the provisions of clause (iii) of this subparagraph, the well shall be exempt from further testing for five years from the date of the test, except to the extent compliance with paragraph (2) of subsection (b) of this section requires more frequent testing. Further, the Commission [~~commission~~] or its delegate may require the operator to perform testing more frequently to ensure that the well does not pose a threat of harm to natural resources. The Commission [~~commission~~] or its delegate may approve less frequent well tests under this subparagraph upon written request and for good cause shown provided that less frequent testing will not increase the threat of harm to natural resources.

(v) Wells that are returned to continuous production, as evidenced by three consecutive months of reported production of at least 10 barrels of oil or 100 mcf of gas per month, need not be tested.

(3) Transfer of operatorship. A transfer of operatorship submitted for any well or lease will not be approved unless the operator acquiring the well or lease has on file with the Commission financial security as provided in §3.78 of this title (relating to Fees, Performance Bonds, and Alternate Forms of Financial Security Required to be Filed) (Statewide Rule 78). [~~of inactive wells. An unbonded operator seeking to assume operatorship of a well that has been inactive for 12 months or longer and has not been returned to active operation must obtain a plugging extension under the terms of §3.14(b)(2)(B) before the transfer of operatorship can be approved.~~]

(4) The Commission [~~commission~~] may plug or replug any dry or inactive well as follows:

(A) After notice and hearing, if the well is causing or is likely to cause the pollution of surface or subsurface water or if oil or gas is leaking from the well, and:

(i) Neither the operator nor any other entity responsible for plugging the well can be found; or

(ii) Neither the operator nor any other entity responsible for plugging the well has assets with which to plug the well.

(B) Without a hearing if the well is a delinquent inactive well and:

(i) the Commission [~~commission~~] has sent notice of its intention to plug the well as required by §89.043(c) of the Texas Natural Resources Code; and

(ii) the operator did not request a hearing within the period (not less than 10 days after receipt) specified in the notice.

(C) Without notice or hearing, if:

(i) The Commission [~~commission~~] has issued a final order requiring that the operator plug the well and the order has not been complied with; or

(ii) The well poses an immediate threat of pollution of surface or subsurface waters or of injury to the public health and the operator has failed to timely remediate the problem.

(5) The Commission [~~commission~~] may seek reimbursement from the operator and any other entity responsible for plugging the well for state funds expended pursuant to paragraph (4) of this subsection.

(c) Designated operator responsible for proper plugging.

(1) The entity designated as the operator of a well specifically identified on the most recent Commission-approved [~~commission-approved~~] operator designation form filed on or after September 1, 1997, is responsible for properly plugging the well in accordance with this section and all other applicable Commission [~~commission~~] rules and regulations concerning plugging of wells.

(2) As to any well for which the most recent Commission-approved [~~commission-approved~~] operator designation form was filed prior to September 1, 1997, the entity designated as operator on that form is presumed to be the entity responsible for the physical operation and control of the well and to be the entity responsible for properly plugging the well in accordance with this section and all other applicable Commission [~~commission~~] rules and regulations concerning plugging of wells. The presumption of responsibility may [~~only~~] be rebutted only at a hearing called for the purpose of determining plugging responsibility.

(d) General plugging requirements.

(1) Wells shall be plugged to insure that all formations bearing usable quality water, oil, gas, or geothermal resources are protected. All cementing operations during plugging shall be performed under the direct supervision of the operator or his authorized representative, who shall not be an employee of the service or cementing company hired to plug the well. Direct supervision means supervision at the well site during the plugging operations. The operator and the cementer are both responsible for complying with the general plugging requirements of this subsection and for plugging the well in conformity with the procedure set forth in the approved notice of intention to plug and abandon for the well being plugged. The operator and cementer may each be assessed administrative penalties for failure to comply with the general plugging requirements of this subsection or for failure to plug the well in conformity with the approved notice of intention to plug and abandon the well.

(2) Cement plugs shall be set to isolate each productive horizon and usable quality water strata.

(3) Cement plugs shall be placed by the circulation or squeeze method through tubing or drill pipe. Cement plugs shall be placed by other methods only upon written request with the written approval of the district director or the director's delegate.

(4) All cement for plugging shall be an approved API oil well cement without volume extenders and shall be mixed in accordance with API standards. Slurry weights shall be reported on the cementing report. The district director or the director's delegate may require that specific cement compositions be used in special situations; for example, when high temperature, salt section, or highly corrosive sections are present.

(5) Operators shall use only cementers approved by the assistant director of well plugging or the assistant director's delegate, except when plugging is conducted in accordance with subparagraph

(B)(ii) of this paragraph or paragraph (6) of this subsection. Cementing companies, service companies, or operators may apply for designation as approved cementers. Approval will be granted on a showing by the applicant of the ability to mix and pump cement in compliance with this rule. An approved cementer is authorized to conduct plugging operations in accordance with Commission [~~commission~~] rules in each Commission [~~commission~~] district.

(A) A cementing company, service company, or operator seeking designation as an approved cementer shall file a request in writing with the district director of the district in which it proposes to conduct its initial plugging operations. The request shall contain the following information:

(i) the name of the organization as shown on its most recent approved organizational report;

(ii) a list of qualifications including personnel who will supervise mixing and pumping operations;

(iii) length of time the organization has been in the business of cementing oil and gas wells;

(iv) an inventory of the type of equipment to be used to mix and pump cement; and

(v) a statement certifying that the organization will comply with all Commission [~~commission~~] rules.

(B) No request for designation as an approved cementer will be approved until after the district director or the director's delegate has:

(i) inspected all equipment to be used for mixing and pumping cement; and

(ii) witnessed at least one plugging operation to determine if the cementing company, service company, or operator can properly mix and pump cement to the specifications required by this rule.

(C) The district director or the director's delegate shall file a letter with the assistant director of well plugging recommending that the application to be designated as an approved cementer be approved or denied. If the district director or the director's delegate does not recommend approval, or the assistant director of well plugging or the assistant director's delegate denies the application, the applicant may request a hearing on its application.

(D) Designation as an approved cementer may be suspended or revoked for violations of Commission [~~commission~~] rules. The designation may be revoked or suspended administratively by the assistant director of well plugging for violations of Commission [~~commission~~] rules if:

(i) the cementer has been given written notice by personal service or by registered or certified mail informing the cementer of the proposed action, the facts or conduct alleged to warrant the proposed action, and of its right to request a hearing within 10 days to demonstrate compliance with Commission [~~commission~~] rules and all requirements for retention of designation as an approved cementer; and

(ii) the cementer did not file a written request for a hearing within 10 days of receipt of the notice.

(6) An operator may request administrative authority to plug its own wells without being an approved cementer. An operator seeking such authority shall file a written request with the district director and demonstrate its ability to mix and pump cement in compliance with this subsection. The district director or the director's delegate will determine whether such a request warrants approval. If the district director or the director's delegate refuses to administratively approve this request, the operator may request a hearing on its request.

(7) The district director may require additional cement plugs to cover and contain any productive horizon or to separate any water stratum from any other water stratum if the water qualities or hydrostatic pressures differ sufficiently to justify separation. The tagging and/or pressure testing of any such plugs, or any other plugs, and respotting may be required if necessary to insure that the well does not pose a potential threat of harm to natural resources.

(8) For onshore or inland wells, a 10-foot cement plug shall be placed in the top of the well, and casing shall be cut off three feet below the ground surface.

(9) Mud-laden fluid of at least 9-1/2 pounds per gallon with a minimum funnel viscosity of 40 seconds shall be placed in all portions of the well not filled with cement. The hole shall be in static condition at the time the cement plugs are placed. The district director may grant exceptions to the requirements of this paragraph if a deviation from the prescribed minimums for fluid weight or viscosity is necessary to insure that the well does not pose a potential threat of harm to natural resources.

(10) Non-drillable material that would hamper or prevent reentry of a well shall not be placed in any wellbore during plugging operations, except in the case of a well plugged and abandoned under the provisions of §3.35 or §3.94(e) of this title (relating to Procedures for Identification and Control of Wellbores in Which Certain Logging Tools Have Been Abandoned (Statewide Rule 35); and Disposal of Oil and Gas NORM Waste (Statewide Rule 94), respectively). Pipe and unretrievable junk shall not be cemented in the hole during plugging operations without prior approval by the district director.

(11) All cement plugs, except the top plug, shall have sufficient slurry volume to fill 100 feet of hole, plus 10% for each 1,000 feet of depth from the ground surface to the bottom of the plug.

(12) The operator shall fill the rathole, mouse hole, and cellar, and shall empty all tanks, vessels, related piping and flowlines that will not be actively used in the continuing operation of the lease within 120 days after plugging work is completed. Within the same 120 day period, the operator shall remove all such tanks, vessels, related surface piping, and all subsurface piping that is less than three feet beneath the ground surface, remove all loose junk and trash from the location, and contour th location to discourage pooling of surface water at or around the facility site. The operator shall close all pits in accordance with the provisions of §3.8 of this title (relating to Water Protection (Statewide Rule 8)). The district director may grant a reasonable extension of time of not more than an additional 120 days for the removal of tanks, vessels and related piping.

(e) Plugging requirements for wells with surface casing.

(1) When insufficient surface casing is set to protect all usable quality water strata and such usable quality water strata are exposed to the wellbore when production or intermediate casing is pulled from the well or as a result of such casing not being run, a cement plug shall be placed from 50 feet below the base of the deepest usable quality water stratum to 50 feet above the top of the statum. This plug shall be evidenced by tagging with tubing or drill pipe. The plug must be respotted if it has not been properly placed. In addition, a cement plug must be set across the shoe of the surface casing. This plug must be a minimum of 100 feet in length and shall extend at least 50 feet above and below the shoe.

(2) When sufficient surface casing has been set to protect all usable quality water strata, a cement plug shall be placed across the shoe of the surface casing. This plug shall be a minimum of 100 feet in length and shall extend at least 50 feet above the shoe and at least 50 feet below the shoe.

(3) If surface casing has been set deeper than 200 feet below the base of the deepest usable quality water stratum, an additional cement plug shall be placed inside the surface casing across the base of the deepest usable quality water stratum. This plug shall be a minimum of 100 feet in length and shall extend from 50 feet below the base of the deepest usable quality water stratum to 50 feet above the top of the stratum.

(f) Plugging requirements for wells with intermediate casing.

(1) For wells in which the intermediate casing has been cemented through all usable quality water strata and all productive horizons, a cement plug meeting the requirements of subsection (d)(11) of this section shall be placed inside the casing and centered opposite the base of the deepest usable quality water stratum, but extend no less than 50 feet above and below the stratum.

(2) For wells in which intermediate casing is not cemented through all usable quality water strata and all productive horizons, and if the casing will not be pulled, the intermediate casing shall be perforated at the required depths to place cement outside of the casing by squeeze cementing through casing perforations.

(g) Plugging requirements for wells with production casing.

(1) For wells in which the production casing has been cemented through all usable quality water strata and all productive horizons, a cement plug meeting the requirements of subsection (d)(11) of this section shall be placed inside the casing and centered opposite the base of the deepest usable quality water stratum and across any multi-stage cementing tool.

(2) For wells in which the production casing has not been cemented through all usable quality water strata and all productive horizons and if the casing will not be pulled, the production casing shall be perforated at the required depths to place cement outside of the casing by squeeze cementing through casing perforations.

(3) The district director may approve a cast iron bridge plug to be placed immediately above each perforated interval, provided at least 20 feet of cement is placed on top of each bridge plug. A bridge plug shall not be set in any well at a depth where the pressure or temperature exceeds the ratings recommended by the bridge plug manufacturer.

(h) Plugging requirements for well with screen or liner.

(1) If practical, the screen or liner shall be removed from the well.

(2) If the screen or liner is not removed, a cement plug in accordance with subsection (d)(11) of this section shall be placed at the top of the liner.

(i) Plugging requirements for wells without production casing and open-hole completions.

(1) Any productive horizon or any formation in which a pressure or formation water problem is known to exist shall be isolated by cement plugs centered at the top and bottom of the formation. Each cement plug shall have sufficient slurry volume to fill a calculated height as specified in subsection (d)(11) of this section.

(2) If the gross thickness of any such formation is less than 100 feet, the tubing or drill pipe shall be suspended 50 feet below the base of the formation. Sufficient slurry volume shall be pumped to fill the calculated height from the bottom of the tubing or drill pipe up to a point at least 50 feet above the top of the formation, plus 10% for each 1,000 feet of depth from the ground surface to the bottom of the plug.

(j) The district director shall review and approve the notification of intention to plug in a manner so as to accomplish the purposes of this section. The district director may approve, modify, or reject the operator's notification of intention to plug. If the proposal is modified or rejected, the operator may request a review by the director of field operations. If the proposal is not administratively approved, the operator may request a hearing on the matter. After hearing, the examiner shall recommend final action by the Commission [~~commission~~].

(k) Plugging horizontal drainhole wells. All plugs in horizontal drainhole wells shall be set in accordance with subsection (d)(11) of this section. The productive horizon isolation plug shall be set from a depth 50 feet below the top of the productive horizon to a depth either 50 feet above the top of the productive horizon, or 50 feet above the production casing shoe if the production casing is set above the top of the productive horizon. If the production casing shoe is set below the top of the productive horizon, then the productive horizon isolation plug shall be set from a depth 50 feet below the production casing shoe to a depth that is 50 feet above the top of the productive horizon. In accordance with subsection (d)(7) of this section, the Commission [~~commission~~] or its delegate may require additional plugs.

§3.78. Fees, Performance Bonds and Alternate Forms of Financial Security Required To Be Filed.

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

(1) Violation--Noncompliance with a Commission [~~commission~~] rule, order, license, permit, or certificate relating to safety or the prevention or control of pollution.

(2) Outstanding violation--A violation for which:

(A) either:

(i) a Commission [~~commission~~] order finding a violation has been entered and all appeals have been exhausted; or

(ii) an agreed order between the Commission [~~commission~~] and the organization relating to a violation has been entered; and

(B) one or more of the following conditions still exist:

(i) the conditions that constituted the violation have not been corrected;

(ii) all administrative, civil, and criminal penalties, if any, relating to the violation of such Commission [~~commission~~] rules, orders, licenses, permits, or certificates have not been paid; or

(iii) all reimbursements of any costs and expenses assessed by the Commission [~~commission~~] relating to the violation of such Commission [~~commission~~] rules, orders, licenses, permits, or certificates have not been paid.

(3) An acceptable record of compliance--

(A) A record of compliance showing:

(i) No enforcement orders issued; and

(ii) No outstanding violations; or

(B) A record of compliance showing:

(i) Only one enforcement order, provided the order specifies that it shall not be considered to meet the elements of subparagraph (A) of this definition and provided the requirements of the order are met;

(ii) No enforcement orders issued other than those that are resolved in the order referenced in clause (i) of this subparagraph;

(iii) No outstanding violations other than those resolved in the order referenced in clause (i) of this subparagraph.

(4) Commercial facility--A facility whose owner or operator receives compensation from others for the storage, reclamation, treatment, or disposal of oil field fluids or oil and gas wastes that are wholly or partially trucked or hauled to the facility and whose primary business purpose is to provide these services for compensation if:

(A) the facility is permitted under §3.8 of this title (relating to Water Protection);

(B) the facility is permitted under §3.57 of this title (relating to Reclaiming Tank Bottoms, Other Hydrocarbon Wastes, and Other Waste Materials);

(C) the facility is permitted under §3.9 of this title (relating to Disposal Wells) and a collecting pit permitted under §3.8 is located at the facility; or

(D) the facility is permitted under §3.46 of this title (relating to Fluid Injection into Productive Reservoirs) and a collecting pit permitted under §3.8 is located at the facility.

(5) Financial security--An individual performance bond, blanket performance bond, letter of credit, or cash deposit filed with the Commission.

(6) Alternate form of financial security--Payment of a nonrefundable annual fee to the Commission.

(7) Individual well bond--A bond or letter of credit issued:

(A) on a Commission-approved form;

(B) by a third party surety, insurance company, or financial institution approved by the Commission; and

(C) to secure the timely and proper plugging of a specified well and remediation of the wellsite, in accordance with Commission rules.

(8) Bay well--Any well under the jurisdiction of the Commission for which the surface location is either:

(A) located in or on a lake, river, stream, canal, estuary, bayou, or other inland navigable waters of the state; or,

(B) located on state lands seaward of the mean high tide line of the Gulf of Mexico in water of a depth at mean high tide of not more than 100 feet that is sheltered from the direct action of the open seas of the Gulf of Mexico.

(9) Land well--Any well subject to Commission jurisdiction for which the surface location is not in or on inland or coastal waters.

(10) Offshore well--Any well subject to Commission jurisdiction for which the surface location is on state lands in or on the Gulf of Mexico, that is not a bay well.

(b) Filing fees. The following filing fees are required to be paid to the Railroad Commission.

(1) With each application or materially amended application for a permit to drill, deepen, plug back, or reenter a well, the applicant shall submit to the Commission [~~commission~~] a nonrefundable fee of:

(A) $200 [~~$100~~] if the proposed total depth of the well is 2,000 feet or less;

(B) $225 [~~$125~~] if the proposed total depth of the well is greater than 2,000 feet but less than or equal to 4,000 feet;

(C) $250 [~~$150~~] if the proposed total depth of the well is greater than 4,000 feet but less than or equal to 9,000 feet; or

(D) $300 [~~$200~~] if the proposed total depth of the well is greater than 9,000 feet.

(2) An application for a permit to drill, deepen, plug back, or reenter a well will be considered materially amended if the amendment is made for a purpose other than:

(A) to add omitted required information;

(B) to correct typographical errors;

(C) to correct clerical errors.

(3) An applicant shall submit an additional nonrefundable fee of $150 [~~$50~~] when requesting that the Commission [~~commission~~] expedite the application for a permit to drill, deepen, plug back, or reenter a well.

(4) With each individual application for an exception to any rule or rules in this chapter, the applicant shall submit to the Commission a nonrefundable fee of $150, except as provided in paragraph (5) of this subsection.

(5) With each application for an exception to any rule or rules in this chapter that includes an exception to §3.37 of this title (relating to Statewide Spacing Rule) (Statewide Rule 37) or §3.38 of this title (relating to Well Densities) (Statewide Rule 38), the applicant shall submit a nonrefundable fee of $200.

(6) With each application for an extension of time to plug a well pursuant to Commission rules, an applicant who has filed an alternate form of financial security as provided for under this rule, shall submit to the Commission a nonrefundable fee of $300.

[~~(4) With each application for an extension of time to plug a well pursuant to commission rules, an applicant shall submit to the commission a nonrefundable fee of $100, unless the applicant has filed a bond or letter of credit pursuant to subsection (c) of this section.~~]

[~~(5) With each application for an exception to any commission statewide rule, the applicant shall submit to the commission a nonrefundable fee of $50. If the permit application is for an exception to §§3.37, 3.38, or 3.39 of this title (relating to Statewide Spacing Rule; Well Densities; and Proration and Drilling Units: Contiguity of Acreage and Exception Thereto) (Statewide Rule 37, 38, or 39), or for any combination of exceptions to such rules, the applicant shall submit one nonrefundable fee of $50.~~]

(7) [~~(6)~~] With each application for an oil and gas waste disposal well permit, the applicant shall submit to the Commission [~~commission~~] a nonrefundable fee of $100 per well.

(8) [~~(7)~~] With each application for a fluid injection well permit, the applicant shall submit to the Commission [~~commission~~] a nonrefundable fee of $200 [~~$100~~] per well. Fluid injection well means any well used to inject fluid or gas into the ground in connection with the exploration or production of oil or gas other than an oil and gas waste disposal well.

(9) [~~(8)~~] With each application for a permit to discharge to surface water other than a permit for a discharge that meets national pollutant discharge elimination system (NPDES) requirements for agricultural or wildlife use, the applicant shall submit to the Commission [~~commission~~] a nonrefundable fee of $300 [~~$200~~].

(10) [~~(9)~~] If a certificate of compliance has been canceled, the operator shall submit to the Commission [~~commission~~] a nonrefundable fee of $100 before the Commission [~~commission~~] may reissue the certificate pursuant to §3.58 of this title (relating to Oil, Gas, or Geothermal Resource Producer's Reports) (Statewide Rule 58).

(11) [~~(10)~~] With each application for issuance, renewal, or material amendment of an oil and gas waste hauler's permit, the applicant shall submit to the Commission [~~commission~~] a nonrefundable fee of $100.

(12) [~~(11)~~] With each Natural Gas Policy Act (15 United States Code §§3301-3432) application, the applicant shall submit to the Commission [~~commission~~] a nonrefundable fee of $150 [~~$50~~].

(13) Hazardous waste generation fee. A person who generates hazardous oil and gas waste, as that term is defined in §3.98 of this title (relating to Standards for Management of Hazardous Oil and Gas Waste), shall pay to the Commission the fees specified in subsection (z) of §3.98.

(14) [~~(12)~~] A check or money order for any of the aforementioned fees shall be made payable to the Railroad Commission [~~state treasurer~~] of Texas. If the check accompanying an application is not honored upon presentment, the permit issued on the basis of that application, the allowable assigned, the exception to a statewide rule granted on the basis of the application, the extension of time to plug a well, or the Natural Gas Policy Act category determination made on the basis of the application may be suspended or revoked.

(15) If an operator submits a check that is not honored on presentment, the operator shall, for a period of 24 months after the check was presented, submit any payments in the form of a credit card, cashier's check, or cash.

(c) Organization Report Fee. An organization report required by Texas Natural Resources Code, §91.142, shall be accompanied by a fee as follows:

(1) for an operator of:

(A) not more than 25 wells, $300;

(B) more than 25 but not more than 100 wells, $500; or

(C) more than 100 wells, $1,000;

(2) for an operator of one or more natural gas pipelines, $100;

(3) for an operator of one or more of the following service activities: pollution cleanup contractor; directional surveying; approved cementer for plugging wells; or physically moving or storing crude or condensate, $300;

(4) for an operator of all other service activities or facilities, including liquids pipelines, $500;

(5) for an operator of wells who also operates one or more service activities, facilities, or pipelines as classified by the Commission, the sum of the fees that would be separately charged for each category of service activity, facility, pipeline, or number or wells operated, provided that such fee shall not exceed $1,000; or

(6) for an entity not currently performing operations under the jurisdiction of the Commission, $300.

(d) [~~(c)~~] Financial security and alternate forms of financial security. Any person, including any firm, partnership, joint stock association, corporation, or other organization, required by Texas Natural Resources Code, §91.142, to file an organization report with the Commission [~~commission~~] must also file [~~a performance bond or alternate form of~~] financial security in one of the following forms [~~. A person may choose to file~~]:

(1) an individual performance bond;

(2) a blanket performance bond;

(3) a nonrefundable annual fee of $1,000, if: [~~$100, if~~]

(A) the Commission determines that individual and blanket performance bonds as specified by this section are not obtainable at reasonable prices as provided for under subsection (f) of this section;

(B) the person can demonstrate to the Commission [~~commission~~] an acceptable record of compliance with all Commission [~~commission~~] rules, orders, licenses, permits, or certificates that relate to safety or the prevention or control of pollution for the previous 48 months and the person has no outstanding violations; and [~~additionally,~~]

(C) if the person is a firm, partnership, joint stock association, corporation, or other organization, its officers, directors, general partners, or owners of more than 25% ownership interest or any trustee must also not have any outstanding violations.

(4) a nonrefundable annual fee equal to 12.5% [~~3.0%~~] of the face amount of the performance bond that otherwise would be required; or

(5) a letter of credit or cash deposit in the same amount as required for an individual performance bond or blanket performance bond [~~a first lien on tangible personal property associated with oil and gas production whose salvage value equals the value of the bond that otherwise would be required~~].

[~~(d) Letter of credit. A letter of credit may be submitted in lieu of either an individual or blanket performance bond, subject to the same requirements for bonds where applicable.~~]

(e) Eligibility for nonrefundable $1,000 fee.

(1) For the purposes of this subsection, "officers and owners" include directors, general partners, owners of more than 25% ownership interest, or any trustee of an organization.

(2) A person filing an organization report for the first time in order to perform any Commission-regulated operations is a new organization and is not eligible to file the nonrefundable fee of $1,000.

(3) A person who filed an initial organization report less than 48 months prior to the current filing is not eligible to file the nonrefundable fee of $1,000.

(4) A change in name, without any other organizational change, of a person registered with the Commission does not indicate a new organization. If the Commission determines that only a name change has occurred, then a person operating under a new name may file the nonrefundable fee of $1,000 if the person meets all other eligibility requirements.

(5) An individual registered with the Commission as a sole proprietor or who is a general partner of a partnership that is registered with the Commission and who reorganizes his or her oil and gas operations under a new legal entity or establishes a new and separate entity will be considered to have satisfied the 48- month eligibility requirement for filing the nonrefundable fee of $1,000.

(6) A surviving or new corporation or other entity resulting from a merger under the Texas Business Corporation Act, Part Five, may file the nonrefundable fee of $1,000 if:

(A) the existing record of compliance for each entity that is a party to the merger qualifies;

(B) the records of compliance for the officers and owners of the surviving or new entities qualify; and

(C) the number of surviving or new entities eligible does not exceed the number of parties registered with the Commission at the time of the merger.

(7) In any Commission enforcement proceeding, if a person is determined not to be the responsible party for a violation and is dismissed from the proceeding for that reason, that violation shall not be considered in determining whether that person has an acceptable record of compliance.

(f) Availability of bonds.

(1) In determining the applicability of the $1,000 nonrefundable fee as provided for under this section, the Commission presumes that individual and blanket performance bonds are obtainable at reasonable prices.

(2) An operator may request a hearing to determine that individual and blanket performance bonds are not obtainable at reasonable prices. In order to support a determination that bonds are not obtainable at reasonable prices, the operator must show:

(A) that no fewer than three companies which have issued a bond filed with the Commission in the past 12 months will not issue a bond to the requesting operator for an annual fee less than 12% of the face amount of the bond; and

(B) that the operator is otherwise eligible under this section to file a $1,000 nonrefundable annual fee.

(g) [~~(e)~~] Forms for financial security. Operators shall submit [~~Performance~~] bonds [~~, liens,~~] and letters of credit [~~shall be submitted~~] on forms prescribed by the Commission [~~commission~~].

(h) [~~(f)~~] Filing deadlines for financial security. Operators shall submit required [~~Performance bonds or an alternate form of~~] financial security [~~shall be filed~~] at the time of filing an initial organization report or upon yearly renewal, or as required under subsection (m) of this section.

(i) [~~(g)~~] New [~~well~~] operators. A person filing an organization report for the first time [~~in order to operate wells~~] is a new organization and is not eligible to file an individual performance bond for the first year of operation.

(j) [~~(h)~~] Amount of bond, letter of credit, or cash deposit [~~Bond amount~~].

(1) A person [~~required to file a bond~~] who operates one or more wells may file an individual performance bond, letter of credit or cash deposit in an amount equal to $2.00 for each foot of total well depth for each well, plus an additional amount to be determined by the Commission in a subsequent rulemaking for each bay and offshore well operated.

(2) A person operating wells required to file a bond may file a blanket bond, letter of credit or cash deposit to cover all wells [~~and other commission-regulated operations~~] for which a bond, letter of credit or cash deposit is required in an amount equal to the sum of [~~as follows~~]:

(A) A base amount determined by the total number of wells operated, as follows: [~~a person who operates 10 or fewer wells or performs other operations shall file a $25,000 blanket bond;~~]

(i) a person who operates 10 or fewer wells or performs other operations shall have a base amount of $25,000;

(ii) a person who operates more than 10 but fewer than 100 wells shall have a base amount of $50,000; and

(iii) a person who operates 100 or more wells shall have a base amount of $250,000, plus;

(B) an additional amount, to be determined by the Commission in a subsequent rulemaking, for each bay well operated, plus [~~a person who operates more than 10 but fewer than 100 wells shall file a $50,000 blanket bond; and~~]

(C) an additional amount, to be determined by the Commission in a subsequent rulemaking, for each offshore well operated [~~a person who operates 100 or more wells shall file a $250,000 blanket bond~~].

(3) A person operating wells and performing other operations, who chooses to cover all operations by a blanket performance bond, letter of credit or cash deposit shall file a bond, letter of credit or cash deposit in an amount determined by the total number of wells, but not less than $25,000. Only one blanket performance bond, letter of credit or cash deposit is required for a person performing multiple operations, unless the person is operating a commercial facility subject to the financial security requirements of subsection (p) of this section.

(4) Financial security [~~Bond~~] amounts are the minimum amounts required by this section to be filed. A person may file [~~a bond in~~] a greater amount if desired.

[~~(i) Expiration of bond obligations. Obligations to pay part or all of a bond amount are deemed released after four years from the expiration date of the bond if no noncompliant operations or activities subject to a bond have been discovered by the commission within that four-year period, and no enforcement action against any operations or activities subject to a bond is pending. A person whose activities are covered by a bond, as the principal, and the surety on a bond may also be relieved of their obligations to pay part or all of a bond amount by written agreement between the Railroad Commission of Texas, principal and surety.~~]

(k) [~~(j)~~] Bond Conditions. Any financial security [~~Each performance bond~~] required under this section is subject to the conditions that the operator [~~principal~~] will plug and abandon all wells and control, abate, and clean up pollution associated with the oil and gas operations and activities covered under the required financial security [~~bond~~] in accordance with applicable state law and permits, rules, and orders of the Commission [~~commission~~].

[~~(k) Eligibility for nonrefundable $100 fee.~~]

[~~(1) A person filing an organization report for the first time in order to perform any commission-regulated operations is a new organization and is not eligible to choose to file the nonrefundable fee of $100 under subsection (c)(3) of this section.~~]

[~~(2) A person that filed an initial organization report less than 48 months prior to the current filing is not eligible to choose to file the nonrefundable fee of $100 under subsection (c)(3) of this section.~~]

[~~(3) A change in name, without any other organizational change, of a person registered with the commission does not indicate a new organization. If the commission or its representative determines that only a name change has occurred, a person operating under a new~~

name may choose to file under subsection (c)(3) of this section, if otherwise qualified.]

[(4) An individual, registered with the commission as a sole proprietor or who is a general partner of a partnership that is registered with the commission, and who reorganizes his or her oil and gas operations under a new legal entity or establishes a new and separate entity, will be considered eligible to choose to file under subsection (c)(3) of this section, if otherwise qualified based on the individual's existing record of compliance as well as the records of any other owners or officers of the new entity.]

[(5) A surviving or new corporation or other entity resulting from a merger under the Texas Business Corporation Act, Part Five, may choose to file under subsection (c)(3) of this section, only if otherwise qualified on the basis of the existing records of compliance, considered as a whole, of all corporations and other entities that are parties to the merger as well as the records of the officers and owners of the surviving or new entities. The number of surviving or new corporations or other entities eligible under this paragraph is limited to no more than the total number of parties to the merger who were currently registered with the commission at the time of the merger.]

[(6) For the purposes of this subsection, "officers and owners" include directors, general partners, owners of more than 25% ownership interest, or any trustee of an organization.]

(l) Conditions for cash deposits. Operators shall tender cash deposits in United States currency or certified cashiers check only. All cash deposits will be placed in a special account within the Oil Field Clean Up Fund account. Any interest accruing on cash deposits will be deposited into the Oil Clean Up Fund pursuant to Texas Natural Resources Code, §91.111(c)(8). The Commission will not refund a cash deposit until either financial security or an alternate form of financial security is accepted by the Commission as provided for under this section or an operator ceases all activity.

[(l) Compliance certification. The commission or a commission representative may require an applicant organization to file a compliance certification in connection with filing the nonrefundable $100 fee under subsection (c)(3) of this section.]

[(1) The certification shall include a statement that:]

[(A) the applicant organization at the time of application or during the 48 months prior to the application has no referrals to the commission's legal enforcement section relating to a violation, or has no pending legal enforcement action relating to a violation; and]

[(B) the applicant organization or any officer, director, general partner, or owner of more than 25% ownership interest, or trustee of the named organization has no outstanding violations.]

[(2) If the certification is signed by an agent of an applicant organization, the certification is binding on the agent and the organization as if signed by a person holding a position of ownership or control in the organization.]

(m) Individual well bonds.

(1) An operator who has filed an alternate form of financial security with the Commission and who applies for a plugging extension for a well that has been inactive for more than 36 months is required under §3.14 of this title (relating to Plugging) to file an individual well bond or individual well letter of credit in the face amount of the estimated plugging cost of the well for which a plugging extension is requested. The Commission shall presume that the estimated plugging cost for wells for which a plugging extension is sought is as follows:

(A) for land wells, the product of the total depth of the well multiplied by $3 per foot;

(B) for bay wells, $60,000; and,

(C) for offshore wells, $250,000.

(2) An operator may rebut the presumed estimated plugging costs for a specific well for which a plugging extension is sought at hearing by clear and convincing evidence establishing a higher or lower prospective plugging cost for the well. The operator, Commission staff, or any owner of the surface or mineral estate on which the well is located may initiate a hearing on the prospective plugging cost for a well for the purpose of setting the amount of an individual well bond by filing a request for hearing.

(3) If an individual well bond is required, it shall be continuously maintained until the well is plugged or returned to active operation, as defined under §3.14, unless the operator files financial security as provided by this section.

[(m) Dismissed violations. In any legal enforcement proceeding, if a person is determined not to be the responsible party for a violation and is dismissed from the proceeding for that reason, that violation shall not be considered in determining whether that person has an acceptable record of compliance.]

(n) Well or lease transfer.

(1) The Commission shall not approve a transfer of operatorship submitted for any well or lease unless the operator acquiring the well or lease has on file with the Commission one of the following approved forms of financial security in an amount sufficient to cover both its current operations and the wells being transferred:

(A) an individual performance bond, letter of credit or cash deposit; or

(B) a blanket performance bond, letter of credit or cash deposit.

(2) Any existing financial security or individual well bond covering the well or lease proposed for transfer shall remain in effect and the prior operator of the well remains responsible for compliance with all laws and Commission rules covering the transferred well until the Commission approves the transfer.

(3) A transfer of a well or lease from one entity to another entity under common ownership is a transfer for the purposes of this section.

[(n) Fee for inactive wells subject to §3.14 of this title (relating to Plugging) (Statewide Rule 14(b)(2)). A person who chooses to file a form of financial security other than a bond or letter of credit shall also submit, pursuant to subsection (b)(4) of this section, a fee of $100 for each well for which an application to extend the time to plug a well has been filed under §3.14(b)(2) (Statewide Rule 14).]

[(o) A transfer of operatorship of any well is not complete unless the operator acquiring the well has on file with the commission an approved form of organizational financial security covering its operations. In addition, if under the terms of §3.14 of this title (relating to Plugging) (Statewide Rule 14), the well has been inactive for 12 or more months, the well has not been returned to active operation prior to the proposed transfer, and the proposed acquiring operator is an unbonded operator, the transfer shall not be approved unless the acquiring operator files an individual well bond, as defined in §3.14 of this title (relating to Plugging) (Statewide Rule 14). All existing individual well bonds, organizational individual bonds, organizational blanket bonds, and letters of credit covering the well and lease proposed for transfer remain in effect and the prior operator of the well remains responsible

~~for compliance with all laws and commission rules covering the transferred well until the commission determines that the well is covered by proper financial security and approves the transfer and the acquiring operator has assumed full responsibility for the well in accordance with all applicable statutes and commission rules.]~~

(o) [~~(p)~~] Reimbursement liability. Filing any [~~a bond or alternate~~] form of financial security does not extinguish a person's liability for reimbursement for the expenditure of state oilfield clean-up funds pursuant to the Texas Natural Resources Code, §89.083 and §91.113.

[~~(q) Hazardous waste generation fee. A person who generates hazardous oil and gas waste, as that term is defined in §3.98 of this title (relating to Standards for Management of Hazardous Oil and gas Waste), shall pay to the commission the fees specified in subsection (z) of §3.98.~~]

(p) [~~(r)~~] Financial security for commercial facilities. The provisions of this subsection shall apply to the holder of any permit for a commercial facility.

(1) Application.

(A) New permits. Any application for a new or amended commercial facility permit filed after the original effective date of this subsection shall include:

(i) a written estimate of the maximum dollar amount necessary to close the facility prepared in accordance with the provisions of paragraph (4) of this subsection that shows all assumptions and calculations used to develop the estimate;

(ii) a copy of the form of the bond or letter of credit that will be filed with the Commission [~~commission~~]; and

(iii) information concerning the issuer of the bond or letter of credit as required under paragraph (5) of this subsection including the issuer's name and address and evidence of authority to issue bonds or letters of credit in Texas.

(B) Existing permits. Within 180 days of the original effective date of this subsection, the holder of any commercial facility permit issued on or before the original effective date of this subsection shall file with the Commission [~~commission~~] the information specified in subparagraph (A)(i)-(iii) of this paragraph.

(2) Notice and hearing.

(A) New permits. For commercial facility permits issued after the original effective date of this subsection, the provisions of §3.8 or §3.57 of this title (relating to Water Protection; and Reclaiming Tank Bottoms, Other Hydrocarbon Wastes, and Other Waste Materials), as applicable, regarding notice and opportunity for hearing, shall apply to review and approval of financial security proposed to be filed to meet the requirements of this subsection.

(B) Existing permits. Notice of filing of information required under paragraph (1)(B) of this subsection shall not be required. In the event approval of the financial security proposed to be filed for a commercial facility operating under a permit in effect as of the original effective date of this subsection is denied administratively, the applicant shall have the right to a hearing upon written request. After hearing, the examiner shall recommend a final action by the Commission [~~commission~~].

(3) Filing of instrument.

(A) New permits. A commercial facility permitted after the original effective date of this subsection may not receive oil field fluids or oil and gas waste until a bond or letter of credit in an amount approved by the Commission [~~commission~~] or its delegate under this subsection and meeting the requirements of this subsection as to form and issuer has been filed with the Commission [~~commission~~].

(B) Existing permits. Except as otherwise provided in this subsection, after one year from the original effective date of this section, a commercial facility permitted on or before the original effective date of this subsection may not continue to receive oil field fluids or oil and gas waste unless a bond or letter of credit in an amount approved by the Commission [~~commission~~] or its delegate under this subsection and meeting the requirements of this subsection as to form and issuer has been filed with and approved by the Commission [~~commission~~] or its delegate.

(C) Extensions for existing permits. On written request and for good cause shown, the Commission [~~commission~~] or its delegate may authorize a commercial facility permitted before the original effective date of this subsection to continue to receive oil field fluids or oil and gas waste after one year after the original effective date of this section even though financial security required under this subsection has not been filed. In the event the Commission [~~commission~~] or its delegate has not taken final action to approve or disapprove the amount of financial security proposed to be filed by the owner or operator under this subsection one year after the original effective date of the section, the period for filing financial security under this subsection is automatically extended to a date 45 days after such final Commission [~~commission~~] action.

(4) Amount.

(A) Except as provided in subparagraphs (B) or (C) of this paragraph, the amount of financial security required to be filed under this subsection shall be an amount based on a written estimate approved by the Commission [~~commission~~] or its delegate as being equal to or greater than the maximum amount necessary to close the commercial facility, exclusive of plugging costs for any well or wells at the facility, at any time during the permit term in accordance with all applicable state laws, Commission [~~commission~~] rules and orders, and the permit, but shall in no event be less than $10,000.

(B) The owner or operator of a commercial facility may reduce the amount of financial security required under this subsection by $25,000 if the owner or operator holds only one commercial facility permit.

(C) The owner or operator of more than one commercial facility may reduce the amount of financial security required under this subsection for one such facility by $25,000. The full amount of financial security required under subparagraph (A) of this paragraph shall be required for the remaining commercial facilities.

(D) Except for the facilities specifically exempted under subparagraph (E), a qualified professional engineer licensed by the State of Texas shall prepare or supervise the preparation of a written estimate of the maximum amount necessary to close the commercial facility as provided in subparagraph (A) of this paragraph. The owner or operator of a commercial facility shall submit the written estimate under seal of a qualified licensed professional engineer to the Commission [~~commission~~] as required under paragraph (1) of this subsection.

(E) A facility permitted under §3.57 of this title (relating to reclaiming tank bottoms, other hydrocarbon wastes, and other waste materials) that does not utilize on-site waste storage or disposal that requires a permit under §3.8 of this title (relating to water protection) is exempt from subparagraph (D) of this paragraph.

(F) Notwithstanding the fact that the maximum amount necessary to close the commercial facility as determined under this

paragraph is exclusive of plugging costs, the proceeds of financial security filed under this subsection may be used by the Commission [~~commission~~] to pay the costs of plugging any well or wells at the facility if the financial security for plugging costs filed with the Commission [~~commission under subsection (c) of this section~~] is insufficient to pay for the plugging of such well or wells.

(5) Issuer and form.

(A) Bond. The issuer of any commercial facility bond filed in satisfaction of the requirements of this subsection shall be a corporate surety authorized to do business in Texas. The form of bond filed under this subsection shall provide that the bond be renewed and continued in effect until the conditions of the bond have been met or its release is authorized by the Commission [~~commission~~] or its delegate.

(B) Letter of credit. Any letter of credit filed in satisfaction of the requirements of this subsection shall be issued by and drawn on a bank authorized under state or federal law to operate in Texas. The letter of credit shall be an irrevocable, standby letter of credit subject to the requirements of Texas Business and Commerce Code, §§5.101-5.118. [~~5.117.~~] The letter of credit shall provide that it will be renewed and continued in effect until the conditions of the letter of credit have been met or its release is authorized by the Commission [~~commission~~] or its delegate.

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 October 26, 2001.

TRD-200106506
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 475-1295

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16 TAC §3.73

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

The Railroad Commission of Texas proposes the repeal of §3.73, relating to Inscriptions on Railroad Commission of Texas Vehicles. The Commission proposes the repeal of §3.73 (commonly referred to as Statewide Rule 75) in order to move the rule into 16 TAC Chapter 20, as new §20.405, proposed in a separate but concurrent rulemaking. Chapter 20, entitled Administration, includes the Commission's general administrative rules, including those regarding Commission vehicles. The text of §3.73 will be proposed as new §20.405; no substantive changes are proposed to the text of the rule, but the citation to statutory authority will be updated.

Rebecca Trevino, Director, Finance and Accounting Division, has determined that for each year of the first five years that the repeal is in effect, there will be no fiscal implications for state or local governments because the rule will continue to exist in a different chapter.

Ms. Trevino has also determined that for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of enforcing the repeal (and the concurrent new rule in chapter 20) will be better organization of the Commission's vehicle rules. Because the exemption from the marking requirement applies to all Commission vehicles, it is more appropriately located in Chapter 20.

There is no anticipated economic cost to individuals, small businesses, or micro-businesses required to comply with the proposed repeal.

The Commission has concurrently filed a notice of intention to review §3.73, as proposed to be repealed, in accordance with Tex. Gov. Code §2001.39 (*as amended by Acts 1999, 76th Leg., ch. 1499 §1.11(a)*).

Comments on the proposal may be submitted to Rebecca Trevino, Director of Finance, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967 or via electronic mail to rebecca.trevino@rrc.state.tx.us. The Commission will accept comments for 30 days after publication in the *Texas Register*. For more information, call Ms. Trevino at (512) 463-7214.

The Commission proposes the repeal pursuant to Texas Transportation Code, §721.003(a)(8), which permits the Railroad Commission by rule to exempt itself from the vehicle identification and marking requirements imposed under Texas Transportation Code, §721.002.

Texas Transportation Code, §§721.002 and 721.003, are affected by the proposed repeal.

Issued in Austin, Texas on October 23, 2001.

§3.73. Inscriptions on Railroad Commission of Texas Vehicles.

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 October 23, 2001.

TRD-200106429
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 475-1295

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CHAPTER 20. ADMINISTRATION
SUBCHAPTER A. CONTRACTS AND PURCHASES

The Railroad Commission of Texas proposes simultaneously to repeal §20.1, relating to Protest/Dispute Resolution Procedures, and to adopt new §20.1, relating to Procedures for Filing and Resolving Protests of a Contract Solicitation or Award. The Commission also proposes new §20.10, concerning Bid Opening and Tabulation. The Commission proposes these actions to comply with statutory provisions requiring state agencies to adopt procedures for dealing with issues attendant to state agency purchasing and contracting, and to clearly describe the requirements of the Commission's procedures for the benefit of bidders, vendors, and members of the public.

Proposed new §20.1 will instruct prospective bidders, offerors, or contractors about the procedures for filing a protest regarding

a Commission procurement. The rule clearly articulates the information that must be included in a protest, the procedures for pursuing a protest, the standards by which a protest will be evaluated, and remedies available for violations of statutes or rules in the procurement process. Additionally, the rule includes appeal procedures in the event that the protestant is not satisfied with the Commission's initial determination.

As proposed, new §20.1 establishes three levels of consideration of a protest concerning claimed violations of statutes or rules in the procurement process. At the first level, the director of finance ("the director") receives protests, gathers information, and makes a determination. At the second level, the director of finance and administration ("the DFA") receives appeals of determinations made by the director of finance. At the third level, the Commission entertains appeals of determinations made by the director of finance and administration. For any determination which would result in a contract being declared void or rescinded, the Commission makes the final decision.

Proposed new §20.1(a) contains definitions of key terms used in the rule. Proposed new §20.1(b) contains general provisions that govern the filing of a protest, appeal, or appeal to the Commission, including a delegation of authority to the director and the DFA to resolve complaints and appeals. In the event the director receives a timely, proper protest, the director may not proceed further with the solicitation or with the award of the contract in question unless the director makes a written determination that the award of the contract, without delay, is necessary to protect substantial interests of the state. Any protest determination by the director or appeal determination by the DFA that results in a declaration that a contract should be void or rescinded and that is not appealed must be forwarded to the next level as if it were an appeal. A protest or appeal determination that does not declare a contract void or rescinded and that is not timely appealed is considered to be the final administrative action of the Commission.

Proposed new §20.1(c) states the proper ground for filing a protest, an appeal, or an appeal to the Commission, and the basis on which the director, the DFA, and the Commission may decline to consider and may dismiss a matter. The absence of an award of a contract to a protestant, an appellant, or a person who appeals to the Commission is not a proper ground for protest or appeal, unless that protestant, appellant, or person makes a specific factual allegation that the failure to award a contract to that protestant, appellant, or person was the result of a violation of statutes or rules. Unless a protestant, appellant, or person who appeals to the Commission demonstrates good cause for delay or unless the director, the DFA, or the Commission determines that a protest or appeal raises issues significant to procurement practices or procedures, the director, the DFA, and the Commission shall not consider a protest, an appeal, or an appeal to the Commission that is not timely filed. Finally, the director, the DFA, or the Commission may dismiss a protest or an appeal that fails to state a proper ground; that is untimely; or that is incomplete when filed.

Proposed new §20.1(d) prescribes the contents of protest and establishes the deadline for filing a protest, which is generally no later than the tenth day after the protestant knows or should have known of the occurrence of the action that is protested; proposed new subsection (e) sets forth the director's obligations in the event of receiving a protest, one of which is to notify all other vendors for the procurement that is the subject of the protest and invite them to submit comments or request to participate in the protest inquiry. If a protest is not withdrawn by the protestant, the director must issue a written determination on the protest by letter and notify the protestant and all interested parties. If the director determines that no violation of rules or statutes has occurred, regardless of whether a contract has been awarded, the director must so state and give the reasons for the determination. If no contract has been awarded, the director may proceed with the award of a contract. If the director determines that a violation of the rules or statutes has occurred in a case in which no contract has been awarded, the director must so state and give both the reasons for the determination and the appropriate remedial action and may, at the director's discretion, proceed with the award of a contract. If the director determines that a violation of the rules or statutes has occurred in a case in which a contract has been awarded, the director must so state and shall set forth the reasons for the determination and the appropriate remedial action, which may include declaring the contract void or rescinded. Any protest determination that declares a contract void or rescinded that is not appealed by an appellant must be forwarded to the DFA to be reviewed as if it were an appeal.

Proposed new §20.1(f) sets forth the procedure on appeal of a director's determination to the DFA, and prescribes the contents of an appeal and the deadline for filing it. The DFA's obligations on appeal, set forth in proposed new subsection (g), include notifying all other interested parties in the protest inquiry and determination that is the subject of the appeal, inviting their participation in the appeal, and setting a deadline by which they must respond. The DFA may request that the General Counsel review and make a recommendation on the matter. If an appeal is not withdrawn by the appellant, the DFA must issue a written determination on the appeal by letter. If the DFA determines that the director's determination was substantially correct, the DFA must so state and give the reasons for the determination. If the DFA determines that the director's determination was substantially incorrect, the DFA must so state and provide the reasons for the determination and the appropriate remedial action. Any appeal determination that results in a contract being declared void or rescinded and that is not appealed must be forwarded to the Commission to be reviewed.

Proposed new §20.1(h) describes the procedures applicable when a DFA's appeal determination is appealed to the Commission. The appeal is filed with the General Counsel, who schedules the matter for consideration at an open meeting of the Commission, notifies the parties, and sets a deadline by which parties must file any additional comments or request to be heard in oral argument before the Commission at the scheduled open meeting. The Commission' determination of the appeal must be by written order.

Finally, proposed new §20.1(i) provides that, in the event the Commission receive a protest, the Commission will retain documents collected as part of a solicitation, evaluation, and/or award of a contract for a period of four years from the date of the initial procurement action. In addition, the Commission will also retain the protest file, the appeal file, and any documents or Commission orders pertaining to a determination made by the Commission.

Proposed new §20.10 will instruct prospective bidders, offerors, or contractors in the bid opening and tabulation process used by the Commission. The rule adopts by reference the practices of the Texas Building and Procurement Commission (formerly

the General Services Commission) found in 1 Texas Administrative Code §113.5(b), relating to Bid Submission, Bid Opening and Tabulation, as required by Texas Government Code, §2156.005(d). These practices provide that all bid openings shall be open to the public; bid opening dates may be changed and bid openings rescheduled if bidders are properly notified in advance of the new opening date; if a bid opening is canceled, all bids which are being held for opening will be returned to the bidders; and all bid tabulation files are available for public inspection. Bid tabulations may be reviewed by any interested person during regular working hours at the offices of the Commission. Employees of the Commission are not required to give bid tabulation information by telephone.

Rebecca Trevino, Director of Finance, has determined that for each of the first five years the proposed repeal of current §20.1 and new §20.1 and §20.10 will be in effect, there will be no fiscal implications for state or local governments. The Commission does not anticipate that there will be any greater number of protests by aggrieved bidders filed under proposed new §20.1 than under the current rule. The Commission also expects no change in its practices with respect to bid opening and tabulation under proposed new §20.10, because the Commission is currently complying with the mandated practices of the Texas Building and Procurement Commission within the current staffing and budget of the agency.

Ms. Trevino has also determined that the public benefit anticipated as a result of the repeal of the current §20.1 and the adoption of new §20.1 will be the elimination of an outdated and outmoded rule and replacement with clearer and more helpful procedures and remedies for aggrieved bidders, and for §20.10, clearly stated procedures for bid openings and tabulations. There is no anticipated increase in the cost of compliance with the repeal of current §20.1 and adoption of new §20.1 and §20.10 for individuals, small businesses or micro-businesses, because filing a protest or an appeal, attending a bid opening, or viewing bid tabulations are voluntary rather than mandatory procedures. However, those individuals, small businesses or micro-businesses that do file protests and/or appeals would incur costs associated with pursuing the matter with the Commission. At a minimum, those costs would include preparing the protest or appeal documents, and perhaps the cost of travel to Austin to appear before the Commission at an open meeting. These costs cannot be quantified on the basis of the cost for each employee, the cost for each hour of labor, or the cost for each $100 of sales because they will be unique to each procurement.

Also, in a concurrent proposal, the Commission proposes the review of current §20.1, required under Texas Government Code, §2001.039 (*as added by Acts 1999, 76th Leg., ch. 1499, §1.11(a)*). The separate rule review documents will be filed with the *Texas Register* concurrently with this rulemaking.

Comments on the proposed review, repeal, and new rules may be submitted to Rebecca Trevino, Director of Finance, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967 or via electronic mail to rebecca.trevino@rrc.state.tx.us. The Commission will accept comments for 30 days after publication in the *Texas Register*. For more information, telephone Ms. Trevino at (512) 463-7214.

16 TAC §20.1

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

The Commission proposes the repeal of §20.1 pursuant to Texas Government Code, §2155.076, which requires agencies to develop and adopt protest procedures for resolving vendor protests relating to purchasing issues that are consistent with the rules of the Texas Building and Procurement Commission.

Texas Government Code, §2155.076, is affected by the proposed repeal.

Issued in Austin, Texas on October 23, 2001.

§20.1. Protest/Dispute Resolution Procedures.

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

Filed with the Office of the Secretary of State, on October 23, 2001.

TRD-200106427
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 475-1295

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16 TAC §20.1, §20.10

The Commission proposes new §20.1 pursuant to Texas Government Code, §2155.076, which requires agencies to develop and adopt protest procedures for resolving vendor protests relating to purchasing issues that are consistent with the rules of the Texas Building and Procurement Commission; and new §20.10 pursuant to Texas Government Code, §2156.005, which requires state agencies making purchases to adopt the Texas Building and Procurement Commission's rules related to bid opening and tabulation.

Texas Government Code, §2155.076 and §2156.005, are affected by the proposed new rules.

Issued in Austin, Texas on October 23, 2001.

§20.1. Procedures for Filing and Resolving Protests of a Contract Solicitation or Award.

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

(1) Appeal determination letter--The DFA's written decision on an appeal of a director's protest determination.

(2) Appeal file--The protest file, the appellant's written appeal, any comments filed by other interested parties, any information or recommendation prepared by the General Counsel, and the DFA's appeal determination letter.

(3) Appellant--A protestant or interested party who is aggrieved by a director's protest determination.

(4) Certified mail--A mailing made using United States Postal Service certified mail service, including return receipt requested.

(5) Commission--The Railroad Commission of Texas.

(6) Day--A day that is not a Saturday, Sunday, or Commission holiday.

(7) DFA--The Director of Finance and Administration or the DFA's delegate.

(8) Director--The Director of Finance or the director's delegate.

(9) General Counsel--The General Counsel of the Commission or the General Counsel's delegate.

(10) Interested party--A vendor, other than the protestant, who has submitted a bid or proposal for the contract that is the subject of a protest and who submits information, comments, or otherwise participates in a protest inquiry.

(11) Other vendor--A vendor, other than the protestant, who has submitted a bid or proposal for the contract that is the subject of a protest.

(12) Protest determination letter--The director's written decision on a protest.

(13) Protest file--All documents pertaining to a protest including the protestant's written protest; the director's notice to other vendors; vendors' comments filed with the director; notes, memoranda, and information compiled by the director in connection with a protest; and the director's protest determination letter.

(14) Protestant--Any actual or prospective bidder, offeror, or contractor aggrieved in connection with the Commission's solicitation, evaluation, or award of a contract.

(b) General provisions.

(1) Protests.

(A) Any protestant may file a protest with the director. A protestant shall conform the protest to the requirements of subsections (c) and (d) of this section.

(B) Except as provided in subparagraph (D) of this paragraph, the director shall have authority, prior to the filing of an appeal under subsection (f) of this section, to resolve a protest filed under this section.

(C) In the event that the director receives a timely, proper protest as defined in subsection (c) of this section, the director shall not proceed further with the solicitation or with the award of the contract in question unless the director makes a written determination that the award of the contract, without delay, is necessary to protect substantial interests of the state.

(D) Any protest determination that a contract should be declared void or rescinded and that is not appealed shall be forwarded to the DFA as if it were an appeal filed pursuant to subsection (f) of this section.

(E) A protest determination that does not declare a contract void or rescinded and that is not timely appealed shall be the final administrative action of the Commission.

(2) Appeals.

(A) Any appellant may file an appeal with the DFA. An appellant shall conform the appeal to the requirements of subsections (c) and (f) of this section.

(B) Except as provided in subparagraph (C) of this paragraph, the DFA shall have authority, prior to the filing of an appeal to the Commission under subsection (h) of this section, to resolve an appeal filed under this section.

(C) Any appeal determination that a contract should be declared void or rescinded and that is not appealed shall be forwarded to the Commission for final action pursuant to subsection (h) of this section.

(D) An appeal determination that does not result in a contract being declared void or rescinded and that is not timely appealed shall be the final administrative action of the Commission.

(3) Appeals to the Commission. Any appellant or interested party to an appeal may file an appeal to the Commission. An appellant or interested party appealing to the Commission shall conform the appeal to the requirements of subsections (c) and (h) of this section.

(c) Ground for filing protest, appeal, or appeal to the Commission; basis for non-consideration; dismissal.

(1) The absence of an award of a contract to a protestant, an appellant, or a person who appeals to the Commission shall not be a proper ground for protest or appeal, unless that protestant, appellant, or person makes a specific factual allegation that the failure to award a contract to that protestant, appellant, or person was the result of a violation of statutes or rules.

(2) Unless a protestant, appellant, or person who appeals to the Commission demonstrates good cause for delay, or the director, the DFA, or the Commission determines that a protest or appeal raises issues significant to procurement practices or procedures, the director, the DFA, and the Commission shall not consider a protest, an appeal, or an appeal to the Commission that is not timely filed pursuant to subsections (d), (f), or (h) of this section.

(3) The director, the DFA, or the Commission may dismiss a protest or an appeal that fails to state a proper ground; that is untimely; or that is incomplete when filed.

(d) Contents of protest; deadline for filing protest.

(1) A protestant shall file a protest in writing with the director no later than the tenth day after the protestant knows or should have known of the occurrence of the action that is protested.

(2) A protest shall be sworn and notarized and shall contain:

(A) the name and address of the protestant;

(B) identification of the procurement to which the protest is directed;

(C) a specific citation to or identification of every statute or rule that the protestant alleges has been violated;

(D) a precise statement of the relevant facts;

(E) identification of the issue or issues to be resolved; and

(F) argument and authorities, if any, in support of the protest.

(e) Director's obligation in protest inquiry.

(1) No later than the tenth day following receipt of a timely, complete protest that sets forth proper grounds for relief, the director shall notify by certified mail all other vendors for the procurement that is the subject of the protest. The notice shall consist of a copy of the written protest, an invitation to the other vendors to submit comments and/or a request to participate in the protest inquiry, and a deadline by which the other vendors must respond to the director. The deadline shall be not less than ten days from the date the other vendors receives the director's notice.

(2) In reviewing the protest, the director shall consider all comments that may be filed by other vendors. The director may request additional information from the protestant, the other vendors, or another source, and may consider this information in reviewing the protest.

(3) If a protest is not withdrawn by the protestant, the director shall issue a written determination on the protest by letter. The director shall provide a copy of the protest determination letter to the protestant and the interested parties by certified mail. The director's protest determination letter shall include the following information, as appropriate:

(A) If the director determines that no violation of rules or statutes has occurred, regardless of whether a contract has been awarded, the director shall so state and shall set forth the reasons for the determination. If no contract has been awarded, the director may proceed with the award of a contract.

(B) If the director determines that a violation of the rules or statutes has occurred in a case in which no contract has been awarded, the director shall so state and shall set forth the reasons for the determination and the appropriate remedial action. At the director's discretion, the director may proceed with the award of a contract.

(C) If the director determines that a violation of the rules or statutes has occurred in a case in which a contract has been awarded, the director shall so state and shall set forth the reasons for the determination and the appropriate remedial action, which may include declaring the contract void or rescinded.

(4) Any protest determination that declares a contract void or rescinded that is not appealed by an appellant shall be forwarded to the DFA to be reviewed pursuant to the procedure in subsection (g) of this section.

(f) Procedure on appeal.

(1) An appellant may appeal the director's protest determination to the DFA by filing a written notice of appeal with the DFA no later than the tenth day after the date the protestant or interested party receives the director's protest determination letter.

(2) An appeal shall be sworn and notarized and shall contain:

(A) the name and address of the appellant;

(B) identification of the procurement to which the protest was directed;

(C) identification of the director's protest determination letter to which the appeal is directed;

(D) a statement of every point of the director's protest determination letter which the appellant claims is incorrect; and

(E) argument and authorities, if any, in support of the appeal.

(g) DFA's obligation on appeal.

(1) No later than the tenth day following receipt of a timely, complete appeal, the DFA shall notify by certified mail all other interested parties in the protest inquiry and determination that is the subject of the appeal. The notice shall consist of a copy of the written appeal, an invitation to the other interested parties to submit comments and/or a request to participate in the appeal, and a deadline by which the interested party must respond to the DFA. In the event the DFA receives a protest determination forwarded under subsection (e)(4) of this section, the notice shall inform the protestant and all other interested parties in the protest inquiry that the director's protest determination has been forwarded to the DFA for review and shall include a deadline by which to respond to the DFA. The deadline shall be not less than ten days from the date the protestant or interested party receives the DFA's notice.

(2) Following the deadline for receipt of comments or requests to participate in the appeal, the DFA may forward to the General Counsel the protest file, the appeal, and any comments by interested parties, and request the General Counsel's review and written recommendation on the appeal.

(3) If an appeal is not withdrawn by the appellant, the DFA shall review the protest file, the appeal, any comments by interested parties, and any information or recommendation prepared by the General Counsel and shall issue a written determination on the appeal by letter. The DFA shall provide a copy of the appeal determination letter to the appellant and the appeal parties by certified mail. The DFA's appeal determination letter shall include the following information, as appropriate:

(A) If the DFA determines that the director's determination was substantially correct, the DFA shall so state and shall set forth the reasons for the determination.

(B) If the DFA determines that the director's determination was substantially incorrect, the DFA shall so state and shall set forth the reasons for the determination and the appropriate remedial action.

(C) Any appeal determination that results in a contract being declared void or rescinded and that is not appealed shall be forwarded to the Commission to be reviewed pursuant to the procedure in subsection (h) of this section.

(h) Procedure on appeal to the Commission. When a DFA's appeal determination is appealed to the Commission or when the DFA forwards an appeal determination to the Commission pursuant to subsection (g)(3)(C) of this section, the following requirements shall apply.

(1) A party to an appeal who is aggrieved by the DFA's appeal determination may appeal the determination to the Commission by filing a written notice of appeal with the General Counsel no later than the tenth day after the date the appellant or interested party receives the DFA's appeal determination letter.

(2) An appeal to the Commission shall be sworn and notarized and shall contain:

(A) the name and address of the person filing the appeal to the Commission;

(B) identification of the procurement to which the protest and appeal were directed;

(C) identification of the DFA's appeal determination letter to which the appeal to the Commission is directed;

(D) a statement of every point of the DFA's appeal determination letter which the person claims is incorrect; and

(E) argument and authorities, if any, in support of the appeal to the Commission.

(3) No later than the tenth day after receiving an appeal to the Commission or an appeal determination under subsection (g)(3)(C) of this section, the General Counsel shall schedule the appeal for consideration at an open meeting of the Commission. The General Counsel shall also notify, by certified mail, all parties to the appeal of the date on which the Commission will consider the appeal and shall the deadline by which parties shall file any additional comments or request to be heard in oral argument before the Commission at the scheduled open

meeting. The deadline for party submissions shall be not less than ten days prior to the open meeting at which the matter is scheduled to be considered.

(4) The General Counsel shall provide to the Commission copies of the protest file, the appeal file, the appeal to the Commission, the General Counsel's notice, and the responses of the parties, if any.

(5) The Commission may consider all written materials and any oral arguments made in open meeting.

(6) The Commission's determination of the appeal or of a determination forwarded under subsection (g)(3)(C) of this section shall be by written order.

(i) In the event the director receives a protest, all documents collected by the Commission as part of a solicitation, evaluation, and/or award of a contract shall be retained by the Commission for a period of four years from the date of the initial procurement action. In addition, the Commission shall also retain the protest file, the appeal file, and any documents or Commission orders pertaining to a determination made by the Commission.

§20.10. Bid Opening and Tabulation.

(a) The Commission adopts by reference the practices of the Texas Building and Procurement Commission (formerly the General Services Commission) found in 1 Texas Administrative Code §113.5(b), relating to Bid Submission, Bid Opening and Tabulation, as that section was adopted effective September 11, 2000, and published at 25 TexReg 8848.

(b) Texas Government Code, §2156.005(d), requires the Commission to adopt the rules of the Texas Building and Procurement Commission related to bid opening and tabulation.

(c) Copies of the rule (16 Texas Administrative Code §113.5, relating to Bid Submission, Bid Opening and Tabulation, as that section was adopted effective September 11, 2000, and published at 25 TexReg 8848) are on file and available for public inspection and copying in the Library of the Railroad Commission of Texas, located on the 12th floor of the William B. Travis Building at 1701 N. Congress, Austin, Texas 78701, and at all Commission' district offices.

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 October 23, 2001.

TRD-200106428
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 475-1295

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SUBCHAPTER E. VEHICLE MANAGEMENT

16 TAC §20.401, §20.405

The Railroad Commission of Texas (Commission) proposes new §20.401, relating to Agency Vehicles, and §20.405, relating to Inscriptions on Railroad Commission of Texas Vehicles. The new rules will be in new subchapter E to be titled Vehicle Management.

The Commission proposes new §20.401 pursuant to Texas Government Code, §2171.1045, which requires each state agency to adopt rules consistent with the management plan adopted under Texas Government Code, §2171.104, relating to the assignment and use of the agency's vehicles. The management plan was adopted by the State Council on Competitive Government on October 11, 2000. The legislature stated, in Senate Bill 1, Article 9, Section 9.13, 77th Legislature (2001), its intent that all state agencies adopt rules or policies to implement the State Vehicle Fleet Management Plan, issued by the Office of Vehicle Fleet Management of the General Services Commission (now the Texas Building and Procurement Commission).

The State Vehicle Fleet Management Plan sets forth management provisions regarding: (1) opportunities for consolidating and privatizing the operation and management of vehicle fleets in areas where there is a concentration of state agencies, including the Capitol Complex and the Health and Human Services Complex in Austin; (2) the number and type of vehicles owned by each agency and the purpose each vehicle serves; (3) procedures to increase vehicle use and improve the efficiency of the state vehicle fleet; (4) procedures to reduce the cost of maintaining state vehicles; (5) the sale of excess state vehicles; and (6) lower- cost alternatives to using state-owned vehicles, including using rental cars and reimbursing employees for using personal vehicles. The plan may be viewed on the web site of the General Services Commission (now known as the Texas Building and Procurement Commission) at www.gsc.state.tx.us/fleet. The Railroad Commission adopted its vehicle management plan on February 22, 2001.

New §20.405 is proposed in order to move the rule text from §3.73 (commonly referred to as Statewide Rule 75) into Chapter 20, Subchapter D, relating to Vehicle Management. The repeal of §3.73, and the concurrent rule review, are proposed in separate rulemakings. Other than the change in chapter and rule number, and correction of a statutory citation, there are no substantive changes to the current rule language. The rule declares that Railroad Commission vehicles are exempt from the identification requirements imposed on agencies under Texas Transportation Code, §721.002, as permitted by Texas Transportation Code, §721.003(a)(8).

Rebecca Trevino, Director of Finance, has determined that for each year of the first five years the new sections are in effect there will be no fiscal implications to state or local governments as a result of administering or enforcing the new sections. The public benefit anticipated as a result of the new sections will be consistent procedures for use of state vehicles in an efficient manner and the location of all rules pertaining to vehicle management in one chapter. There is no anticipated economic cost for small businesses, micro-businesses, or individuals, because the proposed rules apply to the Commission's management of its vehicles.

Comments on the proposal may be submitted to Rebecca Trevino, Director of Finance, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967 or via electronic mail to rebecca.trevino@rrc.state.tx.us. The Commission will accept comments for 30 days after publication in the *Texas Register*. For more information, call Ms. Trevino at (512) 463-7214.

The Commission proposes new §20.401 under Texas Government Code, §2171.1045, which requires the Commission to adopt rules consistent with the management plan adopted under Texas Government Code, §2171.104, relating to the assignment and use of the agency's vehicles. The Commission proposes

new §20.405 under Texas Transportation Code, §721.003, which permits the Commission by rule to exempt its vehicles from the identification requirement imposed on agencies under Texas Transportation Code, §721.002.

Texas Government Code, §§2171.104 and 2171.1045, and Texas Transportation Code, §§721.002 and 721.003, are affected by the proposed new sections.

Issued in Austin, Texas on October 23, 2001.

§20.401. Agency Vehicles.

(a) This section implements the provisions of Texas Government Code, §2171.1045, concerning the use and management of state agency vehicles, and the provisions of the State Vehicle Management Plan adopted by the State Council on Competitive Government on October 11, 2000. The plan may be viewed at the web site of the General Services Commission at www.gsc.state.tx.us/fleet, or any successor site that may be created by the Texas Building and Procurement Commission.

(b) Vehicles, with the exception of vehicles assigned to field employees, are assigned to the Railroad Commission's motor pool and shall be available for checkout by a Commission employee.

(c) The Commission may assign a vehicle to an individual administrative or executive employee on a regular or everyday basis only if there is a documented finding that the assignment is critical to the needs and mission of the Commission.

§20.405. Inscriptions on Railroad Commission of Texas Vehicles.
Under Texas Transportation Code, §721.003(a)(8), vehicles assigned to and used by district office field personnel are exempt from bearing the inscription required in Texas Transportation Code, §721.002. These Commission vehicles are used in regulatory and administrative activity, including inspections and investigations which require that the Railroad Commission of Texas personnel be able to accomplish their tasks undetected.

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 October 23, 2001.

TRD-200106430
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 475-1295

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PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

SUBCHAPTER G. ADVANCED SERVICES

16 TAC §26.143

The Public Utility Commission of Texas (commission) proposes new §26.143, relating to Provision of Advanced Services in Rural Areas. The proposed new rule will implement the Public Utility Regulatory Act (PURA), Texas Utilities Code Annotated §51.001(g) and §55.014 (Vernon 1998 & Supplement 2001), regarding the provision of advanced services by a Chapter 58 electing company, certificate of operating authority (COA) holder, and service provider certificate of operating authority (SPCOA) holder (collectively companies) in rural areas when an advanced telecommunications service is provided in an urban area by the company. Project Number 21175 has been assigned to this proceeding.

The proposed new section sets forth procedures whereby a retail customer within a rural service area may seek advanced services in order to access the Internet. The proposed section establishes in subsection (e) a competitive forum for all retail customers in a rural area to seek advanced services from any advanced services provider. Following this, the proposed section provides a mechanism in subsections (d) and (f) whereby retail customers in a rural area may secure access to services that are reasonably comparable to the advanced telecommunications services offered by companies within urban service areas. The section sets forth the bona fide retail request procedures that retail customers must utilize in order to request the reasonably comparable advanced services. The new section defines "rural area" and addresses the parameters for determining reasonably comparable advanced telecommunications services, including reasonably comparable prices, terms, and conditions. The section outlines the requirements of service and establishes commission proceedings for selection of serving companies.

In 1999, as part of Senate Bill 560 (SB 560), the Legislature enacted PURA §55.014 to effectuate the deployment of advanced services in rural areas of the state. Furthermore, in the same bill, the Legislature enacted PURA §51.001(g) which pronounced that it is the policy of this state to ensure that customers in all regions of this state, including low-income customers and customers in rural and high cost areas, have access to advanced telecommunications and information services that are reasonably comparable to those services provided in urban areas and that are available at prices that are reasonably comparable to prices charged for similar services in urban areas. Accordingly, the commission initiates this rulemaking proceeding to provide rural retail customers with a competitive process for the provision of advanced services and to ensure that retail customers in rural areas have access to reasonably comparable advanced services offered by companies subject to PURA §55.014.

Mr. Don Ballard, Chief Attorney, Policy Development Division, has determined that for the first five-year period the new section is in effect there will be no fiscal implications on state government. The fiscal implications for local governments with retail customers requesting advanced services may consist of legal, personnel, or consulting service costs associated with compilation of a request for services with the commission and with establishing aggregation and fulfilling the bona fide retail request process. The extent to which a local government will have retail customers participating in competitive or bona fide retail request activities or will itself participate in a request for advanced services will vary greatly across the state.

No reductions in costs to the state and to local governments are estimated as a result of enforcing and administering this section as proposed. No loss or increase in revenue to the state or to local governments is estimated as a result of enforcing and administering this section as proposed.

Mr. Ballard has determined that for each year of the first five years the new section is in effect the public benefit anticipated as a result of enforcing the section will be the deployment of advanced services offered in urban service areas to retail customers in rural service areas. First, rural local governments may experience economic benefits resulting from increased attraction of business and resident location within the area. Second, the effect on small businesses or micro-businesses as a result of enforcing the proposed rule will be the ability of these entities to request advanced services. Receipt and use of advanced services may provide businesses the ability to acquire remote business practices, create a larger customer base, and generate greater levels of financial performance. Additionally, small businesses or micro-businesses may experience greater levels of efficiency and productivity. The extent to which small businesses or micro-businesses will be effected by the acquisition of advanced services will vary greatly among different businesses.

The anticipated economic effect on the companies subject to the proposed section will consist of costs associated with infrastructure and equipment upgrades, capital improvements, engineering, personnel, marketing, and other miscellaneous costs associated with fulfilling bona fide retail requests or responses in the competitive process. These costs, however, will be dependent on the number of retail lines requested, the number of customers seeking service, the type of service requested, and the geographic location and features of the area seeking service. The proposed section contemplates, however, that companies will recover their costs of providing service through rates charged to the rural retail customers who request and are receiving an advanced service. Subsection (d)(2) provides that a company charging a monthly retail price within 140% of the monthly retail price of the advanced telecommunications service offered in the same company's proximate urban area is presumed to be compliant with the rule and statute. Under the proposed section, moreover, a company is permitted to charge a monthly retail price that is higher than 140% of an urban area price if the company shows that a higher price is necessary to recover its reasonable costs in providing an advanced service in the rural area. Further, a company is permitted to require of the rural retail customers a term commitment for the advanced service. The anticipated economic effect on persons utilizing this proposed section will consist of personnel, planning, and legal costs associated with establishing demand for the competitive and bona fide retail request process. The number of individuals participating in the competitive bona fide retail request process and the number with need for support services will vary greatly among different rural areas and communities.

Mr. Ballard has also determined that for each year of the first five years the proposed section is in effect there may be a sustained effect on the local economy of rural areas requesting advanced services. As stated above, the anticipated result of enforcing the section will be the deployment of advanced services offered in urban service areas to retail customers in rural service areas. Advanced services provided under this section would allow end use customers in rural areas to access the Internet more quickly and more efficiently than is currently the case in the rural area. Rural areas may experience economic benefits from advanced services through increased attraction of business and resident location within the area. Additionally, existing or emerging businesses in rural areas will have the opportunity to request advanced services. Receipt and use of advanced services may provide these businesses with the ability to acquire remote business practices, create a larger customer base, or generate greater levels of financial performance. These economic benefits may in turn lead to increased employment in the rural areas. Advanced services providers may employ additional personnel in the rural area for management and maintenance; small businesses may create new jobs due to the need for technical assistance or because of opportunities that are only possible through Internet transactions; and businesses may increase productivity or customers and require more workers due to greater demand for their goods and services. Likewise, new business enterprises may create added workforce prospects because of the options available through increased connectivity to the Internet. The extent to which local employment in particular rural areas will be effected by the acquisition of advanced services will vary greatly across the state and will depend on the population and technical ability of the population in the rural area, the number of retail lines requested, the number of customers seeking service, and the types of service provided.

The commission staff will conduct a public hearing on this rulemaking, if requested under 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 Commissioners' Hearing Room, on Thursday, December 13, 2001, at 9:00 a.m.

Comments on the proposed new rule (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 20 days after publication. Reply comments may be submitted within 30 days after publication. In particular, the commission requests comments on the appropriate number of lines of service necessary for a bona fide retail request under subsection (f)(2)(A), and economically how or why that number is appropriate or essential. Comments are also requested, in the context of requiring a company to provide an advanced service, on the economic relationship between the required number of lines for service and the standards for a reasonably comparable price, term, and condition for service, including the 140% rebuttal presumption on price and the availability of a contract term commitment. The commission additionally invites specific comments regarding the benefits that will be gained by implementation of the proposed section. All comments should refer to Project Number 21175.

This new section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2001) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure. Additionally, PURA §55.014(g) specifically provides the commission with all jurisdiction necessary to enforce PURA §55.014 regarding the provision of advanced services within rural service areas in Texas.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 51.001(g) and 55.014.

§26.143. Provision of Advanced Services in Rural Areas.

(a) Purpose. The purpose of this section is to implement Public Utility Regulatory Act (PURA) §55.014 regarding the provision of advanced services to facilitate connection of end users to the Internet. This section is also intended to promote the policy, pursuant to PURA §51.001(g), that customers in all regions of this state have access to advanced telecommunications and information services.

(b) Application. This section applies to a company electing under PURA Chapter 58 or a company that holds a certificate of operating authority (COA) or service provider certificate of operating authority (SPCOA).

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

(1) Advanced services provider--Any entity that offers or deploys advanced services, such as a holder of a certificate of convenience and necessity, a COA, a SPCOA, a cable company, a fixed wireless company, a satellite company, or any other provider of an advanced service.

(2) Advanced telecommunications services--Any retail telecommunications services that, regardless of transmission medium or technology, are capable of originating and receiving data transmissions for the purpose of accessing the Internet with a speed of at least 200 kilobits per second in the last mile in one direction and with a speed of at least 128 kilobits a second in the last mile in the alternative direction.

(3) Advanced services--Any retail services that, regardless of transmission medium or technology, are capable of originating and receiving data transmissions for the purpose of accessing the Internet with a speed of at least 200 kilobits per second in the last mile in one direction and with a speed of at least 128 kilobits a second in the last mile in the alternative direction. An advanced service includes any advanced telecommunications service.

(4) Company--A telecommunications utility electing under PURA Chapter 58 or an entity that holds a COA or a SPCOA that provides advanced telecommunications services in urban areas of this state and provides local exchange telephone services in a rural area seeking provision of advanced services.

(5) Reasonably comparable or similar services--Any services that meet the definition of an advanced service. Each advanced service is substitutable for any other advanced service.

(6) Rural area or rural service area--Any community located in a county not included within any Metropolitan Statistical Area (MSA) boundary, as defined by the United States Office of Management and Budget, and any community within a MSA with a population of 20,000 or fewer not adjacent to the primary MSA city.

(7) Urban area or urban service area--A municipality in this state with a population of more than 190,000.

(d) Provision of advanced services.

(1) Requirement to provide an advanced service.

(A) A company that provides advanced telecommunications services within the company's urban service areas shall, on a Bona Fide Retail Request for service, provide in rural areas served by the company advanced services that are reasonably comparable to the advanced telecommunications services provided in urban areas. The company shall provide such advanced services to the retail customer(s) seeking service through a Bona Fide Retail Request determined by the commission under this section:

(i) at reasonably comparable prices, terms, and conditions to the prices, terms, and conditions for similar advanced telecommunications services provided by the company in proximate urban areas; and

(ii) within 15 months after notice of the Bona Fide Retail Request for those services is published in the *Texas Register*.

(B) A company that provides advanced services in a rural area pursuant to a Bona Fide Retail Request shall provide advanced services to any subsequent retail customer(s) located within 14,000 26-gauge cable feet or its equivalent of the same central office as determined for the original Bona Fide Retail Request under this section:

(i) at reasonably comparable prices, terms, and conditions to the prices, terms and conditions for similar advanced services provided by the company in proximate urban areas; and

(ii) within a reasonably comparable period of time as the period of time a company provides advanced telecommunications services to the company's subsequent retail advanced services customers located in proximate urban areas.

(C) A company meets the requirement of providing a reasonably comparable advanced service if the company has provided the requested or a reasonably comparable advanced service in accordance with this section either:

(i) directly; or

(ii) through a business arrangement with an advanced services provider.

(D) A company shall not be required to provide advanced services in a rural area when an advanced services provider is already providing advanced services in the rural area seeking an advanced service at the time of the Bona Fide Retail Request or within 15 months after notice of the Bona Fide Retail Request is published in the *Texas Register*. When determining if another provider is already providing an advanced service in a rural area, the commission shall, with information available to the public, consider:

(i) whether an advanced services provider is actively marketing an advanced service in the rural area;

(ii) whether an advanced services provider is offering, directly or indirectly, installation and repair services for facilities and equipment necessary for the provision of the advanced service;

(iii) whether customers in the rural area are able to receive installation and repair services necessary for facilities and equipment;

(iv) whether the price of installation and repair services are reasonably comparable to prices in proximate urban areas; and

(v) whether an advanced services provider or distributor is located within or near the rural area.

(E) A company shall not be required to provide advanced services in a rural area if no Internet service provider is providing or commits to provide Internet connectivity in the rural area seeking the advanced service that is compatible with the advanced service to be deployed by the company.

(F) This section may not be construed to require a company to:

(i) begin providing services in a rural area in which the company does not provide local exchange telephone service;

(ii) provide advanced services in a rural area of this state unless the company provides advanced telecommunications services in urban areas of this state; or

(iii) provide a specific advanced service or technology in a rural area.

(2) Reasonably comparable price, terms, and conditions. Advanced services provided by a company to a rural area pursuant to

paragraph (1) of this subsection must be provided at prices, terms, and conditions that are reasonably comparable to the prices, terms, and conditions for similar advanced telecommunications services provided by the company in proximate urban areas.

(A) Reasonably comparable prices.

(i) If a monthly retail price for an advanced service is within 140% of the monthly retail price of the advanced telecommunications service offered in the same company's proximate urban service area, there shall be a rebuttable presumption that the price is reasonably comparable. A promotional rate for an advanced telecommunications service shall not be considered a monthly retail price if it is offered for less than four months.

(ii) When considering whether a price is reasonably comparable, the commission shall consider the distance, terrain, and features of the rural area seeking the advanced service.

(iii) A company may rebut the 140% presumption by showing that a higher price is necessary to recover its reasonable costs in providing the advanced service.

(iv) Any interested person may rebut the 140% presumption by showing that a lower price will allow a company to recover its reasonable costs in providing the advanced service.

(B) Reasonably comparable terms and conditions.

(i) Reasonably comparable terms and conditions are those terms and conditions applicable to the provision of advanced services in a rural area that are similar to the terms and conditions for advanced telecommunications services provided by the same company in proximate urban areas.

(ii) A company may require a term commitment for all persons seeking advanced services under a Bona Fide Retail Request. When considering whether a term commitment is reasonably comparable, the commission shall consider the distance, terrain, and features of the rural area seeking the advanced service.

(e) Requesting competitive response for provision of advanced services. A person(s) in a rural area seeking provision of an advanced service shall first submit a request for a competitive response for provision of those services. The request need not conform to the requirements of a Bona Fide Retail Request unless the requesting person(s) intends to seek provision of an advanced service under the Bona Fide Retail Request process in subsection (f) of this section.

(1) Requesting advanced services.

(A) Any person(s) in a rural area seeking the provision of advanced services shall submit a written request to the commission for posting on the commission website.

(B) The written request must include the name, address, and telephone number of a contact person.

(C) Within five working days after receipt, the commission shall post the request for advanced services on the commission's website.

(D) The commission shall post on the commission website:

(i) the name, address, and telephone number of the contact person;

(ii) the number of lines requested;

(iii) the number of customers requesting service;

(iv) the location of the rural area seeking the advanced service;

(v) any other information the commission deems relevant.

(2) Competitive response.

(A) After posting on the website, any company or advanced service provider may submit to the contact person a proposal to provide advanced services to the person(s) seeking advanced services.

(B) Proposals must be submitted to the contact person within 50 days after the request was posted and provide for deployment of the advanced service within 15 months after the request was posted by the commission.

(C) The person(s) seeking advanced services may negotiate with and select a provider based upon all of the proposals received.

(D) If no advanced services provider has committed to provide advanced services to the person(s) submitting a request within 60 days after the request was posted by the commission, the contact person shall notify the commission. Upon notification, the contact person may ask that the commission establish a proceeding to determine that the request is a Bona Fide Retail Request.

(f) Bona Fide Retail Request process.

(1) Commission proceeding to determine a Bona Fide Retail Request.

(A) Upon request under subsection (e)(2)(D) of this section, the commission shall determine whether a request is a Bona Fide Retail Request. This request may be processed administratively.

(B) Any interested person may present written comments or objections, setting forth the basis of any facts in dispute, regarding whether the request is a Bona Fide Retail Request under this section.

(2) Bona Fide Retail Request. A Bona Fide Retail Request must:

(A) include a written request for at least 150 lines for service within 14,000 26-gauge cable feet or its equivalent of the same central office in a rural area;

(B) contain the name, address, telephone number, and signature of the retail customer(s) seeking service, the advanced service(s) requested, and the date of the request;

(C) contain the name, address, and telephone number of a contact person;

(D) state whether an advanced services provider is already providing, is contracted to provide, or is willing to provide advanced services in the rural area seeking the advanced service; and

(E) state whether an Internet service provider is providing or commits to provide functional Internet connectivity in the rural area seeking the advanced service.

(3) Notice of Bona Fide Retail Request. After determination that a request is a Bona Fide Retail Request, the commission shall:

(A) notify electronically or by mail all companies electing under PURA Chapter 58 and all COA and SPCOA holders of the Bona Fide Retail Request;

(B) post notice of the Bona Fide Retail Request on the commission website; and

(C) publish notice of the Bona Fide Retail Request in the *Texas Register*.

(D) The commission shall include in the notification, post on the commission website, and publish in the *Texas Register*:

(i) the name, address, and telephone number of the contact person;

(ii) the number of lines requested;

(iii) the number of customers requesting service;

(iv) the location of the rural area;

(v) any other information the commission deems relevant.

(4) Commission selection proceeding. After notification of the Bona Fide Retail Request, the commission shall establish a proceeding to select the company or companies obligated to provide an advanced service.

(A) Company response. Each company subject to this section for the rural area seeking advanced services shall submit a proposal for the provision of one or more advanced services to the retail customer(s) seeking service through the Bona Fide Retail Request determined by the commission under this section.

(i) Each company shall submit its proposal within 30 days after publication of the Bona Fide Retail Request notice in the *Texas Register*.

(ii) All proposals shall comply with the requirements of subsection (d) of this section.

(iii) A company required to submit a proposal may contest the obligation to serve by setting forth the basis of its challenge. The company must, however, file its proposal as required by this subsection.

(B) Company response exemption. A company subject to this section for the rural area seeking advanced services is presumed to be exempt from the requirements of this subsection and is not required to submit a proposal for the provision of advanced services if, at the time the Bona Fide Retail Request is published in the *Texas Register*, the company served fewer than 150 local exchange telephone service lines within 14,000 26-gauge cable feet or its equivalent of the same central office as determined for the Bona Fide Retail Request under this section in the last month of the most recent quarterly reporting period submitted to the commission pursuant to Local Government Code, Chapter 283.

(C) Commission determination. Within 150 days after notice of the Bona Fide Retail Request is published in the *Texas Register*, the commission shall determine the selected company or companies obligated to serve the retail customer(s) seeking service through the Bona Fide Retail Request determined by the commission under this section.

(D) Selection Criteria. When selecting the company or companies obligated to serve, among other factors the commission may deem relevant, the commission shall consider:

(i) the overall quality of telecommunications service in the rural area;

(ii) the characteristics and attributes of network facilities in the rural area;

(iii) the terrain and geographic features of the rural area;

(iv) the number of local exchange telephone service providers in the rural area;

(v) the population and population density of the rural area;

(vi) the number of local exchange telephone service customers the company serves in the rural area;

(vii) the manner or method by which the company provides local exchange telephone service in the rural area;

(viii) whether a company that provides local exchange service through resale or unbundled network element platform can purchase advanced services through resale or unbundled network element platform in the rural area;

(ix) the extent to which the selection may prohibit or have the practical effect of prohibiting the ability of any company to provide local exchange telephone service in rural areas;

(x) a company's planned response for subsequent requests for service within 14,000 26-gauge cable feet or its equivalent of the same central office as determined for the original Bona Fide Retail Request under this section;

(xi) the method by which the company would provide an advanced service in the rural area; and

(xii) whether a company provides service in proximate urban areas to the rural area seeking advanced services.

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

Filed with the Office of the Secretary of State, on October 26, 2001.

TRD-200106566
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-7308

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SUBCHAPTER M. OPERATOR SERVICES

16 TAC §26.315

The Public Utility Commission of Texas (commission) proposes an amendment to §26.315, relating to Requirements for Dominant Certificated Telecommunications Utilities (DCTUs). The proposed amendment will help to ensure that all the parties associated with the completion and eventual billing of collect calls properly handle those types of calls. The amendment to §26.315 as originally published in the *Texas Register* on June 15, 2001 (26 TexReg 4365) has been withdrawn. Project Number 24105 has been assigned to this proceeding.

Charles Johnson, Attorney, Legal 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.

Charles Johnson 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 help protect the public from unscrupulous collect calls. There will be no 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.

Charles Johnson 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.

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. 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. In addition, the commission seeks specific comments on the following question: Should the billing utility be required to seek a commission order to terminate the billing and collection arrangement when the proposed 0.5% complaint threshold has been met? All comments should refer to Project Number 24105.

This amendment is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002, (Vernon 1998, Supplement 2001) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically §17.001 which confers on the commission the authority to adopt and enforce rules to protect retail customers from fraudulent, unfair, misleading, deceptive, or anticompetitive practices; §17.004 which provides that all buyers of telecommunications services are entitled to protection from fraudulent, unfair, misleading, deceptive, or anticompetitive practices, and which provides that the commission may adopt and enforce rules as necessary or appropriate to carry out the provisions of §17.004; and §52.002(a) that provides the commission with exclusive original jurisdiction over the business and property of telecommunications utilities in Texas, subject to the limitations imposed by PURA, to regulate rates, operations, and services so that the rates are just, fair, and reasonable and the services are adequate and efficient.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 17.001, 17.004, 52.002, 52.057(a)(2) and (b), and 56.104(d).

§26.315. Requirements for Dominant Certificated Telecommunications Utilities (DCTUs).

(a) Validation information. Each DCTU shall make validation information (e.g., DCTU calling card numbers, whether an access line is equipped with billed number screening, or whether an access line is a pay telephone) available to any interexchange carrier requesting it on the same prices, terms, and conditions that the DCTU provides the service to any other interexchange carrier. The DCTU may comply with the requirements of this paragraph by providing its own database, making arrangements with another DCTU to provide the information, or making arrangements with a third-party vendor.

(b) Billing and collection services. Each DCTU shall offer billing and collection services, pursuant to subsection (c) of this section, to any interexchange carrier requesting it on the same prices, terms, and conditions that the DCTU provides the services to any other interexchange carrier.

(c) Validation requirements. If validation information is available for calls that the interexchange carrier (or a third-party billing and collection agent operating on behalf of the interexchange carrier) will bill through the DCTU, the interexchange carrier is required to validate the call and is allowed to submit the call for billing only if the call was validated. To insure that only validated collect calls are billed, the DCTU shall:

(1) Establish edits in the DCTU's current billing system to insure that calls less than five minutes in duration, and total charges for that call exceed $35, are not billed; or

(2) Establish Billing and Collections contract language that permits the DCTU to immediately, without liability and without notice, terminate any and all Billing and Collection efforts for any interexchange carrier generating complaints that exceed a threshold of 0.5% of all records billed for a billing month. In conjunction with the contract language, the DCTU will establish a random, periodic, unannounced audit process whereby the DCTU will audit messages. The interexchange carrier will be required to provide the DCTU the necessary audit data in a form consistent with DCTU capabilities. The fact an audit has or has not been conducted and/or the DCTU has not previously questioned the charges at issue does not constitute approval or endorsement of charges by the DCTU; and.

(3) The DCTU shall implement a public education campaign advising customers of the responsibilities and obligations associated with accepting collect telephone calls. The public education campaign must also inform customers of the DCTU's policies and procedures for contesting unauthorized collect call charges. A DCTU fulfills this requirement if it publishes such information in the customer rights section of the white page directory.

(d) [~~(c)~~] Request to access another carrier. If a DCTU receives a request from a caller to access another carrier, the DCTU shall, using the same prices, terms, and conditions for all carriers, either:

(1) transfer the caller to the caller's carrier of choice if facilities that allow such transfer are available and if such transfer is otherwise allowed by law; or

(2) instruct the caller how to access the caller's carrier of choice if that carrier has provided the DCTU with the information referred to in §26.319(2) of this title (relating to Access to the Operator of a Local Exchange Company (LEC)).

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 October 25, 2001.

TRD-200106497
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-7308

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PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 79. WEATHER MODIFICATION

16 TAC §§79.1, 79.10 - 79.13, 79.15, 79.17, 79.18, 79.20 - 79.22, 79.31 - 79.33, 79.41 - 79.44, 79.51 - 79.55, 79.61, 79.62

The Texas Department of Licensing and Regulation (Department) proposes new rules §§79.1, 79.10-79.13, 79.15, 79.17, 79.18, 79.20-79.22, 79.31-79.33, 79.41-79.44, 79.51-79.55, 79.61 and 79.62 regarding the licensing and permitting of the weather modification program.

These rules are necessary to implement Senate Bill 1175, Acts of the 77th Legislature, and establish procedures and requirements necessary for the licensing and permitting of the weather modification programs in Texas.

George Bomar, Staff Meteorologist, Texas Department of Licensing and Regulation, has determined that for the first five-year period these sections are in effect there will be no effect on state or local government as a result of enforcing or administering these new rules. The new fee rules merely transfer fee authority for the weather modification permitting program from the Texas Natural Resource Conservation Commission to the Department, as mandated by Senate Bill 1175.

Mr. Bomar 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 to provide technological oversight to weather-modification operations to ensure that methods used for both rain-enhancement and hail-suppression neither dissipate clouds nor prevent their natural course of developing precipitation to the detriment of people or property within areas where weather modification is practiced.

The anticipated economic effect on small businesses and persons who are required to comply with the sections, as proposed, will be a substantial savings in costs to publish the required Notice of Intention to Conduct Weather Modification Operations in the State of Texas. Fewer newspapers will be required to ensure the Notice is published in both operational and "target" areas, thereby saving permit applicants $500 to $12,000 each time (every fourth year) a permit application is filed.

In accordance with the requirements of the Government Code §2001.0225, Regulatory Analysis of Major Environmental Rules which applies only to a major environmental ruled adopted by a state agency, 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 Department has determined that these proposed rules do not meet any of the four results applicable to §2001.0225, therefore a regulatory impact analysis is not required.

Comments on the proposal may be submitted to George Bomar, Staff Meteorologist, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, facsimile (512) 475-2871, or by e-mail: george.bomar@license.state.tx.us. The deadline for comments is thirty days after publication in the *Texas Register*.

The new rules are proposed under Senate Bill 1175, 1st Called Session, 77th Texas Legislature, and the code sections in which it may be codified, that authorizes the Texas Department of Licensing and Regulation to promulgate and enforce a code of rules and take all action necessary to assure compliance with the intent and purpose of this legislation.

The statute affected by the proposed new rules is Senate Bill 1175, 1st Called Session, 77th Texas Legislature, and the code sections in which it may be codified, and Texas Occupations Code, Chapter 51.

§79.1. Authority.

These rules are promulgated under the authority of the Texas Weather Modification Act, Senate Bill 1175, 1st Called Session, 77th Texas Legislature, and the code sections in which it may be codified, and Texas Occupations Code, Chapter 51.

§79.10. Definitions.

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

(1) Act--The Texas Weather Modification Act, Senate Bill 1175, 1st Called Session, 77th Texas Legislature, and the code sections in which it may be codified.

(2) Commission--The Texas Commission of Licensing and Regulation.

(3) Commissioner--As used in Senate Bill 1175, 1st Called Session, 77th Texas Legislature, and the code sections in which it may be codified, and in these rules, has the same meaning as Executive Director.

(4) Department--The Texas Department of Licensing and Regulation.

(5) Executive Director--As used in Senate Bill 1175, 1st Called Session, 77th Texas Legislature, and the code sections in which it may be codified, and in these rules, has the same meaning as Commissioner.

(6) Operational area--That area, described by metes and bounds or other specific bounded description, within which it is reasonably necessary to effectuate the purposes of a permitted operation. A part of the operational area may be outside the target area and thus not intended to be affected by the operation.

(7) Target area--The area described by metes and bounds, or other specific bounded description, which is intended to be affected by the operation.

§79.11. License and Permit Required.

(a) Unless specifically exempted by §79.12 of this title (relating to License and Permit Exemptions), no person may engage in weather modification and control activities without first obtaining a license and permit from the Department if any part of a Texas county is included in the operational or target area of the project.

(b) A separate permit is required for each weather modification project. If an operation is to be conducted under contract, a permit is required for each separate contract.

§79.12. License and Permit Exemptions.

(a) Upon receiving written approval of exemption status from the Department in accordance with this section, persons may engage in the following types of weather modification and control activities without obtaining a license or permit.

(1) Laboratory research and experiments.

(2) Activities of an emergency nature for protection against fire, frost, sleet, or fog.

(3) Research, development, and application of weather modification technologies conducted by state and federal agencies, institutions of higher learning, and bona fide nonprofit research organizations.

(4) Activities normally conducted for purposes other than inducing, increasing, decreasing, or preventing precipitation or hail.

(b) Persons planning to conduct projects meeting the exemption requirements in subsection (a) of this section must request exemption status from the Department in writing at least 90 days prior to the proposed start of each weather modification project. The request must include the documentation required in §79.18 (3) of this title (relating to Permit Application) and the name and mailing address of the requestor.

(c) The Department will either grant or deny exemption status in writing within 30 days after the request is received.

(d) Persons engaging in weather modification and control activities exempted from licensing and permitting under this section must comply with the requirements of §79.31 of this title (relating to Recordkeeping Requirements), §79.32 of the title (relating to Additional Record keeping Requirements for Operations Employing Aircraft), and §79.33 of this title (relating to Reporting Requirements).

§79.13. Application for License.

(a) An application for a license shall be filed with the Department on a form provided or approved by the Department. The application shall include a license fee of $150 and evidence of one of the following:

(1) the applicant possesses a baccalaureate or higher degree in meteorology and at least five months of field experience in weather modification;

(2) the applicant possesses a baccalaureate or higher degree in physical science or engineering and at least ten months of field experience in weather modification; or

(3) the applicant possesses other training and experience that the Department accepts as indicative of sufficient competence in the field of meteorology to engage in weather modification activities.

(b) If the applicant is an organization, evidence of the possession of the educational and experience qualifications required in subsection (a) of this section by the individual or individuals who will be in control and in charge of the applicant's operations must be included with the application.

§79.15. Renewal of License.

(a) The Department shall issue a renewal license to each applicant who submits a timely license renewal application, pays the annual license fee, and maintains the qualifications necessary for issuance of an original license.

(b) The Department may refuse to renew the license of any applicant who:

(1) has failed to comply with any provision of the license, the Act, this chapter, or any Texas weather modification permit issued to the licensee by the Department; or

(2) has violated provisions of weather modification permits or licenses in another state, resulting in suspension or revocation of the applicant's license in that other state.

(c) If the licensee has made application prior to the expiration date of the license, the terms of the existing license shall remain in effect until such time as the Department rules on the license renewal application.

§79.17. Notice of Intention to Obtain Permit.

(a) Any person seeking to obtain a Texas weather modification permit shall file with the Department a notice of intention to engage in a weather modification operation.

(b) The applicant shall include the following information in the notice of intention and must submit the notice of intention in the format prescribed by the Department.

(1) A statement that an application for a Texas weather modification permit has been filed with the Department, giving the name and address of the applicant.

(2) The date on which the Department issued the applicant a Texas weather modification license and all dates of renewal, or the date on which the applicant filed an application for a weather modification license with the Department.

(3) The nature and objectives of the proposed operation and the number of years for which a permit is requested.

(4) If applicable, the person or organization, including mailing address and occupation, on whose behalf the operation is to be conducted.

(5) The operational area in which the proposed operation will be conducted, described in sufficient detail to plot the location on a map.

(6) The target area, which is intended to be affected by the proposed operation, described, in sufficient detail to plot the location on a map.

(7) The materials and methods to be used in conducting the proposed operation.

(8) The approximate dates and times during which the proposed operation will be conducted.

(9) A statement that persons interested in the permit application should contact the Department for more information.

(10) A statement summarizing the conditions under which the public may request a public meeting on the application, as set forth in §79.20 of this title (relating to Requests for Public Meeting on Permit Application).

(11) If the application includes hail suppression as an objective, a statement summarizing how the public can petition for an election.

(c) The applicant must submit with the notice of intention the type of supporting data prescribed in §79.18 (3) of this title (relating to Permit Application).

(d) The applicant may not publish the notice of intention until the Department has reviewed and approved the notice of intention in writing.

(e) The Department shall decide whether the notice of intention should include hail suppression as an objective of the proposed operation. The Department may seek the advice of the Weather Modification Advisory Committee.

(f) The Department may disapprove a notice of intention if the applicant fails to provide any of the information required by subsections (b) and (c) of this section or if the Department determines that the notice of intention does not adequately describe the operation. The Department may seek the advice of the Weather Modification Advisory Committee in making this determination.

(g) If the notice of intention is disapproved by the Department, the applicant may appeal to the Executive Director within 10 working days after the applicant receives the Department's written disapproval.

The Executive Director shall review the Department's decision and enter an order approving or disapproving the notice of intention.

(h) The applicant must publish the notice of intention as approved at the applicant's cost at least once a week for three consecutive weeks in a newspaper of general circulation in each county in which the operation is to be conducted.

(i) The applicant must file proof of publication and publishers' affidavits with the Department within 15 days after the date of the last publication.

§79.18. Permit Application.

An application for a Texas weather modification permit must be filed with the Department and must include the following.

(1) A permit fee of $75.00.

(2) Proof that the applicant holds a valid weather modification license or has a pending application for one.

(3) Supporting data for the application in a form prescribed by the Department, including:

(A) a plan of operation that details the type of weather modification activity proposed,

(B) equipment and personnel involved in the operation,

(C) a description of climate and hazardous weather in the operational area,

(D) the weather modification methodology that will be used, and

(E) a description of the technique that will be used to evaluate the overall effect of the proposed operation.

(4) Supporting data for the application, including a plan of operation that details the type of weather modification activity proposed, equipment and personnel involved in the operation, a description of climate and hazardous weather in the operational area, cloud-seeding methodology (or the techniques and control used for other proposed types of weather modification), and a technique to evaluate the overall effect of the proposed operation;

(5) All contracts, letters of intent, or proposals that pertain to conducting the proposed operation for a client;

(6) An illustration of the operational and target areas that is plotted on a map;

(7) Sufficient information to satisfy the Department that the applicant is able to pay damages for liability which might reasonably arise as a result of the proposed operation, such as a copy of a comprehensive liability insurance policy or a certificate from an insurer guaranteeing coverage for the proposed operation during the proposed term.

(8) A notice of intention.

§79.20. Requests for Public Meeting on Permit Application.

(a) If at least 25 eligible persons make timely written request, the Department shall hold a public meeting on an application prior to the issuance of a permit.

(b) Those eligible to request a public meeting on an application include all persons who reside or own property within the boundaries of the weather modification operational area, as defined in the application.

(c) A request for a public meeting must include:

(1) the signature, full name, mailing address, phone number, and physical address and county of the residence or property located in the proposed operational area of each person requesting a public meeting; and

(2) a statement that each person requesting a public meeting resides or owns property within the proposed operational area.

(d) To be considered timely, a person's request for a public meeting must be mailed to the Department and post-marked within 30 days after the date of the first publication of the notice of intention in the newspaper, which publishes the latest notice of intention in accordance with §79.17 (g) of this title (relating to Notice of Intention). The Department, for good cause, may extend the time allowed for submitting a request for a public meeting.

(e) Upon determining that proper requests for a public meeting from at least 25 persons have been submitted, the Department will schedule a public meeting within the area where the operation is to be conducted.

(f) Notice stating the time, place, subject, and legal authority of the public meeting shall be provided at least 20 days prior to the public meeting, as follows.

(1) The Department shall give notice by first-class mail to the applicant and to each person who has submitted a proper request for a public meeting.

(2) The applicant must publish notice of the public meeting (at the applicant's cost) at least once in a newspaper of general circulation in each county that includes any part of the operational or target areas.

§79.21. Issuance of Permit.

(a) The Department may issue a Texas weather modification permit upon determination of the following:

(1) that the operation proposed in the application will not significantly dissipate the clouds and prevent their natural course of developing rain in the area where the operation is to be conducted to the material detriment of persons or property in that area;

(2) that the applicant:

(A) holds a valid weather modification license;

(B) has submitted an administratively complete application in accordance with §79.18 of this title (relating to Permit Application); and

(C) has published a notice of intention as approved by the Department and submitted proof of publication as required by §79.17 of this title (relating to Notice of Intention).

(b) The Department shall not issue a permit before the end of the 30-day period immediately following the first publication of the notice of intention. If the notice of intention is required to be published in more than one county and the newspapers publish the notice beginning on different days, the 30-day period begins on the date of the first publication of the notice in the newspaper that publishes the latest notice of intention.

(c) When an election regarding a permit application including hail suppression has been held in accordance with §1.41 (relating to Election for Approval of a Permit that Includes Authorization for Hail Suppression) set forth in Senate Bill 1175, 1st Called Session, 77th Texas Legislature, and the code sections in which it may be codified, the Department shall issue Texas weather modification permits in accordance with this section and §79.62 of this title (relating to Issuance of Permit When Election Held).

§79.22. Description of Permit.

A Texas weather modification permit shall include the following:

(1) the effective period of the permit, which shall not exceed four years, and

(A) if the permit is for more than one year, the permit shall contain a statement that it shall remain valid for so long as the permittee continues to operate in successive years during all or part of the months authorized;

(B) if a weather modifier is authorized to conduct an operation on behalf of a sponsoring entity, the term of the permit shall be limited to the duration of the contract in effect between the weather modifier and the sponsor at the date that the Department issues the permit; and

(C) if a weather modifier and client initially contract that their agreement should be renegotiated during the term of a multi-year permit, the permit shall contain a statement that the weather modifier must submit a copy of any modified contract to the Department for review and approval before the start of operations under that modified contract;

(2) a description of the boundaries of the operational and target areas and a map that depicts those areas;

(3) the weather modification method(s) that may be employed;

(4) a requirement that the permittee maintain insurance coverage or other financial assurance of the types and amounts satisfactory to the Department for the term of the permit;

(5) a requirement that the permittee maintain a valid license and that the operation be directed only by those individuals named on the license;

(6) a statement that the operation must be conducted during each year of a multi-year permit, as set forth in the plan of operations, and that the plan is incorporated in the permit;

(7) a requirement that the permittee notify the Department of any changes to the list required by §79.18 (8) of this title (relating to Permit Application);

(8) a statement that the Department shall have immediate access to any information the permittee maintains that is pertinent to day-to-day weather modification operations; and

(9) other terms, requirements, and conditions that the Department deems advisable.

§79.31. Recordkeeping Requirements.

Any person conducting a weather modification operation with an operational or target area that includes any part of a Texas county must record and maintain, for each operation, the following:

(1) the daily log (NOAA Form 17-4B) required by 15 Code of Federal Regulations, §908.8(a); and

(2) the supplemental information required by 15 Code of Federal Regulations, §908.8(b), (c), and (d).

§79.32. Additional Recordkeeping Requirements for Operations Employing Aircraft.

In addition to the record keeping requirements of §79.31 of this title (relating to Recordkeeping Requirements), any person conducting a weather modification operation with an operational or target area that includes any part of a Texas county and that employs aircraft for reconnaissance or seeding purposes must record and maintain, for each operation, the following:

(1) date;

(2) time period (in minutes of local time);

(3) rates of dispersion of the seeding agent for each flight;

(4) total amount of seeding agent dispensed;

(5) description of each flight track logged in such a manner as to allow a complete and accurate reconstruction of the run and identified at the beginning and ending of each flight by one of the following methods:

(A) radial distance from a standard reference point,

(B) ground fixes in statute miles from a nearby town or landmark, or

(C) geostationary positioning system (GPS) location.

§79.33. Reporting Requirements.

Any person conducting a weather modification operation with an operational or target area that includes any part of a Texas county must report in writing the following information to the Department according to the schedule given:

(1) any changes or additions to the list submitted with the permit application in accordance with §79.18 (8) of this title (relating to Permit Application) must be submitted as soon as practicable;

(2) for each month in which operations are conducted, one copy of the record of operations for that month required by §79.31 of this title (relating to Recordkeeping Requirements) and, if applicable, one copy of the record of operations for that month required by §79.32 of this title (relating to Additional Recordkeeping Requirements for Operations Employing Aircraft) must be submitted by the fifth day of the following month;

(3) one copy of all other reports required by 15 Code of Federal Regulations, §§908.5-908.7, must be submitted as soon as practicable, but in no case later than the deadlines set by the federal regulation.

§79.41. Amendment, Revocation, or Suspension.

(a) The Department may initiate proceedings before the Executive Director to:

(1) amend a permit if it appears necessary to protect the health or property of any person; or

(2) suspend or revoke a permit or license if the Department has good cause to believe that the permit or license should be suspended or revoked.

(b) Suspension of a license shall suspend automatically for a like period of time any permit issued under that license, unless the permit is issued to more than one licensee, and at least one of those licensees remains in good standing.

(c) Revocation of a license shall revoke automatically any permit issued under that license, unless the permit is issued to more than one licensee, and at least one of those licensees remains in good standing.

§79.42. Good Cause.

(a) Good cause to believe that a license should be revoked or suspended shall include, but not be limited to, the following:

(1) the licensee has violated any of the provisions of the Act, rules, or license;

(2) the licensee has submitted false and/or misleading information on his or her application;

(3) the individual or individuals named in the license no longer possess the qualifications necessary for the issuance of an original license;

(4) the operational personnel or other information which were the basis for the issuance of the license have changed materially; or

(5) the licensee is deemed incompetent to hold a license by virtue of previous violations of weather modification permits or licenses in other states, resulting in suspension or revocation of the licensee's license in that other state.

(b) Good cause to believe that a permit should be revoked or suspended shall include, but not be limited to, the following:

(1) the permittee has violated any of the provisions of the Act, rules, or the permit;

(2) the permittee has submitted false or misleading information in either its application for a permit or the records required to be submitted by §79.31 of this title (relating to Recordkeeping Requirements) and §79.32 of this title (relating to Additional Recordkeeping Requirements for Operations Employing Aircraft);

(3) the permittee's license has expired during the term of the permit and the licensee has not made a timely request for renewal; or

(4) the Department has reason to believe that the permitted operation is significantly dissipating the clouds and preventing the natural course of developing rain in the area where the operation is conducted to the material detriment of persons or property in that area.

§79.43. Notice and Hearing.

The Department may initiate proceedings to amend, suspend, revoke, or otherwise sanction a permit or a license and/or recommend administrative penalties in accordance with the Act or the Texas Occupations Code, Chapter 51 and 16 TAC, Chapter 60 (relating to the Texas Commission of Licensing and Regulation).

§79.44. Emergency Order To Cease Operations.

(a) If the executive director determines that probable imminent injury or hazard to any person, property, or to the public, will occur as the result of a weather modification operation, the executive director shall immediately initiate proceedings to order a licensee or the person in control and in charge of the operation to cease some or all operations without suspending the permit.

(b) Notice of the order to discontinue operation may be given verbally by the executive director to the licensee or to the person in control and in charge of the operation, to be confirmed in writing thereafter at the earliest possible date.

(c) Operations may resume after the licensee or person in control and in charge of the operation has been notified by the executive director that the probability of injury or hazard has ceased.

§79.51. Application for License Amendment.

A licensee seeking to amend any provision of a Texas weather modification license must:

(1) file a license amendment request with the Department in accordance with the requirements of §79.13 of this title (relating to License Application), excluding payment of the license fee required by §79.13 (a) of this title;

(2) if the amendment being requested involves adding a person or persons to the license, provide sufficient documentation on the education and training, qualifications, and work experience of the individual or individuals who is (are) to be in control, and in charge, of weather modification operations for the licensee.

§79.52. Issuance of License Amendment.

The Department shall issue a Texas weather modification license amendment in the same manner as issuance of an original license in accordance with §79.14 (relating to Issuance of License).

§79.53. Application for Permit Amendment.

A permittee seeking to amend any provision of a Texas weather modification permit must:

(1) file an application with the Department in accordance with the requirements of §79.18 of this title (relating to Permit Application); however, the headings of the application should be altered to reflect the fact that the permittee seeks an amendment rather than an original permit;

(2) unless the Department deems the amendments minor in accordance with §79.55 of this title (relating to Exceptions for Minor Permit Amendments), file and publish a notice of intention with the Department in accordance with the requirements of §79.17 of this title (relating to Notice of Intention); however, the headings of the notice of intention should be altered to reflect the fact that the permittee seeks an amendment rather than an original permit;

(3) if the amendment sought by the permittee alters only the delineation of either the operational or target areas to the extent that territory is added to either or both areas, publish the notice of intention only in the counties that include any part of the territory being added to the operational or target areas.

§79.54. Issuance of Permit Amendment.

(a) The Department shall issue a Texas weather modification permit amendment in the same manner as for issuance of an original permit in accordance with §79.21 (relating to Issuance of Permit).

(b) The Department will evaluate requests for a public meeting on permit amendment applications in the same manner as for original permit applications in accordance with §79.20 (relating to Requests for Public Meeting on Permit Application).

§79.55. Exception for Minor Permit Amendments.

(a) No notice of intention need be filed or published and no public meeting will be scheduled with respect to applications for amendments that the Department deems minor.

(b) An amendment shall be deemed minor if:

(1) in the judgment of the Department, it has no potential for harming the health or property of any person; and

(2) it does not negate or render inaccurate any information contained in the notice of intention that was published with respect to the original application for the permit that is sought to be amended.

§79.61. Hail Suppression as Objective of Permit.

(a) If the notice published pursuant to Senate Bill 1175, 1st Called Session, 77th Texas Legislature, and the code sections which it may be codified, does not include notice that hail suppression is an objective of the operation, any qualified voter in the proposed target or operational area may request that the Department determine whether the objective of the operation includes hail suppression.

(b) The Commission shall consider the request in a public meeting and determine the nature of the proposed operation. The Commission shall issue an order that determines the nature of the operation. If the Commission determines that the proposed operation

includes hail suppression as an objective, the order shall specify the terms under which the applicant may republish the notice of intention.

(c) If the Commission determines that the objectives of the proposed operation include hail suppression, the Commission shall not issue a permit unless the applicant meets the requirements of the order issued by the Commission.

§79.62. Issuance of Permit When Election Held.

(a) If qualified voters in counties or parts of counties included in the target area or operational area petition for and cause an election or elections to be held in accordance with §1.41 (relating to Election for Approval of a Permit that Includes Authorization for Hail Suppression) set forth in Senate Bill 1175, 1st Called Session, 77th Texas Legislature, and the code sections in which it may be codified, the Department must evaluate the results of the election or elections, as certified and submitted by the respective county commissioners court in accordance with §1.41 (relating to Election for Approval of a Permit that Includes Authorization for Hail Suppression) set forth in Senate Bill 1175, 1st Called Session, 77th Texas Legislature, and the code sections in which it may be codified, before issuing the permit.

(b) If, as a result of the election or elections, certain areas are excluded from the coverage of the permit as applied for, the Department must determine if the proposed operation is still feasible for those areas in which no election was requested and in those areas in which the voters gave their approval. The Department may conduct a public meeting for the sole purpose of determining the feasibility of the proposed operation.

(c) The Department shall not issue the permit if a majority of the qualified voters voting in the election precincts, which are wholly or partially within the target area, vote in opposition to the issuance of the permit.

(d) The Department may issue the permit if a majority of the qualified voters voting in the election precincts that are wholly or partially within the target area vote in favor of the issuance of the permit. However, the permit must exclude any precinct in which the majority of qualified voters voted in opposition to the issuance of the permit if that precinct is wholly within the target area and contiguous with its outer boundary or is wholly or partially within the operational area.

(e) No permit can be issued covering any county or part of a county previously excluded from the coverage of a permit by virtue of an election for at least two years from the date of the election, and then, only if a subsequent election is held at which the majority of voters vote to approve the permit.

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 October 24, 2001.

TRD-200106465
Brian Francis
Deputy Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 463-7348

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PART 6. TEXAS MOTOR VEHICLE BOARD

CHAPTER 105. ADVERTISING RULES

16 TAC §105.10

The Texas Motor Vehicle Board proposes amendments to §105.10(a), 105.10(c)(1), 105.10(c)(2) and 105.10(c)(3). The rules provide guidelines for truthful and accurate practices in the advertising of motor vehicles.

In section 105.10 (a) the word "a" is replaced with the word "the" to provide greater clarity. The proposed amendment to §105.10(c)(2), Figure: 16 TAC 105.10(c)(2), clarifies the example of acceptable dealer price advertising of rebate incentives. It shows that the rebate must be subtracted from the advertised price to depict the ultimate sales price in an advertisement. Amendments to 105.10(c)(1) and 105.10(c)(3) correct typographical errors in previous publications.

The proposed amendment to §105.10 (a) addresses the issue of bait and switch tactics utilized by some dealerships, that is, advertising one price, but then making higher offers to consumers that respond to the advertisement. As written, the rule lends itself to such a practice. By amending the rule to refer to "the" price instead of "a" price, the language is more definitive.

Section 105.6 of the Board's Advertising Rules states that "All advertised statements shall be accurate, clear, and conspicuous." The current language of §105.10 (a) with the language "a" price, does not meet that standard.

Some have suggested that adopting any language other than "a" price would require dealers to sell only at the advertised prices and not allow consumers an opportunity to negotiate a lower-than-advertised price. The Board does not agree. No rule prevents either consumers from negotiating lower than advertised prices, or dealers from selling at a lower than advertised price. On the other hand, a consumer is not going to negotiate upward from the advertised price and the dealer might find it economically unsound to drop the price lower than already advertised. The primary purpose of advertising is to draw consumers to the dealership, hence to do so and remain competitive, the dealership is likely to advertise its lowest available prices.

Regarding the situation in which a consumer trades in a vehicle owing more than the vehicle is worth, a dealer is not allowed under the Finance Code to alter the cash price of the vehicle. Negative equity may be itemized separately in a retail installment contract, but it cannot be added to the cash price. Thus, even in a situation where the consumer is "upside down" on a trade-in, the advertised price must remain definite for the benefit of the consumer. The proposed amendment to §105.10 (a) provides needed clarification and definition.

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

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

Comments on the proposed amendments may be submitted to Brett Bray, Director, Motor Vehicle Division, P.O. Box 2293, Austin, Texas 78768. The deadline for submitting comments is December 28, 2001. Please submit fifteen copies. The Texas Motor Vehicle Board will consider the adoption of the proposed amendments at its meeting on January 17, 2002.

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

Texas Motor Vehicle Commission Code §5.01A is affected by the proposed amendments.

§105.10. Dealer Price Advertising.

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

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

(b) (No change.)

(c) If a price advertisement discloses a rebate cash back or discount savings claim, the price of the vehicle must be disclosed as well as the price of the vehicle after deducting the incentive.

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

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

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

(d)-(e) (No change.)

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

Filed with the Office of the Secretary of State, on October 26, 2001.

TRD-200106595
Brett Bray
Director
Texas Motor Vehicle Board
Proposed date of adoption: January 17, 2002
For further information, please call: (512) 416-4899

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CHAPTER 109. LESSORS AND LEASE FACILITATORS

16 TAC §§109.1 - 109.7, 109.9, 109.10, 109.12

The Texas Motor Vehicle Board of the Texas Department of Transportation proposes amendments to §§109.1-109.5, 109.7, 109.9, and 109.10, Lessors and Lease Facilitators. The Board also proposes the adoption of new §109.6 and §109.12. Together, these sections set guidelines for obtaining and holding a license as a lessor or lease facilitator of motor vehicles in Texas.

General changes to rule language:

The Motor Vehicle Board acquired jurisdiction over lessors and lease facilitators in 1995. The amendments clarify that these rules are issued under the authority of the Board and delete inappropriate references to the Department of Transportation. Other proposals correct grammar.

Additional changes specific to each section:

Proposed changes to §109.1, Objective, insert references to additional Texas Motor Vehicle Commission Code sections that relate to the leasing of motor vehicles in Texas. Modifications to §109.2, Definitions, add definitions of the terms "Board," "Lease," "Lease Facilitator," and "Lessor." The addition of these terms will bring this section into conformity with the language of the Texas Motor Vehicle Commission Code, and provide necessary information about the terms within this chapter. Proposed changes to §109.3, License, are mainly grammatical, and are intended to clarify the language of that section.

The Board's proposes amendments to §109.4, Application for a License, to fulfill two purposes. First, this section now divides the application requirements for lessors and lease facilitators into two separate subsections to give potential licensees a clearer indication of which items are necessary to apply for each license. Also, certain specific changes to the language in this section are proposed to provide a better explanation of particular items required to be submitted.

The Board proposes removing language from §109.4(a) stating that the documents required to be filed with a new application for a lessor or lease facilitator must be filed also with renewals for these licenses. Upon renewal, the Board asks for information from lessors and lease facilitators that confirms these entities are maintaining their qualifications to hold their respective licenses. The Board does not ask that these licensees submit all the items listed under §109.4 each year with their renewals, as it feels such effort would be duplicative. Therefore, the proposed deleted language is not necessary, and could be misleading to licensees.

The Board proposes adding language to §109.4(a)(2) that states that individuals or officers of the applicant lessor entity required to be listed on the application must provide verification to the Board that such person has not been convicted of a felony. The current language does not restrict its inquiry about felony convictions to those individuals listed in the application. The Board also seeks to amend §109.4(a)(5) to clarify that a new lessor may provide verification of its assumed name from whatever state or county authority that issues assumed name certificates in that locale. The current language appears to require that assumed name certificates may come only from the Secretary of State or county clerk where the applicant resides. The Board also proposes language in §109.4(a)(6) that broadens the requirement for verification of business entity. The current subsection appears only to apply to corporations, and the new language also requires partnerships to verify their business form. The Board proposes removing language in §§109.4(b)(1), 109.4(b)(7), and 109.4(b)(8) that refers to requirements for lease facilitator applications. Further changes to §109.4(b)(8) add requirements for verification of the business background for those principals and

officers that must be identified specifically on the lessor application.

The Board also proposes to amend §109.4 by adding subsection (c), which outlines the requirements for lease facilitator applications separately from those listed for lessor applications. The Board has not recommended any substantial changes to the requirements for obtaining a lease facilitator license. However, it has recommended changes similar to those proposed in §109.4(b) for the lessor requirements. The Board proposes language in §109.4(c)(2) that states that individuals or officers of the applicant lessor entity required to be listed on the application must provide verification to the Board that such person has not been convicted of a felony. The Board proposes new language §109.4(c)(5) to clarify that a new lessor may provide verification of its assumed name from whatever state or county authority that issues assumed name certificates in that locale. The Board also proposes to include language in §109.4(c)(6) that broadens the requirement for verification of business entity. Further proposed language in §109.4(c)(9) adds requirements for verification of the business background for those principals and officers that must be specifically identified on the lease facilitator application.

The Board also proposes amendments to §109.5, Sanctions, by adding §§109.5(2)(A) and 109.5(2)(B), that permit representatives of the Board to examine a licensee's records during normal business hours, or to request copies of records by certified letter. This change will bring the lessor and lease facilitator rules into conformity with rules for other licensees regulated by the Board.

Additionally, the Board proposes changes to §109.7, Established and Permanent Place of Business, to clarify the physical location and office requirements for lessors and lease facilitators. A significant difference between the current rule and the proposed amendments is that the amendments seek to draw a distinction between lessors and lease facilitators who operate within the state, and lessors who operate out of state, sometimes referred to by the industry as "indirect lessors." To accomplish this, the Board has renumbered the rules, placing in-state lessor and lease facilitator requirements in §109.7(a), and out-of-state lessor requirements under §109.7(b).

The Board recommends other specific changes to §109.7. The Board proposes to amend §109.7(a)(1)(A) to require that a lessor or lease facilitator must maintain a land-based telephone in its offices. The current language does not specify that the telephone must be land-based. The Board also proposes changes to §109.7(a)(1)(B) to clarify that a licensee's office, if located in a residential structure, can have no direct access from the office to the living quarters. The Board further proposes changes to §109.7(a)(1)(D)(ii), stating that a lessor or lease facilitator who shares office space with other lessors or lease facilitators must have its own separate telephone number, and listing in the business name, with a fixed land-based telephone company. The Board further proposes an amendment to §109.7(a)(2), clarifying that a lessor or lease facilitator must display a sign at its location showing the name of the business.

The Board proposes changes to §109.7, adding subsection (b) that specifies physical location requirements and office requirements for out-of-state lessors. The proposed additional language states that it applies to lessors who process leases in another state, and who have no direct contact with the public to execute leases. The principal difference between the requirements for in-state licensees and out-of-state lessors is that out-of-state lessors are not subject to regulations governing the posting of business hours signs.

The Board proposes §109.7(b)(1), physical location requirements for these types of entities. Proposed §109.7(b)(1)(A) requires that an out-of-state lessor must reside in a structure of sufficient size and be equipped with traditional office furniture and equipment. Proposed §109.7(b)(1)(B) places restrictions on access between residential quarters and business space for an out-of-state lessor who conducts its business in a residential structure. The Board's proposed §109.7(b)(1)(C) allows out-of-state lessors to operate from portable office structures, if they follow all other premises requirements under subsection (b). Sections 109.7(b)(2) and (3) contain sign and lease requirements that are identical to those for in-state licensees. Also, the Board proposes to amend the current §109.7(4), by changing its subsection designation to §109.7(c). The Board is proposing amended language in this subsection that clarifies that lessors and lease facilitators can be employees of financial institutions or their wholly owned subsidiaries. Furthermore, the Board seeks to amend §109.7 by adding subsection (d) to define the term "employee."

The Board proposes amending §109.9, Records of Leasing, which specifies recordkeeping requirements for lessors and lease facilitators. Recommended changes to §109.9(a) include language that alters the time period for which licensees must keep records, and clarifies which records that the lessor or lease facilitator must keep at its licensed location. The Board also recommends changes to allow lessors and lease facilitators to keep certain records at off-site locations, if the records are over thirteen months old. The proposed amendments further add a requirement that licensees must provide records upon mailed request from the director or designee, within fifteen days of such request. The Board recommends adding §109.9(e) that requires that the letter of appointment must be executed by both lessors and lease facilitators who conduct business together.

Amendments also are proposed by the Board to §109.10, Change of Lessor or Lease Facilitator Status, which governs change in ownership of lessors and lease facilitators. The proposed changes to §109.10(a) clarify that a licensee must file an application to amend its license within ten days of the sale or assignment of any portion of its business entity that results in a change of entity. The proposed language states that publicly held corporations need only inform the Board of substantial changes in ownership, where one person or entity purchases a ten percent or more interest in the corporation.

The Board further recommends changes to §109.10(b). The proposed language states that lessors and lease facilitators should obtain Board approval before moving an existing location, or opening a supplemental location. The current language does not require prior authorization before making these changes.

The Board also proposes two new rules, §109.6, More Than One Location, and §109.12, General Distinguishing Number Exception. Proposed new rule §109.6 defines when a licensee under this subchapter should reapply for a license or obtain a separate license. New §109.12 clarifies that lessors do not need to possess general distinguishing numbers to sell vehicles, that are owned by those lessors, to lessees or to properly licensed motor vehicle dealers. This new rule also provides that licensed lessors may not purchase vehicles at wholesale motor vehicle auctions. New §109.12 states that the Board shall cancel any existing general distinguishing numbers held by lessors who do not otherwise qualify to hold general distinguishing numbers. Furthermore, the

proposed rule states a lessor whose existing general distinguishing number is cancelled under the rule is not barred from obtaining a subsequent general distinguishing number, provided that applicant meets all necessary qualifications.

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

Mr. Bray also has determined that for each year of the first five years the proposed sections are in effect, the anticipated public benefit of the amendments to Chapter 109 will be to provide a clearer understanding of the lessor and lease facilitator operating rules and conserve the time and resources of the agency and entities appearing before it. There will be no significant effect on small businesses. Mr. Bray anticipates that there will be some indeterminate economic cost to persons who are required to comply with the sections as proposed, however, he does not feel this cost will be significant. Mr. Bray also has certified that there will be no impact on local economies or overall employment as a result of enforcing or administering the sections.

Comments on the proposed amendments may be submitted to Brett Bray, Director, Motor Vehicle Division, P.O. Box 2293, Austin, Texas 78768. Please submit fifteen copies by December 28, 2001. The Texas Motor Vehicle Board will consider adoption of the proposal at its meeting on January 17, 2002.

The amendments are proposed under the Texas Motor Vehicle Commission Code, §3.06, which provides the Board with authority to adopt rules as necessary and convenient to effectuate the provisions of the Act and to govern practice and procedure before the agency.

Motor Vehicle Commission Code §§1.03, 3.08, 4.01, 4.03A, 4.03B, 5.03A, and 5.03B are affected by the proposed amendments and the proposed new rules.

§109.1. Objective.

The objective of these rules is to implement the intent of the legislature as declared in the Texas Motor Vehicle Commission Code, and in particular, §§4.01(a), 4.03A, 4.03B, 5.03A, and 5.03B, by prescribing rules to regulate the business of leasing motor vehicles in this state.

§109.2. Definitions.

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

(1) Director--The Director of the Board[~~Motor Vehicle Division, Texas Department of Transportation~~].

(2) Department--The Texas Department of Transportation.

(3) Board--The Motor Vehicle Board of the Texas Department of Transportation.

(4) Motor Vehicle Lease--A transfer of the right to possession and use of a motor vehicle for a term in excess of 180 days, in return for consideration.

(5) Motor Vehicle Lease Facilitator--A person, other than a franchised dealer or a bona fide employee of a dealer, or a vehicle lessor or a bona fide employee of a vehicle lessor, who:

(A) holds himself out to any person as a "motor vehicle leasing company" or "motor vehicle leasing agent" or uses a similar title, for the purpose of soliciting or procuring a person to enter into a contract or agreement to become the lessee of a vehicle that is not, and will not be, titled in the name of and registered to the lease facilitator; or

(B) otherwise solicits a person to enter into a contract or agreement to become a lessee of a vehicle that is not, and will not be, titled in the name of and registered to the lease facilitator, or who is otherwise engaged in the business of securing lessees or prospective lessees of motor vehicles that are not, and will not be, titled in the name of and registered to the facilitator.

(6) Motor Vehicle Lessor--A person who, pursuant to the terms of a lease, transfers to another person the right to possession and use of a motor vehicle titled in the name of the lessor.

§109.3. License.

(a) No person may engage in business as a lessor or a lease facilitator unless that person has a currently valid license assigned by the Board, or is otherwise exempt by law from obtaining such a license [~~Department~~].

(b) [~~Lease facilitators must be licensed separately for each business location.~~] Any person who facilitates leases on behalf [~~representative~~] of a lease facilitator must [~~be a bona fide employee of the lease facilitator. A bona fide employee is a representative of the lease facilitator's business~~]:

(1) [~~who is~~] be on the lease facilitator's payroll and receive [~~receives~~] compensation in which Social Security, FUTA, and all other appropriate taxes are withheld from the representative's paycheck and said taxes are paid to the proper taxing authority; and

(2) [~~the details of the work of~~] have work details such as when, where, and how the final results are achieved ,[~~are~~] directed and controlled by the lease facilitator.

§109.4. Application for a License.

(a) Application for a lessor's or lease facilitator's license[~~, or a renewal thereof,~~] shall be on a form prescribed by the director, properly completed by the applicant, and shall be submitted with supporting documentation showing all information requested.

(b) The supporting documentation for a lessor's license shall include:

(1) a letter of appointment for [~~from~~] each [~~lessor or~~] lease facilitator or acceptable substitute as designated by the Motor Vehicle Division;

(2) a verification that each owner and officer of the applicant required to be listed on the application has not been convicted of any felony;

(3) the fee for the license as prescribed by law for each type of license required;

(4) photographs clearly depicting the overall appearance of the interior and exterior of the applicant's office;

(5) verification of all assumed name(s), if applicable, in the form of assumed name certificate(s) on file with the appropriate recording entity, such as the Secretary of State or the county clerk;

(6) verification of the business entity, such as a copy of the Certificate of Incorporation on file with the Secretary of State, if a corporation or the partnership agreement ;

(7) a sample copy of the agreement between the lessor [~~or lease facilitator~~] and a lessee; and

(8) [~~a list of all lessors, including names and addresses, with which any lease facilitator executes leases. This list must be updated in writing upon renewal of a license, and within ten days of the~~

~~addition of any lessor to this list.~~] business background information for each principal or officer of the entity required to be listed on the application.

(c) The supporting documentation for a lease facilitator's license shall include:

(1) a letter of appointment from each lessor or acceptable substitute as designated by the Motor Vehicle Division;

(2) a verification that each owner and officer of the applicant required to be listed on the application has not been convicted of any felony;

(3) the fee for the license as prescribed by law for each type of license required;

(4) photographs clearly depicting the overall appearance of the interior and exterior of the applicant's office;

(5) verification of all assumed name(s), if applicable, in the form of assumed name certificate(s) on file with the appropriate recording entity, such as the Secretary of State or the county clerk;

(6) verification of the business entity, such as a copy of the Certificate of Incorporation on file with the Secretary of State, or the partnership agreement;

(7) a sample copy of the agreement between the lease facilitator and a lessee;

(8) a list of all lessors, including names and addresses, with whom any lease facilitator executes leases. This list must be updated in writing upon renewal of a license, and within ten days of the addition of any lessor to this list; and

(9) business background information for each principal or officer of the entity required to be listed on the application.

§109.5. Sanctions.

(a) Revocation/Denial. The Motor Vehicle Board may revoke, deny or suspend a lessor or lease facilitator's license, or assess civil penalties, if that lessor or lease facilitator:

(1) fails to maintain an established and permanent place of business conforming to the Board's [~~Department's~~] regulations under §109.7 of this chapter[~~title~~](relating to Lessors and Lease Facilitator Licensing, Established and Permanent Place of Business);

(2) refuses to permit or fails to comply with a request by a representative of the Board [~~department~~] to examine[~~, during normal working hours,~~] the current and previous year's leasing records required to be kept under §109.9 of this chapter and ownership papers for vehicles owned, leased, or under that lessor or lease facilitator's control, and evidence of ownership or lease agreement for the property upon which the business is located;[~~. Such records shall be kept in accordance with §109.9(a) of this title (relating to Records of Leasing);~~]

(A) during normal working hours at the lessor's or lease facilitator's permanent place of business, or

(B) through a certified letter request signed by the director or the director's designee;

(3) fails to notify the Board [~~department~~] of a change of address within ten days after such change;

(4) fails to notify the Board [~~department~~] of a change of lessor/lease facilitator's name or ownership within ten days after such a change;

(5) fails to observe the fee restrictions as described in the Motor Vehicle Commission Code, §5.03A and §5.03B;

(6) fails to maintain leasing and/or advertisement records as described in these rules;

(7) fails to remain regularly and actively engaged in the business of leasing vehicles or facilitating the leasing of vehicles for which [~~as~~] the [~~person's~~] license is issued;

(8) violates any law relating to the sale, lease, distribution , financing or insuring of motor vehicles;

(9) uses or allows use of a lessor [~~leasing~~] or lease facilitator [~~facilitating~~] license for the purpose of avoiding any provisions of the Motor Vehicle Commission Code;

(10) makes a material misrepresentation in any application or other information filed with the Board[~~department~~];

(11) fails to update in writing the list of lessors, including names and addresses, with which any lease facilitator executes leases within ten days of any changes to this list and upon renewal of the license;

(12) violates any state or [~~of~~] federal law relating to the leasing of new motor vehicles.

(b) Referral fees prohibited. A lessor or lease facilitator may not, directly or indirectly, accept a fee from a dealer for referring customers who purchase or consider purchasing vehicles.

§109.6. More Than One Location.

(a) Lease facilitators must be licensed separately for each business location.

(b) Lessors or Lease facilitators that relocate from a point outside the limits of a city, or relocate to a point not within the limits of the same city of the initial location are required to obtain a new license.

(c) Lessors are required to obtain a license for their primary locations. Lessors must provide the address, telephone number, and the name of a contact person for all other satellite offices that conduct business in the State of Texas.

§109.7. Established and Permanent Place of Business.

(a) A lessor or lease facilitator operating within the State of Texasmust meet the following requirements at each location where vehicles are leased or offered for lease.

(1) Physical location requirements.[~~Office Requirements.~~]

(A) A lessor or lease facilitator within Texas must be open to the public during normal working hours. The lessor or lease facilitator's business hours for each day of the week must be posted at the main entrance of the office, and the owner or an [~~a bona fide~~] employee of the lessor or lease facilitator must be at the location during the posted business hours for the purpose of leasing vehicles. In the event the owner or an [~~a bona fide~~] employee is not available to conduct business during the posted business hours, a separate sign must be posted indicating the date and time such owner or [~~a bona fide~~] employee will resume leasing operations. The structure must be of sufficient size to accommodate and must be equipped with a desk and chairs from which the lessor or lease facilitator transacts his business. The office also must [~~and~~] be equipped with a working land-based telephone instrument listed in the name under which the lessor or lease facilitator does business.

(B) If a licensee's office is located in a residential structure, the office must be [~~completely~~] separated completely from and have no direct access into the residential quarters and be in compliance with all applicable local zoning ordinances and deed restrictions. Such an office shall not be used as a part of the living quarters and must be

readily accessible to the public without having to pass into or through any part of the living quarters.

(C) Portable-type office structures may qualify, provided they meet the minimum requirements as set forth herein.

(D) In those instances when two or more lessors or lease facilitators occupy the same business locations and conduct their respective leasing operations under different names, one office structure for all lessors or lease facilitators operating from such location will be acceptable; provided, however, each lessor or lease facilitator must have:

(i) a separate desk from which that lessor or lease facilitator transacts business;

(ii) a separate working telephone instrument, number, and listing in the lessor or lease facilitator's name with a fixed, land-based telephone company;

(iii) a separate right of occupancy meeting the requirements of this section.

(E) A lease facilitator's established and permanent place of business, as prescribed in this rule, must be physically located within the State of Texas.

(2) Sign requirements.

[~~(A)~~] A lessor or lease facilitator shall display a conspicuous and permanent sign at the licensed location showing the name under which the lessor or lease facilitator conducts business. Outdoor signs must contain letters no smaller than six inches in height.

[~~(B) Such sign must be readable from the address listed on the application for the lessor or lease facilitator license.~~]

(3) Lease requirements. If the premises from which a lessor or lease facilitator conducts business are not owned by the licensee, such licensee shall maintain a lease continuous for the same period of time as the lessor's or lease facilitator's license, and such lease agreement shall be on a properly executed form containing, but not limited to the following information:

(A) the names of the lessor and lessee;

(B) the legal description of the property or street address; and

(C) the period of time for which the lease is valid.

(b) A lessor whose licensed location is in another state and who does not deal directly with the public to execute leases must meet the following requirements at each location.

(1) Physical location requirements.

(A) The structure must be of sufficient size to accommodate and must be equipped with a desk and chairs from which the lessor transacts his business. The office also must be equipped with a working land-based telephone instrument listed in the name under which the lessor does business.

(B) If a lessor's office is located in a residential structure, the office must be separated completely from and have no direct access into the residential quarters and be in compliance with all applicable local zoning ordinances and deed restrictions. Such an office shall not be used as a part of the living quarters and must be readily accessible to the public without having to pass into or through any part of the living quarters.

(C) Portable-type office structures may qualify, provided they meet the minimum requirements as set forth herein.

(D) In those instances when two or more lessors occupy the same business locations and conduct their respective leasing operations under different names, one office structure for all lessors operating from such location will be acceptable; provided, however, each lessor must have:

(i) a separate desk from which that lessor transacts business;

(ii) a separate working telephone instrument, number, and listing in the lessor's name with a fixed, land-based telephone company;

(iii) a separate right of occupancy meeting the requirements of this section.

(2) Sign requirements. An out of state lessor shall display a conspicuous and permanent sign at the licensed location showing the name under which the lessor conducts business. Outdoor signs must contain letters no smaller than six inches in height.

(3) Lease requirements. If the premises from which a lessor conducts business are not owned by that person or entity, that person or entity shall maintain a lease on the property of the licensed location continuous for the same period of time as the license, and such agreement shall be on a properly executed form containing, but not limited to the following information:

(A) the names of the lessor and lessee;

(B) the legal description of the property or street address; and

(C) the period of time for which the lease is valid.

(c) [~~(4)~~] Independence. A lessor or lease facilitator shall be independent of financial institutions and dealerships in location and in business activities unless that lessor or lease facilitator is an employee of, a legal subsidiary of, or an entity wholly owned by the financial [~~such an~~] institution or dealership.

(d) For the purposes of this subsection, an employee is a person who meets the requirements of §109.3(b).

§109.9. Records of Leasing.

(a) Purchase and leasing records. A lessor or lease facilitator must keep a complete record of all vehicle purchases and sales for a minimum period of at least one year after the expiration of the lease. Records reflecting lease transactions that have occurred within the preceding 13 months must be available for inspection by a representative of the Board at the licensed location. Records for prior time periods may be kept off-site at a location within the same county or within 25 miles of the licensed location. Upon receipt of a certified letter from the director or the director's designee, a lessor or lease facilitator must produce copies of specified records by mailing those copies to the address listed in the request within 15 days. [~~Lessors and lease facilitators must maintain a separate and complete lease file for each transaction in their business office readily available and subject to inspection during regular business hours upon request by a Department representative containing the following information on each lease transaction for a period of at least three years after the expiration of the lease.~~]

(b) Content of records. As used in this subsection, a complete lease file shall include [~~the following things~~]:

(1) names, addresses and telephone numbers of the lessor of the vehicle in the transaction;

(2) names, addresses and telephone numbers of the lessee of the vehicle in the transaction;

(3) names, addresses, telephone numbers and license numbers of the lease facilitator of the vehicle in the transaction;

(4) name, home address, and telephone number of employee of lease facilitator who handled the transaction;

(5) complete description of the vehicle involved in the transaction, including its Vehicle Identification Number (VIN);

(6) name, address, telephone number and General Distinguishing Number of the Dealer selling the vehicle, as well as the franchise license number of the dealer if the vehicle in the transaction is a new motor vehicle;

(7) amount of fee received by or paid to the lease facilitator;

(8) copies of the buyers order and sales contract for the vehicle;

(9) copy of the lease contract;

(10) copies of all other contracts, agreements or disclosures between the lease facilitator and the consumer lessee;

(11) copies of the front and back of Manufacturer's Statement/Certificate of Origin or the title of the vehicle involved in the transaction.

(c) Records of advertising. A lessor or lease facilitator must maintain copies of all advertisements, brochures, scripts or electronically reproduced copies, in whatever medium appropriate, of promotional materials for a period of at least 18 months, subject to inspection upon request by a [~~department~~] representative of the Board at the business of the licensee during regular business hours.

(1) All advertisements by lessors or lease facilitators must be in accordance with the Motor Vehicle Board Advertising Rules.

(2) Lessors and lease facilitators may not state or infer, either directly or indirectly, in any manner such as advertisements, stationery or business cards that their business involves the sale of new motor vehicles.

(d) Title assignments. All certificates of title, manufacturer's certificates of origin, or other evidence of ownership for vehicles which have been acquired by a lessor for lease must be [~~properly~~] assigned properly from the seller [~~selling dealer~~] into the lessor's name.

(e) Letters of appointment. All letters of appointment between each lessor or lease facilitator with whom the licensee does business must be executed by both parties.

§109.10. Change of Lessor or Lease Facilitator Status.

(a) Change of ownership. A lessor or lease facilitator who proposes to sell and/or assign to another any interest in the licensed entity, whether a corporation or otherwise, so long as the physical location of the licensed entity remains the same, shall notify the Board [~~department~~] in writing within ten days by filing an application to amend the license. If the sale or assignment of any portion of the business results in a change of entity, then the purchasing/assignee entity must apply for and obtain a new license. Publicly held corporations licensed as lessors or lease facilitators need only inform the Board of a change in ownership if one person or entity acquires 10% or greater interest in the licensee[~~if there is any change of ownership. Upon notification of a change of the majority ownership interest, the department shall cancel the existing license and the new licensee must qualify under this section~~].

(b) Change of operating status of business location. A licensee shall obtain Board approval prior to the opening of a supplemental location, or the relocation of an existing location, in accordance with §109.6 of this chapter. Also, a licensee must notify the Board when closing an existing location[~~notify the department in writing within ten days of the opening, closing or relocation of any licensed business location. Each new location must meet all applicable regulations under the Texas Motor Vehicle Commission Code and these rules~~].

§109.12. General Distinguishing Number Exception.

It is not necessary for a licensed lessor to hold a General Distinguishing Number (GDN) in order to sell a vehicle, which the lessor owns, to either the lessee or a duly licensed dealer, either directly or through a licensed wholesale auction. A licensed lessor is not allowed to purchase vehicles at a wholesale auction. Any existing GDN held by a lessor who does not otherwise qualify for a GDN shall be cancelled. A lessor whose GDN has been cancelled under this section may reapply for a GDN once all the qualifications for a GDN are met.

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 October 26, 2001.

TRD-200106596
Brett Bray
Director
Texas Motor Vehicle Board
Proposed date of adoption: January 17, 2002
For further information, please call: (512) 416-4899

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CHAPTER 111. GENERAL DISTINGUISHING NUMBERS

16 TAC §111.2, §111.18

The Texas Motor Vehicle Board proposes amendments to §111.2, General Distinguishing Numbers, Definitions, and proposes the adoption of new §111.18, Proof of Valid License Required of Foreign Motor Vehicle Dealers, which requires Texas licensees to require proof of licensure from persons claiming to hold a license in a foreign jurisdiction, to identify and keep copies of certain license records pertaining to Mexican motor vehicle dealers with whom they do business, and to affix a "For Export Only" stamp with the General Distinguishing Number on the title of every vehicle sold to a foreign motor vehicle dealer.

A significant number of vehicles in Texas are sold to persons claiming to be foreign licensed dealers and who represent that the vehicles are purchased for export. In fact, the vehicles are not taken out of the country, but are sold in unlicensed and unregulated lots near the border with Mexico. These lots compete unfairly with licensed and regulated dealers, who must make a significant investment in facilities and inventory. Additionally, consumers have no recourse against such dealers, who do not meet license requirements such as maintaining a security bond or a permanent place of business. These rules are designed to eliminate the supply of vehicles to unlicensed dealers by requiring Texas licensees to obtain proof that the international dealer is, in fact, licensed in his or her home nation.

Additionally, the rules will support the efforts of other nations to require licensing of their dealer bodies. By restricting access to a steady supply of American vehicles to those who have obtained

licenses from their governments to sell vehicles, Texas will provide a strong incentive for would-be dealers to meet the requirements for licensing.

The rules specifically require certain documents from dealers claiming to be licensed by the Republic of Mexico. The Board has learned of Mexico's requirements and supports them by requiring Texas dealers to maintain copies of appropriate documents and to verify that the Mexican dealer's license is active and in good standing. The Board's position is based on the special relationship that exists between Texas and the Republic of Mexico. Texas and Mexico share a long border, where both sides have developed a highly integrated economy. Texas supports the Republic of Mexico in its efforts to limit the trade in motor vehicles to licensed dealers, and to that end the Motor Vehicle Board proposes specific requirements concerning Mexican motor vehicle dealers. The more general requirements are intended for all non-United States dealers.

Brett Bray, Director, Motor Vehicle Board, 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 amendments and new rule.

Mr. Bray has also determined that for each of the first five years the amendments and new rule are in effect, the public benefit anticipated from enforcement of the proposed amendments and new rule will be a reduction of the number of vehicles sold through unlicensed dealers in Texas and in the number of vehicles illegally exported to the Republic of Mexico. The cost to small business associated with complying with the rules is anticipated to be minimal, including only the cost of obtaining an appropriate stamp and in maintaining the records.

Comments on the proposed amendments and new rule may be submitted to Brett Bray, Director, Motor Vehicle Division, P.O. Box 2293, Austin, Texas 78768. The deadline for comments is December 28, 2001. Please submit fifteen copies. The Texas Motor Vehicle Board will consider the adoption of the proposed amendments at its meeting on January 17, 2002.

The amendments and new rule are proposed under the Texas Motor Vehicle Commission Code, §§ 3.01, 3.03, and 3.06, which provide the Board with authority to amend and adopt rules as necessary and convenient to effectuate the provisions of the Motor Vehicle Commission Code and Transportation Code.

Texas Transportation Code Sections 503.021, 503.036, and 503.038 are affected by the proposed amendments and new rule.

§111.2. Definitions.

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

(1) Agent of foreign motor vehicle dealer--a resident of a foreign country who is formally authorized by a foreign motor vehicle dealer to purchase motor vehicles for import and resale by the foreign motor vehicle dealer at the foreign motor vehicle dealer's authorized business in the foreign country.

(2) [~~(1)~~] Barrier--A material object or set of objects that separates or demarcates.

(3) [~~(2)~~] Board--The Motor Vehicle Board of the Texas Department of Transportation.

(4) [~~(3)~~] Charitable Organization--An organization that is established and exists for the purpose of relieving poverty, the advancement of education, religion, or science, the promotion of health, governmental, or municipal purposes, or other purposes beneficial to the community without financial gain.

(5) [~~(4)~~] Commission--Texas Transportation Commission.

(6) [~~(5)~~] Consignment Sale--The sale of a vehicle by a person other than the owner, under the terms of a written authorization from the owner.

(7) [~~(6)~~] Dealer--Any person who is regularly and actively engaged in the business of buying, selling, or exchanging new or used motor vehicles, motorcycles, motor homes, house trailers, or trailers or semitrailers as defined in the Transportation Code § 501.001 et seq., or the Transportation Code § 502.001, et seq., at either wholesale or retail, either directly, indirectly, or by consignment.

(8) [~~(7)~~] Department--Texas Department of Transportation.

(9) [~~(8)~~] Director--Director, Motor Vehicle Division, Texas Department of Transportation.

(10) Foreign Motor Vehicle Dealer--A person holding a valid license to sell motor vehicles at retail or wholesale issued by a jurisdiction outside of the territorial limits of the United States. For purposes of this section, all states, protectorates, and trust territories administered by the federal government of the United States are considered part of the United States and excluded from the definition of Foreign Motor Vehicle Dealer.

(11) [~~(9)~~] License--A dealer's general distinguishing number assigned by the Motor Vehicle Board of the Texas Department of Transportation for the location from which the person engages in business.

(12) Mexican Motor Vehicle Dealer--a resident of the Republic of Mexico holding a current and valid license to sell motor vehicles issued by the Secretaria de Economia of the Republic of Mexico.

(13) [~~(10)~~] Person--Any individual, firm, partnership, corporation, or other legal entity.

(14) [~~(11)~~] Sale--With regard to a specific vehicle, the transfer of possession of that vehicle to a purchaser for consideration.

(15) [~~(12)~~] Temporary Cardboard Tag--A buyer tag, supplemental buyer tag, dealer tag, or charitable organization tag.

(16) [~~(13)~~] Wholesale Dealer--A licensed dealer who only sells or exchanges vehicles with other licensed dealers.

§111.18. Proof of Valid License Required of Foreign Motor Vehicle Dealers.

(a) All holders of General Distinguishing Numbers must verify that a foreign motor vehicle dealer holds a valid license from the foreign dealer's country of origin before permitting the foreign motor vehicle dealer to purchase vehicles.

(b) All auctions or dealers who sell a vehicle to a foreign motor vehicle dealer shall stamp in black ink on the back of the title in all unused dealer reassignment spaces the words "For Export Only" and their General Distinguishing Number. The stamp shall also be placed on the front of the title in a manner that does not obscure any names, dates, or mileage statements. The stamp must be at least two inches wide, and all words must be clearly legible.

(c) Where the purchaser is a Mexican motor vehicle dealer or the agent of a Mexican motor vehicle dealer the following documents

must be obtained prior to the sale and maintained in the sales file for each vehicle:

(1) A copy of the Republic of Mexico license issued by the Secretaria de Economia to the Mexican Motor Vehicle Dealer;

(2) A statement indicating telephonic confirmation from Secretaria de Economia that the license is active and valid;

(3) A copy of identification documents issued by the Republic of Mexico indicating that the person claiming to be a Mexican dealer is, in fact, a resident of Mexico. Such documents include but are not limited to Mexican driver's licenses, voter registration documents, or official identification cards, if the card contains a picture of the person and lists a physical address;

(4) A completed Texas Motor Vehicle Sales Tax Resale Certificate for each vehicle sold to a Mexican dealer, indicating that the vehicle has been purchased for export to the Republic of Mexico;

(5) A copy of the front and back of the title to the vehicle, showing the "For Export Only" stamp and the General Distinguishing Number of the auction or dealer; and

(6) In the case of agents of Mexican motor vehicle dealers, the file must contain copies of the listed documents for the dealer and documentation supporting the person's claim to be acting as an agent for an Mexican motor vehicle dealer.

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 October 26, 2001.

TRD-200106594
Brett Bray
Director
Texas Motor Vehicle Board
Proposed date of adoption: January 17, 2002
For further information, please call: (512) 416-4899

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TITLE 22. EXAMINING BOARDS

PART 10. TEXAS FUNERAL SERVICE COMMISSION

CHAPTER 203. LICENSING AND ENFORCEMENT--SPECIFIC SUBSTANTIVE RULES

22 TAC §203.17

The Texas Funeral Service Commission proposes an amendment to §203.17, concerning Clarification of Other Facilities Necessary in a Preparation Room.

The Texas Funeral Service Commission proposes an amendment to change some of the language. Subsection (a) has updated language deleting the reference to Texas Civil Statutes Article 4582b and adding Chapter 651, Texas Occupations Code. Subsection (b) and (c) are new language.

O.C. Robbins, Executive Director, Texas Funeral Service Commission, has determined that for the first five-year period this section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section. There will be no effect on small businesses.

Mr. Robbins has also determined that for the first five-year period this section is in effect the public benefit will be that it continues to provide standards for licensed funeral establishments to provide sanitary rooms for embalming of human bodies throughout the state.

Comments on the proposal may be submitted in writing for a 30 day period to O.C. Robbins, Executive Director, Texas Funeral Service Commission, 510 South Congress, Ste. 206, Austin, Texas 78704, or P.O. Box 12217, Capitol Station , Austin, Texas 78711-1440, or faxed to (512) 479-5064, or submitted electronically to chet.robbins@tfsc.state.tx.us.

The amendment is proposed under Section 651.152 of the Texas Occupations Code, as amended by Section 18 of House Bill 3516, 76th Legislature which authorizes the Commission to issue such rules and regulations as may be necessary to effect the provision of this Section.

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

§203.17. Clarification of Other Facilities Necessary in a Preparation Room.

(a) The commission will approve only those preparation room which meet the requirements of [~~Texas Civil Statutes, Article 4582b, sec. 4(C)(4),~~] Chapter 651, Texas Occupations Code, and the following minimum standards listed in paragraphs (1)-(12) of this section prescribed by the commission:

(1) must be of sufficient size and dimensions to accommodate an operating table, a sink with water connections, and an instrument table, cabinet, or shelves:

(A) the operating table must have a rust proof metal or porcelain top, with edges raised at least 3/4 inch around the entire table and a drain opening at the lower end;

(B) the sink must have hot and cold running water and drain freely;

(C) the faucet must be equipped with an aspirator;

(2) must contain an injection/embalming machine and sufficient supplies and equipment for normal operations;

(3) must be clean, sanitary, and not used for other purposes;

(4) must not have defective construction which permits the entrance of rodents;

(5) must not have evidence of infestation of insects or rodents;

(6) must be private and have no general passageway through it;

(7) must be properly ventilated with an exhaust fan that provides at least five room air exchanges per hour;

(8) must not have unenclosed or public restroom facilities located within the room;

(9) must have walls which run from floor to ceiling and be covered with tile, or by plaster or sheetrock painted with washable paint;

(10) must have floors of concrete with a glazed surface, or tiled in order to provide the greatest sanitary condition possible;

(11) must have doors, windows, and walls constructed to prevent odors from entering any other part of the building;

(12) must have all windows and openings to the outside screened.

(b) The majority owner or designated agent of record of a funeral establishment may submit a written petition to the commission requesting an exemption to subsection (a) of this section. Each petition shall clearly state:

(1) each location's name and address;

(2) that the exempt establishment is located within 50 miles of the facility at which embalming services are to be performed;

(3) that no embalming services will be performed at the exempt funeral establishment location.

(c) Upon receipt of the petition and the determination by the executive director that the criteria listed in subsection (b) of this section have been met, the executive director will notify the petitioner that the exemption has been granted and will remain in effect so long as the criteria listed in subsection (b) of this section remain unchanged.

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 October 23, 2001.

TRD-200106412
O.C. "Chet" Robbins
Executive Director
Texas Funeral Service Commission
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2474

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22 TAC §203.20

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

The Texas Funeral Service Commission proposes to repeal §203.20 concerning Clarification of Other Itemized Services Provided by Funeral Home Staff.

O.C. Robbins, Executive Director, has determined that for the first five year period this section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

O.C. Robbins, Executive Director, has determined that the public benefit is that the repeal of this section will be that new language under the same title and number will be submitted that increases licensee accountability. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

The repeal is proposed under §651.152 of the Texas Occupations Code, as amended by §18 of House Bill 3516, 76th Legislature which authorizes the Commission to issue such rules and regulations as may be necessary to effect the provisions of this Section.

Comments on the amendment may be submitted for thirty days of publication to O.C. Robbins, Executive Director, Texas Funeral Service Commission, 510 South Congress Avenue, Suite 206, Austin, Texas 78704, (512) 936-2474 or 1-888-667-4881. Comments may also be submitted electroncially to chet.robbins@tfsc.state.tx.us or faxed to (512)479-5064.

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

§203.20. Clarification of Other Itemized Services Provided by Funeral Home Staff.

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 October 25, 2001.

TRD-200106485
O.C. "Chet" Robbins
Executive Director
Texas Funeral Service Commission
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2474

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22 TAC §203.20

The Texas Funeral Service Commission proposes a new rule §203.20, concerning Declinable Items.

The Texas Funeral Service Commission proposes the new rule to address the charges for other services of funeral director and staff.

O.C. Robbins, Executive Director, Texas Funeral Service Commission, has determined that for the first five-year period this section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section. There will be no effect on small businesses.

Mr. Robbins has also determined that for the first five-year period this section is in effect the public benefit will be that it gives the consumer more information concerning declinable items, merchandise or services.

Comments on the proposal may be submitted in writing for a 30 day period to O.C. Robbins, Executive Director, Texas Funeral Service Commission, 510 South Congress, Ste. 206, Austin, Texas 78704, or P.O. Box 12217, Capitol Station , Austin, Texas 78711-1440, or faxed to (512) 479-5064, or submitted electronically to chet.robbins@tfsc.state.tx.us.

The rule is proposed under §651.152 of the Texas Occupations Code, as amended by §18 of House Bill 3516, 76th Legislature which authorizes the Commission to issue such rules and regulations as may be necessary to effect the provision of this Section.

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

§203.20. Declinable Items.

(a) The term "other itemized services provided by the funeral establishment staff" shall not contradict any part of the Federal Trade Commission "Funeral Rule" definition of "services of funeral director and staff" and must be itemized on the general price list and declinable by the consumer.

(b) Any item designated a "cash advance item" must be indicated on the funeral purchase agreement. The charge to the consumer for the cash advance item must be the same as the cost to the funeral provider to obtain the service or merchandise.

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 October 25, 2001.

TRD-200106488
O.C. "Chet" Robbins
Executive Director
Texas Funeral Service Commission
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2474

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22 TAC §203.21

The Texas Funeral Service Commission proposes an amendment to §203.21, concerning the Presentation of Consumer Brochure.

The Texas Funeral Service Commission proposes an amendment to add new language under the same title.

O.C. Robbins, Executive Director, Texas Funeral Service Commission, has determined that for the first five-year period this section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section, beyond what is already required under the existing rule.

Mr. Robbins has also determined that for the first five-year period this section is in effect the public benefit will be that it makes consumer related material available to the public.

Comments on the proposal may be submitted in writing for a 30 day period to O.C. Robbins, Executive Director, Texas Funeral Service Commission, 510 South Congress, Ste. 206, Austin, Texas 78704, or P.O. Box 12217, Capitol Station , Austin, Texas 78711-1440, or faxed to (512) 479-5064, or submitted electronically to chet.robbins@tfsc.state.tx.us.

The amendment is proposed under Section 651.152 of the Texas Occupations Code, as amended by Section 18 of House Bill 3516, 76th Legislature which authorizes the Commission to issue such rules and regulations as may be necessary to effect the provision of this Section.

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

§203.21. Presentation of Consumer Brochure.

(a) Consumer brochures shall be prominently displayed in the public view, offered free of charge for keeping to any person, and presented during the arrangement conference. [~~Consumer information brochures, containing information specified by the commission, will be present in the same manner and timing as required price lists.~~]

(b) Consumer brochures are designed and printed by the Commission and may be copied only when the Commission is unable to furnish the funeral establishment with an ordered supply.

(c) The Commission determines the minimum order size and the fees for the brochures.

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 October 26, 2001.

TRD-200106498
O.C. "Chet" Robbins
Executive Director
Texas Funeral Service Commission
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2474

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22 TAC §203.24

The Texas Funeral Service Commission proposes an amendment to §203.24, concerning Unprofessional Conduct.

The Texas Funeral Service Commission proposes an amendment to change some of the language, updating references to Texas Civil Statutes to Texas Occupations Code and adding one phrase in subsection (b)(2).

O.C. Robbins, Executive Director, Texas Funeral Service Commission, has determined that for the first five-year period this section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section, beyond what is already required under the existing rule.

Mr. Robbins has also determined that for the first five-year period this section is in effect the public benefit will be that it strengthens the requirement from statute for licensees to maintain records and provide those records upon request to the Commission.

Comments on the proposal may be submitted in writing for a 30 day period to O.C. Robbins, Executive Director, Texas Funeral Service Commission, 510 South Congress, Ste. 206, Austin, Texas 78704, or P.O. Box 12217, Capitol Station , Austin, Texas 78711-1440, or faxed to (512) 479-5064, or submitted electronically to chet.robbins@tfsc.state.tx.us.

The amendment is proposed under Section 651.152 of the Texas Occupations Code, as amended by Section 18 of House Bill 3516, 76th Legislature which authorizes the Commission to issue such rules and regulations as may be necessary to effect the provision of this Section.

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

§203.24. Unprofessional Conduct.

(a) The commission may, in its discretion, refuse to issue or renew a license or may fine, revoke, or suspend any license granted by the commission, and may probate any license suspension if the commission finds that the applicant or licensee has engaged in unprofessional conduct as defined in this section.

(b) For the purpose of this section, unprofessional conduct shall include but not be limited to:

(1) providing funeral goods and services or performing acts of embalming in violation of Texas Occupations Code, Chapter 651[~~Texas Civil Statutes, Article 4582b~~], the adopted rules of the Texas Funeral Service Commission and applicable health and vital statistics laws and rules;

(2) refusing or failing to keep, maintain or furnish any record or information required by law or rule, including a failure to file with the commission any documentation as and when requested during the course of a commission or staff investigation.

(3) operating a funeral establishment in an unsanitary manner;

(4) failing to practice funeral directing or embalming in a manner consistent with the public health or welfare;

(5) obstructing a commission employee in the lawful performance of such employee's duties of enforcing Texas Occupations Code, Chapter 651[~~Article 4582b~~] and commission rules or instructions;

(6) copying, retaining, repeating, or transmitting in any manner the questions contained in any examination administered by the commission;

(7) physically abusing or threatening to physically abuse a commission employee during the performance of his lawful duties;

(8) conduct which is willful, flagrant, or shameless or which shows a moral indifference to the standards of the community;

(9) in the practice of funeral directing or embalming, engaging in:

(A) fraud, which means an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him, or to surrender a legal right, or to issue a license; a false representation of a matter of fact, whether by words or conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives or is intended to deceive another;

(B) deceit, which means the assertion, as a fact, of that which is not true by any means whatsoever to deceive or defraud another;

(C) misrepresentation, which means a manifestation by words or other conduct which is a false representation of a matter of fact.

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 October 23, 2001.

TRD-200106417
O.C. "Chet" Robbins
Executive Director
Texas Funeral Service Commission
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2474

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22 TAC §203.27

The Texas Funeral Service Commission proposes a new rule to replace the rule that was repealed by the same title §203.27, concerning Sponsors of Provisional Licensees.

The Texas Funeral Service Commission proposes the new rule to change some of the language that existed in the repealed rule while keeping some of the former language.

O.C. Robbins, Executive Director, Texas Funeral Service Commission, has determined that for the first five-year period this section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section, beyond what is already required under the existing rule.

Mr. Robbins has also determined that for the first five-year period this section is in effect the public benefit will be that it requires sponsors of provisional licensees to be more involved with the training of provisional licensees.

Comments on the proposal may be submitted in writing for a 30 day period to O.C. Robbins, Executive Director, Texas Funeral Service Commission, 510 South Congress, Ste. 206, Austin, Texas 78704, or P.O. Box 12217, Capitol Station , Austin, Texas 78711-1440, or faxed to (512) 479-5064, or submitted electronically to chet.robbins@tfsc.state.tx.us.

The rule is proposed under §651.152 of the Texas Occupations Code, as amended by §18 of House Bill 3516, 76th Legislature which authorizes the Commission to issue such rules and regulations as may be necessary to effect the provision of this Section.

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

§203.27. Sponsors of Provisional Licensees.

(a) Each participant in the provisional licensure program shall have a sponsor who is licensed by the commission in the specific discipline of the provisional program served. The sponsor must have been licensed in that discipline for at least two consecutive years prior to the date that he or she becomes a sponsor.

(b) No sponsor may sponsor more than two provisional licensees at one time.

(c) A sponsor shall ensure that direct personal supervision is provided in order to provide firsthand and factual documentation of work accomplished by the provisional licensee on each case report submitted.

(d) The sponsor is ultimately responsible for providing a work environment and assigning duties that are conducive to the provisional licensee's acquiring proficiency in the skills required of a funeral director and/or embalmer.

(e) Prior to the provisional licensee's attendance at the exit interview required by §203.6 of this title (relating to Provisional Licensees), the sponsor shall execute and provide to the commission an affidavit attesting to the proficiency of the provisional licensee in those areas observed.

(f) In those cases where it is unlikely that a provisional licensee will be able to acquire sufficient cases at one funeral establishment to complete the requirements of the program, the provisional licensee may obtain additional sponsors, as long as each additional sponsor notifies the commission in writing of the sponsorship.

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 October 23, 2001.

TRD-200106416
O.C. "Chet" Robbins
Executive Director
Texas Funeral Service Commission
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2474

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22 TAC §203.31

The Texas Funeral Service Commission proposes an amendment to §203.31, concerning the Inspection as Requirement for Renewal of Establishment License; Fees.

The Texas Funeral Service Commission proposes an amendment to change the title and some of the language. Subsection (a) is deleted and replaced with new language. Subsection (b) is deleted and replaced with the language from existing subsection (c) which then has additional information. Subsection (d) is deleted and new language is added as a new subsection (c).

O.C. Robbins, Executive Director, Texas Funeral Service Commission, has determined that for the first five-year period this section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section, beyond what is already required under the existing rule.

Mr. Robbins has also determined that for the first five-year period this section is in effect the public benefit will be that it conforms the rule to statutory requirements.

Comments on the proposal may be submitted in writing for a 30 day period to O.C. Robbins, Executive Director, Texas Funeral Service Commission, 510 South Congress, Ste. 206, Austin, Texas 78704, or P.O. Box 12217, Capitol Station , Austin, Texas 78711-1440, or faxed to (512) 479-5064, or submitted electronically to chet.robbins@tfsc.state.tx.us.

The amendment is proposed under Section 651.152 of the Texas Occupations Code, as amended by Section 18 of House Bill 3516, 76th Legislature which authorizes the Commission to issue such rules and regulations as may be necessary to effect the provision of this Section.

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

§203.31. Inspections of Licensed or Registered Facilities[~~As Requirement for Renewal of Establishment License; Fees~~].

(a) The Commission will inspect a facility licensed or registered by the commission if: [~~No establishment license may be renewed in the absence of completion of an annual inspection, as required by Texas Civil Statutes, Article 4582b; section 4G (concerning Funeral establishments), unless the absence of such an inspection was due to the failure of the commission, its employees, or agents, to attempt to inspect the funeral establishment.~~]

(1) the facility was found to be deficient on a prior inspection; failed to prove compliance following a deficient finding during a prior inspection; or failed to be open for a follow-up inspection following a finding of a deficiency during a prior inspection;

(2) the Commission receives a complaint regarding the establishment or facility; or

(3) the Commission opens a complaint investigation in its own name against the establishment or facility.

(b) If an inspector is unable to contact the establishment or facility owner, its funeral director in charge, manager of the property, or any other employee or agent of the establishment or facility to provide notice of the attempted inspection before leaving the general area, the inspector shall notify the establishment or facility by mail of the attempted inspection. [~~At any time that an agent or employee of the commission attempts to inspect a funeral establishment and such establishment is not open or is otherwise unavailable for inspection, the inspector shall notify the owner of the establishment, its funeral director in charge, or any other employee or agent of the establishment, that an inspection was attempted but could not be made due to the unavailability of the establishment for such inspection. An attempt to give such notice shall be made by the inspector, in person or by telephone, on the same date as the initially attempted inspection, with the intent that the inspection shall be made on that date or before the inspector leaves the general area in which the establishment is located.~~]

(c) If an establishment or facility is unavailable for inspection twice during a six month period, the Commission may file a complaint against the establishment or facility, making the establishment or facility subject to an administrative penalty or other action.

[~~(c) If an inspector is unable to contact the establishment owner, its funeral director in charge, or any other employee or agent of the establishment to provide notice of the attempted inspection before leaving the general area, the inspector shall notify the funeral establishment by mail of the attempted inspection.~~]

[~~(d) If an inspector is required to make a special trip to the county in which an establishment is located to make a subsequent attempt to inspect an establishment which previously was not available for inspection, an inspection rescheduling fee of $250 must be paid to the commission prior to such inspection unless a waiver is granted by the Executive Director for good cause shown.~~]

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 October 26, 2001.

TRD-200106499
O.C. "Chet" Robbins
Executive Director
Texas Funeral Service Commission
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2474

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PART 20. TEXAS COMMISSION ON PRIVATE SECURITY

CHAPTER 421. FRAUDULENT APPLICATION PROHIBITED

22 TAC §421.1

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

The Texas Commission on Private Security proposes the repeal of Chapter 421, §421.1, concerning Fraudulent Application Prohibited. The Commission by way of an Ad-Hoc Committee has under taken a comprehensive review of its commission rules that were in effect prior to December 31, 2001. The Commission staff and the Ad-Hoc Committee have also reviewed suggestions and recommendations from individuals and various trade associations. As a result of this review all of the Commission Rules in effect prior to December 31, 2001, are being repealed, and a new substantive revision of Commission Rules have been complied.

Dr. Jerry L. McGlasson, Director, has determined that for the first five years the repeal is in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the repeal.

Dr. McGlasson has also determined that for the first five years the repeal is in effect the public benefit will be derived through the promulgation of the rules as the result of strengthened enforcement of the regulated industry thereby raising the level of public safety. There will no fiscal implications for individuals who are required to comply with the repeal. There will be no fiscal implications for small business who are required to comply with the repeal.

Comments on the proposal may be submitted to Dr. Jerry L. McGlasson, Director, Texas Commission on Private Security; P.O. Box 13509, Austin, Texas 78711.

The repeal is proposed under §1702.061, Texas Occupations Code which provides the Texas Commission on Private Security with the authority "to adopt rules and general policies to guide the agency in the administration of this chapter."

The following is the code that is affected by the proposed repeal: Chapter 1702, Texas Occupations Code.

§421.1. Fraudulent Application Prohibited.

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 October 30, 2001.

TRD-200106678
Dr. Jerry L. McGlasson
Executive Director
Texas Commission on Private Security
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2088

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CHAPTER 421. DEFINITIONS

22 TAC §421.1

The Texas Commission on Private Security proposes new §421.1, concerning Definitions. The new section is being proposed to limit commissioned security officers or personal protection officers to carry only a firearm of which they have been formally trained and filed with the Commission.

Dr. Jerry L. McGlasson, Executive Director, has determined that for the first five years the rule is in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the rule.

Dr. McGlasson has determined that for the first five years the rules are in effect the public benefit will be derived through the promulgation of the rules as the result of strengthened enforcement of the regulated industry thereby raising the level of public safety. There will be no fiscal implications for individuals who are required to comply with these rules, and are specifically directed towards the conduct of licensees for the protection of the public and consumers. There will be no fiscal implications for small businesses who are required to comply with these rules.

Comments on the proposal may be submitted to Dr. Jerry L. McGlasson, Executive Director, Texas Commission on Private Security, P.O. Box 13509, Austin, Texas 78711.

The new section is proposed under Chapter 1702, Texas Occupations Code, which provides the Texas Commission on Private Security with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the code that is affected by the rule: Texas Occupations Code.

§421.1. Definitions.

The following words or terms, when used in the Act or Commission Rules, shall have the following meaning, unless the context clearly indicates otherwise:

(1) Client--Any person, individual, firm, association, company, partnership, corporation, nonprofit organization, institution, or similar entity, having a contract which authorizes services to be provided in return for financial or other considerations.

(2) Conflicts of interest--A conflict or the appearance thereof, between the private interests and public obligations of an individual, organization, or other legal entity authorized to conduct business pursuant to the Act.

(3) Commission--Means the members appointed by the Governor of Texas to serve as the governing body of the Texas Commission on Private Security or the staff serving the administration/enforcement needs of that agency.

(4) Contract--An agreement between a person or company licensed under this Act and a client. Such contracts may be oral or written, or in any combination thereof.

(5) Conviction--Any final adjudication of guilt, whether pursuant to a plea of guilty or nolo contendre, or otherwise, and any deferred or suspended sentence or judgment, community supervision, or pre-trial diversion.

(6) Curriculum--The collective, written documentation of the material content of a training course, or any particular phase of training prescribed by the Act, minimally consisting of course objectives, student objectives, lesson plans, training aids, and examinations.

(7) Licensee--Any person defined in the Act that has been granted a license, registration or security officer commission or has filed an application for a license, registration or security officer commission by or with the Texas Commission on Private Security.

(8) Act--Title 10 Chapter 1702 Occupations Code as amended by the Texas Legislature.

(9) Director/Executive Director--Chief Appointed Officer of the Texas Commission on Private Security.

(10) Shareholder--Shall mean any individual holding stock in a licensee who is actively involved in the normal course of operation and business of the licensee and shall not include those individuals who only hold stock in the licensee solely for the purposes of investment.

(11) Advertising--Means the direct solicitation for business which requires a license under the provisions of this Act and involving more than a mere listing of a licensees name, address and telephone number.

(12) Undercover Agent--A person as defined under Section 1702.240, requiring protected identity, during the course and scope of a specific, ongoing, investigation.

(13) State--The State of Texas or any political subdivision thereof.

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

Filed with the Office of the Secretary of State, on October 30, 2001.

TRD-200106693
Dr. Jerry L. McGlasson
Executive Director
Texas Commission on Private Security
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2088

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CHAPTER 422. DEFINITIONS

22 TAC §422.1

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

The Texas Commission on Private Security proposes the repeal of Chapter 422, §422.1, concerning Definitions. The Commission by way of an Ad-Hoc Committee has under taken a comprehensive review of its commission rules that were in effect prior to December 31, 2001. The Commission staff and the Ad-Hoc Committee have also reviewed suggestions and recommendations from individuals and various trade associations. As a result of this review all of the Commission Rules in effect prior to December 31, 2001, are being repealed, and a new substantive revision of Commission Rules have been complied.

Dr. Jerry L. McGlasson, Director, has determined that for the first five years the repeal is in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the repeal.

Dr. McGlasson has also determined that for the first five years the repeal is in effect the public benefit will be derived through the promulgation of the rules as the result of strengthened enforcement of the regulated industry thereby raising the level of public safety. There will no fiscal implications for individuals who are required to comply with the repeal. There will be no fiscal implications for small business who are required to comply with the repeal.

Comments on the proposal may be submitted to Dr. Jerry L. McGlasson, Director, Texas Commission on Private Security; P.O. Box 13509, Austin, Texas 78711.

The repeal is proposed under §1702.061, Texas Occupations Code which provides the Texas Commission on Private Security with the authority "to adopt rules and general policies to guide the agency in the administration of this chapter."

The following is the code that is affected by the proposed repeal: Chapter 1702, Texas Occupations Code.

§422.1. Additional Definitions.

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 October 30, 2001.

TRD-200106679
Dr. Jerry L. McGlasson
Executive Director
Texas Commission on Private Security
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2088

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CHAPTER 422. PROHIBITIONS

22 TAC §422.1, §422.2

The Texas Commission on Private Security proposes new §422.1 and §422.2, concerning Prohibitions. The new sections are being proposed to limit commissioned security officers or personal protection officers to carry only a firearm of which they have been formally trained and filed with the Commission.

Dr. Jerry L. McGlasson, Executive Director, has determined that for the first five years the rules are in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the rules.

Dr. McGlasson has determined that for the first five years the rules are in effect the public benefit will be derived through the promulgation of the rules as the result of strengthened enforcement of the regulated industry thereby raising the level of public safety. There will be no fiscal implications for individuals who are required to comply with these rules, and are specifically directed towards the conduct of licensees for the protection of the public and consumers. There will be no fiscal implications for small businesses who are required to comply with these rules.

Comments on the proposal may be submitted to Dr. Jerry L. McGlasson, Executive Director, Texas Commission on Private Security, P.O. Box 13509, Austin, Texas 78711.

The new sections are proposed under Chapter 1702, Texas Occupations Code, which provides the Texas Commission on Private Security with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the code that is affected by these rules: Texas Occupations Code.

§422.1. Fraudulent Application Prohibited.

Applications submitted to the Commission are government documents and/or records. A fraudulent application for a license, registration or

security officer commission pursuant to the Act is a criminal offense. Applicants that willfully make false statements in making applications for licenses, registrations, or security officer commissions pursuant to the Act, or otherwise commit a violation in connection with such application, will be subject to prosecution.

§422.2. Permitting or Allowing Violations.

Any person who has applied for or been issued a license, registration, security officer commission, instructor approval, school approval, or letter of authority, shall not knowingly permit or allow any person to violate a provision of the Act, a Commission rule, or any Criminal Statute.

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 October 31, 2001.

TRD-200106733
Dr. Jerry L. McGlasson
Executive Director
Texas Commission on Private Security
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2088

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CHAPTER 423. RULEMAKING PROCEDURES

22 TAC §§423.1 - 423.3

The Texas Commission on Private Security proposes new §§423.1 - 423.3, concerning Rulemaking Procedure. The new sections are being proposed to limit commissioned security officers or personal protection officers to carry only a firearm of which they have been formally trained and filed with the Commission.

Dr. Jerry L. McGlasson, Executive Director, has determined that for the first five years the rules are in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the rules.

Dr. McGlasson has determined that for the first five years the rules are in effect the public benefit will be derived through the promulgation of the rules as the result of strengthened enforcement of the regulated industry thereby raising the level of public safety. There will be no fiscal implications for individuals who are required to comply with these rules, and are specifically directed towards the conduct of licensees for the protection of the public and consumers. There will be no fiscal implications for small businesses who are required to comply with these rules.

Comments on the proposal may be submitted to Dr. Jerry L. McGlasson, Executive Director, Texas Commission on Private Security, P.O. Box 13509, Austin, Texas 78711.

The new sections are proposed under Chapter 1702, Texas Occupations Code, which provides the Texas Commission on Private Security with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the code that is affected by these rules: Texas Occupations Code.

§423.1. Amendments to Commission Rules.

(a) Prior to the adoption of any rule, the Commission shall give at least 30 days notice of its intended action. Notice of the proposed rule shall be filed with the Secretary of State and published by the Secretary of State in the *Texas Register*. The notice shall include:

(1) A brief explanation of the proposed rule;

(2) The text of the proposed rule, except any portion omitted as provided in §2002.014 of the Texas Government Code prepared in a manner to indicate the words to be added or deleted from the current text, if any;

(3) A statement of the statutory or other authority under which the rule is proposed to be promulgated;

(4) A request for comments on the proposed rule from any interested person; and

(5) Any other statement required by law.

(b) Each notice of a proposed rule becomes effective as notice when published in the *Texas Register*. The notice shall be mailed to all persons who have made timely written requests of the Commission for advance notice of this rule making proceeding. However, failure to mail the notice does not invalidate any actions taken or rules adopted.

(c) Prior to the adoption of any rule, the Commission shall afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing. In the case of substantive rules, opportunity for public hearing shall be granted if requested by at least 25 persons, by a governmental subdivision or agency, or by an association having at least 25 members. The Commission shall consider fully all written and oral submissions concerning the proposed rule. On adoption of a rule, the Commission, if requested to do so by an interested person either prior to adoption or within 30 days after adoption, shall issue a concise statement of the principal reasons for and against its adoption, incorporating in statement its reasons for overruling the considerations urged against its adoption.

(d) If the Commission finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule on fewer that 30 days notice and states in writing its reasons for that finding, it may proceed without prior notice or hearing that it finds practicable to adopt an emergency rule. The rule may be effective for a period not longer than 120 days renewable once for a period of not exceeding 60 days, but the adoption of an identical rule under subsections (a) and (d) of this section is not precluded. An emergency rule adopted under the provisions of this subsection, and the Commission's written reasons for the adoption, shall be filed in the office of the Secretary of State for publication in the *Texas Register*.

(e) The Commission may use informal conferences and consultations as means of obtaining viewpoints and advice of interested persons concerning contemplated rule making. The Commission may also appoint committees of experts or interested persons or representatives of the general public to advise it with respect to any contemplated rule making. The powers of the committees are advisory only.

(f) Any interested person may petition the Commission requesting the adoption of a rule. Any such petition must be presented in substantially the form set forth in §423.3 of this title (relating to Petition of Adoption of a Rule). Within 60 days after submission of a petition, the Commission either shall deny the petition in writing, stating its reasons for the denial, or shall initiate rule-making proceedings in accordance with the provisions of this rule.

§423.2. Effective Date.

These rules govern all proceedings filed after they take effect and they also govern all proceedings then pending. Any rule adopted shall become effective 20 days after filing two certified copies of said rule with

the Secretary of State, unless otherwise specified in the rule because of statutory directive or federal law or emergency.

§423.3. Petition for Adoption of a Rule.

Applicant: (Here give name and complete mailing address of applicant on whose behalf the application is filed, hereinafter called the applicant.)

(1) Caption: Applicant hereby seeks (Here make specific reference to the rule or rules which it is proposed to establish, change or amend, so that it or they may be readily identified, prepared in a manner to indicate the words to be added or deleted from the current text, if any.)

(2) Proposed Change: (Here make reference to any exhibit to be attached to and incorporated by reference to the petition, the said exhibit to show the amendment providing for the proposed new provision, rule, regulation rate practice or other change, including the proposed effective date, application and all other necessary information, in the exact form in which it is to be published, adopted or promulgated.)

(3) Justification: (Here submit the justification for the proposed action in narrative form with sufficient information to inform the Commission and any interested party fully of the facts upon which applicant relies.)

(4) Resume or Concise Abstract: (Here file with the petition a concise but complete resume or abstract of the information required in subsections (a) - (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.

Filed with the Office of the Secretary of State, on October 30, 2001.

TRD-200106694
Dr. Jerry L. McGlasson
Executive Director
Texas Commission on Private Security
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2088

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CHAPTER 424. STANDARDS

22 TAC §§424.1 - 424.9

The Texas Commission on Private Security proposes new §§424.1 - 424.9, concerning Standards. The new sections are being proposed to limit commissioned security officers or personal protection officers to carry only a firearm of which they have been formally trained and filed with the Commission.

Dr. Jerry L. McGlasson, Executive Director, has determined that for the first five years the rules are in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the rules.

Dr. McGlasson has determined that for the first five years the rules are in effect the public benefit will be derived through the promulgation of the rules as the result of strengthened enforcement of the regulated industry thereby raising the level of public safety. There will be no fiscal implications for individuals who are required to comply with these rules, and are specifically directed towards the conduct of licensees for the protection of the public and consumers. There will be no fiscal implications for small businesses who are required to comply with these rules.

Comments on the proposal may be submitted to Dr. Jerry L. McGlasson, Executive Director, Texas Commission on Private Security, P.O. Box 13509, Austin, Texas 78711.

The new sections are proposed under Chapter 1702, Texas Occupations Code, which provides the Texas Commission on Private Security with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the code that is affected by these rules: Texas Occupations Code.

§424.1. Complaint Limitation.

The Commission shall not accept a complaint against a licensee or an employee if the complaint is filed more than two years after the alleged violation date, except in matters that relate to conviction for a Class B offense or greater or a material misstatement in an application.

§424.2. Date of Licensing, Certification or Acknowledgement.

If an application or written notification is required, the date of licensing, certification, or acknowledgment by the Commission will be either the receipt date or the date the complete application or written notification is accepted for processing, whichever is later.

§424.3. Certificate of Installation.

(a) For purposes of interpreting the term "exterior structure opening" in §6(a)(2)(A), Texas Insurance Code, that term shall mean all exterior doors, windows, or other openings into a structure greater than 96 square inches with the smallest dimension exceeding six inches; provided however, that no opening is an "exterior structure opening" if it was designed and installed to be unmovable or inoperable and has not been reconstructed to be movable or operable. A garage door is not an exterior structure opening if all other exterior structure openings from the garage into the structure are contacted.

(b) Any alarm system company may issue a certificate of installation pursuant to §1702.065, Texas Occupations Code.

§424.4. Standards of Conduct.

(a) Licensees shall carry out fully any contract for services entered into with a client except for reasons deemed to be unlawful.

(b) Licensed companies may use the phrase "Licensed by the Texas Commission on Private Security" on stationary, business cards, and in advertisements, but no licensee shall have a badge, shield or insignia as part of any uniform, identification card or markings on a motor vehicle containing the State Seal of Texas, except those identification and license items that are prepared or issued by the Commission. No licensee shall use the State Seal of Texas to advertise or publicize a commercial undertaking.

(c) No licensee shall have a badge, shield or insignia as part of any uniform, identification card or markings on a motor vehicle containing the Flag of the State of Texas, except those identification and license items that are prepared or issued by the Commission. No licensee shall use the Flag of the State of Texas to advertise or publicize a commercial undertaking.

(d) Licensees will make copies of contracts with clients available to Commission investigators when served with a subpoena signed by the investigator for copies of said contracts if a written contract was utilized.

(e) Commissioned security officers or personal protection officers shall carry only a firearm of the category with which they have been formally trained and of which training documentation is on file

with the commission. Firearm categories will be shown on the individual's registration card and will be:

(1) SA: any handgun, whether semi-automatic or not,

(2) NSA: handguns that are not semi-automatic,

(3) STG: any shotgun.

(f) No commissioned security officer or personal protection officer shall carry an inoperative, unsafe, replica or simulated firearm while in the course and scope of their employment.

(g) No commissioned security officer or personal protection officer shall brandish, point, exhibit, or otherwise display a firearm at anytime, except as authorized by law.

(h) The discharge of a firearm while in the performance of their duty by any person registered, or commissioned by a licensee shall be reported to the Austin office of the Commission. Notification of the discharge of a firearm shall be in writing within 24 hours of the incident, and shall be faxed by the licensee, or manager. The fax shall be addressed to the Executive Director of the Commission at (512) 447-5051. The fax shall include:

(1) Name of the person discharging the firearm:

(2) Name of the employer

(3) Location of the incident;

(4) A brief narrative of what happened;

(5) Whether death, personal injury or property damaged resulted, and

(6) Whether the incident is being or was investigated by a law enforcement agency.

(i) No licensee shall engage in any business activity in violation of §38.11 or §38.12 of the Texas Penal Code (Barratry and Solicitation of Professional Employment.

(j) Licensees shall not perform any service regulated by the Commission if a Letter of Summary Suspension or Letter of Summary Denial has been forwarded in accordance with the Act and Commission Rules. After Summary Suspension or Summary Denial, a Letter of Reinstatement must be received by the licensee prior to performing any services regulated by the Commission.

(k) All licensees, if arrested, charged, or indicted for a criminal offense above the level of Class C misdemeanor shall within 72 hours notify their employer, who shall then notify the Commission by fax at (512) 447-5051 or in writing at the Austin office of the Commission within 72 hours of notification by licensee including the name of the arresting agency the offense, court, and cause number of the charge or indictment, if any.

(1) All licensees shall report any name changed by marriage, divorce or other reason to the Commission within 30 days of the effective date of change. The notice of the change shall be in writing, and shall include a certified copy of the legal document ordering the name change.

(2) No licensee shall engage in conduct while in the course, scope or performance of their duties that constitutes a Class C misdemeanor or greater offense as provided in the Texas Penal Code, Alcoholic Beverage Code, or Health and Safety Code.

(3) When an employee of a licensee is terminated for any conduct as described in §1702.361, the licensee shall notify the Commission of such conduct within 14 days of termination. Such notice shall include but not be limited to:

(A) A completed Commission complaint form (form #022);

(B) Any and all documents or evidence concerning the alleged offense;

(C) Said correspondence shall be mailed to the Commission, to the attention of the Criminal Investigation division.

§424.5. Standards of Services.

(a) In accordance with subsection (c) of this section, a licensee shall inform each client he is entitled to receive a written contract that contains the fee arrangement with necessary information covering services to be rendered.

(b) A written contract for services required to be licensed under the Act shall be furnished to a client within seven days after a request is made for such written contract. The written contract shall contain the fee arrangement, with the necessary information covering services to be rendered.

(c) A written contract for services requiring a license under the Act shall be dated and signed by the owner, manager, or a person authorized by one or either of them to sign written contracts for the licensed company.

(d) Each licensee that has a contract to provide services licensed by the Commission within seven days after entering into a contract for services regulated by the Commission with another licensee shall:

(1) Notify the recipient of those services of the name, address, and telephone number, and individual to contact at the company which purchased the contract.

(2) Notify the recipient of services at the time the contract is negotiated that another licensed company may provide any, all or part of the services requested by sub-contracting or outsourcing those services. If any of the services are sub-contracted or outsourced to a licensed third party the recipient of services must be notified of the name, address, phone number and license number of the company providing those services

§424.6. Consumer Information.

(a) A licensee shall notify consumers or recipients of services of the name, mailing address, and telephone number of the Commission on each written contract for services.

(b) A licensed company must display prominently in the principle place of business and any branch office, a sign containing the name, mailing address, and telephone number of the Commission, and a statement informing consumers or recipients of services that complaints against licensees can be directed to the Commission.

(c) Signs required to be displayed in the place of business of a licensed company shall be obtained from the Commission.

§424.7. Information Show in Advertisements.

Any advertisement by a licensee shall include:

(1) The company name and address as it appears in the records of the Commission; and

(2) The license number of the licensee as issued by the Commission.

§424.8. Standards of Reports.

(a) At the time a contract for services requiring a license under the Act is negotiated, each client shall be informed that he or she is entitled to receive a written report concerning services rendered for which a fee has been tendered by a licensed company.

(b) A written report shall be furnished by the licensed company to the client within seven days after a written request is received from the client.

§424.9. Uniform Requirements.

(a) Each commissioned security officer shall, at a minimum, display on the outermost garment the name of the company under whom the commissioned security officer is employed, the work "Security" and identification which contains the last name of the security officer.

(b) The name of the company and the word "Security" shall be of a size, style, shape, design, and type which is clearly visible by reasonable person under normal conditions.

(c) Each noncommissioned security officer shall display in the outermost garment in style, shape design and type which is visible by a reasonable person under normal conditions identification which contains:

(1) The name or Commission-approved logo of the company under whom the security officer is employed, or

(2) The name or the Commission-approved logo of the business entity with whom the employing company had contracted.

(3) The last name of the security officer, and

(4) The word "Security"

(d) No license shall display a badge, shoulder patch, logo or any other identification which contains the words "Law Enforcement" and/or similar word(s) including, but not limited to: agent, enforcement agent, detective, task force, fugitive recovery agent or any other combination of names which gives the impression that the bearer is in any way connected with the Federal government, State government or any political subdivision of a State government

(e) A reserve Law Enforcement Officer who has made application for or who has been issued a registration as a non-commissioned Security Officer or has been issued a Security Officer commission by the Texas Commission of Private Security under a licensed security services contractor or a Letter of Authority may wear the official uniform of that agency while working private security only when:

(f) The Chief Administrator of the appointing law enforcement agency has the authority to appoint reserve Peace Officers and a reserve Peace Officer Licensee has been issued by the Texas Commission on Law Enforcement Officer Standards and Education.

(g) The reserve Law Enforcement Officer has written permission to wear the official uniform of the appointing Law Enforcement agency;

(1) The written authorization must be signed and dated by the Chief Administrator of the appointing Law Enforcement agency and shall be maintained for inspection by the Texas Commission on Private Security at the principal place of business or branch office of the licensed Security Service contractor or Letter of Authority;

(2) The reserve is wearing the official uniform of the appointing agency that clearly identifies that agency and is not wearing a generic peace officer uniform;

(3) The reserve peace officer meets the definition of the Internal Revenue Services as and employee of the licensed Security Service Contractor or Letter of Authority;

(4) The Licensed Security Services Contractor or Letter of Authority has not accepted any monies or remuneration to allow the reserve peace officer to work under the license of the Security Services Contractor or Letter of Authority;

(5) The reserve Peace Officer has not terminated employment with the appointing agency;

(6) The reserve Peace Officer has not been Summary Suspended or Summary Denied or Revoked by the Texas Commission on Private Security.

(h) A reserve law enforcement officer, while working as a noncommissioned security officer or commissioned security officer for a Licensed Security Services Contractor (Guard Company), Private Business Letter of Authority, or Governmental Letter of Authority, shall at all times carry on their person the noncommissioned security officer registration pocket card or security commission pocket card issued by the Texas Commission on Private Security and their official appointing agency's identification; and shall present the same upon request to any individual or law enforcement officer requesting them to identify themselves.

(i) A regular peace officer who maintains full-time employment, and meets the requirements of §1702.322 of the Texas Occupations Code, may wear the uniform of the Licensed Security Services Contractor (Guard Company), Private Business Letter of Authority, or Governmental Letter of Authority or the official police officer uniform of their appointing law enforcement agency while working private security in Texas.

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 October 30, 2001.

TRD-200106695
Dr. Jerry L. McGlasson
Executive Director
Texas Commission on Private Security
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2088

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CHAPTER 425. LICENSED COMPANIES

22 TAC §§425.1 - 425.4, 425.10, 425.15, 425.20, 425.25, 425.30, 425.35, 425.40 - 425.42, 425.50, 425.55, 425.70, 425.80, 425.81, 425.85, 425.86, 425.90 - 425.94

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

The Texas Commission on Private Security proposes the repeal of Chapter 425, §§425.1 - 425.4, 425.10, 425.15, 425.20, 425.25, 425.30, 425.35, 425.40 - 425.42, 425.50, 425.55, 425.70, 425.80, 425.81, 425.85, 425.86, and 425.90 - 425.94, concerning Licensed Companies. The Commission by way of an Ad-Hoc Committee has under taken a comprehensive review of its commission rules that were in effect prior to December 31, 2001. The Commission staff and the Ad-Hoc Committee have also reviewed suggestions and recommendations from individuals and various trade associations. As a result of this review all of the Commission Rules in effect prior to December 31, 2001, are being repealed, and a new substantive revision of Commission Rules have been complied.

Dr. Jerry L. McGlasson, Director, has determined that for the first five years the repeal is in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the repeal.

Dr. McGlasson has also determined that for the first five years the repeal is in effect the public benefit will be derived through the promulgation of the rules as the result of strengthened enforcement of the regulated industry thereby raising the level of public safety. There will no fiscal implications for individuals who are required to comply with the repeal. There will be no fiscal implications for small business who are required to comply with the repeal.

Comments on the proposal may be submitted to Dr. Jerry L. McGlasson, Director, Texas Commission on Private Security; P.O. Box 13509, Austin, Texas 78711.

The repeal is proposed under §1702.061, Texas Occupations Code which provides the Texas Commission on Private Security with the authority "to adopt rules and general policies to guide the agency in the administration of this chapter."

The following is the code that is affected by the proposed repeal: Chapter 1702, Texas Occupations Code.

§425.1. Complaint Limitation.
§425.2. Date of Licensing, Certification or Acknowledgement.
§425.3. Certificate of Installation.
§425.4. Standards of Conduct.
§425.10. Stay of Summary Suspension.
§425.15. Standards of Service.
§425.20. Standards of Reports.
§425.25. Permitting or Allowing Violations.
§425.30. Administrative Hearing Procedures.
§425.35. Penalty Range.
§425.40. Amendments to Commission Rules Subsequent to January 1, 1976.
§425.41. Effective Date.
§425.42. Petition for Adoption of a Rule.
§425.50. Consumer Information.
§425.55. Information Shown in Advertisements.
§425.70. Guard Dog Welfare Requirements.
§425.80. Written Examination.
§425.81. Reexamination and Fee.
§425.85. Photographs.
§425.86. Fingerprint Cards.
§425.90. Assumed Name Requirements.
§425.91. Verification of Corporations.
§425.92. Assignment Under Class.
§425.93. Procedure for Termination of License or Branch Office License.
§425.94. Assignment to Spouse or Heirs.

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 October 30, 2001.

TRD-200106680
Dr. Jerry L. McGlasson
Executive Director
Texas Commission on Private Security
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2088

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CHAPTER 425. SUMMARY SUSPENSION

22 TAC §425.1

The Texas Commission on Private Security proposes new §425.1, concerning Summary Suspension. The new section is being proposed to limit commissioned security officers or personal protection officers to carry only a firearm of which they have been formally trained and filed with the Commission.

Dr. Jerry L. McGlasson, Executive Director, has determined that for the first five years the rule is in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the rule.

Dr. McGlasson has determined that for the first five years the rule is in effect the public benefit will be derived through the promulgation of the rules as the result of strengthened enforcement of the regulated industry thereby raising the level of public safety. There will be no fiscal implications for individuals who are required to comply with the rule, and are specifically directed towards the conduct of licensees for the protection of the public and consumers. There will be no fiscal implications for small businesses who are required to comply with the rule.

Comments on the proposal may be submitted to Dr. Jerry L. McGlasson, Executive Director, Texas Commission on Private Security, P.O. Box 13509, Austin, Texas 78711.

The new section is proposed under Chapter 1702, Texas Occupations Code, which provides the Texas Commission on Private Security with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the code that is affected by these rules: Texas Occupations Code.

§425.1. Stay of Summary Suspension.

(a) Within three working days after receipt of notice of a summary suspension for a Class B misdemeanor or equivalent offense only, an individual may request a stay of summary suspension by submitting a written request to the Executive Director by mail or by fax at 512-447-5051.

(b) The written request for a stay of summary suspension must include all of the following:

(1) The full name, mailing address, telephone number, fax number, social security number, license number, position with the company, and date of birth of the individual making the written request.

(2) The arrest date, time, and location, and the offense title, arresting officer's name and department relating to the offense for which the stay request is made.

(3) A statement as to whether the individual making the request for a stay of summary suspension was in the performance of an activity or duties involved in the operation of the individual's company or activities for which a license, commission or registration would be required.

(4) A detailed account of the circumstances leading up to, and resulting in the requesting individual's arrest.

(5) An explanation as to why the summary suspension of the individual making the request for a stay would place an undue hardship on the company's continued operation.

(6) A statement providing that the information in the written request for a stay of summary suspension is true and correct.

(7) Any additional information requested by the Executive Director.

(c) Upon receiving a written request for a stay of summary suspension, the Executive Director may, at his discretion, consider the request under the following conditions:

(1) The Class B misdemeanor offense does not involve violence, theft or fraud, as outlined in Commission policy 2001-01.

(2) Circumstances of the individual's arrest.

(3) Any other information as may be required by the Executive Director.

(d) If, in the discretion of the Executive Director, a stay of the summary suspension is granted, the requesting individual will be notified in writing by the Executive Director within two working days after the request is received by the Executive Director.

(e) No stay of summary suspension shall be effective until and unless the requesting party has received written confirmation of the stay from the Executive Director.

(f) No stay of summary suspension shall remain in effect beyond the date of the next called meeting of the Commission following the request for a stay at which time the Commission members will consider the disposition of the matter. No continuance shall be granted.

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 October 30, 2001.

TRD-200106696
Dr. Jerry L. McGlasson
Executive Director
Texas Commission on Private Security
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2088

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CHAPTER 426. GENERAL ADMINISTRATION AND EXAMINATION

22 TAC §§426.2 - 426.15

The Texas Commission on Private Security proposes new §§426.2 - 426.15, concerning General Administration and Examination. The new sections are being proposed to limit commissioned security officers or personal protection officers to carry only a firearm of which they have been formally trained and filed with the Commission.

Dr. Jerry L. McGlasson, Executive Director, has determined that for the first five years the rules are in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the rules.

Dr. McGlasson has determined that for the first five years the rules are in effect the public benefit will be derived through the promulgation of the rules as the result of strengthened enforcement of the regulated industry thereby raising the level of public safety. There will be no fiscal implications for individuals who are required to comply with these rules, and are specifically directed towards the conduct of licensees for the protection of the public and consumers. There will be no fiscal implications for small businesses who are required to comply with these rules.

Comments on the proposal may be submitted to Dr. Jerry L. McGlasson, Executive Director, Texas Commission on Private Security, P.O. Box 13509, Austin, Texas 78711.

The new sections are proposed under Chapter 1702, Texas Occupations Code, which provides the Texas Commission on Private Security with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the code that is affected by these rules: Texas Occupations Code.

§426.2. Reexamination Fee.

Any examination, other than the one examination authorized by payment of the original license fee, shall be considered a reexamination and the reexamination fee shall be $100.00.

§426.3. Photographs.

Photographs required by the Act shall be in color and shall show a facial likeness of applicants. Photographs placed on pocket cards shall have been taken within the past six months and be 1"x11/4" in size.

§426.4. Fingerprint Cards.

(a) All fingerprint cards required by the Act shall be fingerprint cards approved by and obtained from the Commission. Except as provided for in §433.2 of this title (relating to Fingerprints), two fingerprint cards shall be submitted for each applicant. All blank spaces shall be completed and the cards shall be signed by the applicant and the person taking the prints.

(b) Applicants who have had fingerprints rejected on three separate attempts may appeal to the Executive Director in writing for a waiver, which the Executive Director may grant under conditions deemed appropriate.

§426.5. Assumed Name Requirements.

(a) All applicants, doing business under an Assumed Name shall submit a certificate from the County Clerk of the county of the applicant's residence, showing compliance with the Assumed Name Statute.

(b) Corporations using an Assumed Name shall submit a certificate from the Texas Secretary of State and the County Clerk of the county of the applicant's residence, showing compliance with the Assumed Name Statute.

§426.6. Verification of Corporations.

Applicants that are corporations shall submit a current Certificate of Existence or a Certificate of Authority from the Texas Secretary of State.

§426.7. Assignment Under Class.

When a Class A license or a Class B license is assigned to a Class C license, a fee in the amount of the difference in the cost of the licenses shall be paid to upgrade the license. There shall be no refund when a Class C license is assigned to a Class A or Class B license. This fee is in addition to the regular assignment of a license fee.

§426.8. Procedure for Termination of License or Branch License.

An owner or qualified manager shall:

(1) Submit a written request to the Commission to terminate the license;

(2) Not be required to pay a fee to terminate a license; and

(3) Once terminated, a license shall not be reinstated.

§426.9. Assignment to Spouse or Heirs.

The Commission may approve the assignment of a license to the spouse or heir(s) of a deceased provided:

(1) A certified copy of the owner's death certificate is filed with the Commission;

(2) A certified copy of the Will, Order Admitting Will to Probate, Letters of Testament, or Order of Heirship is filed with the Commission; and

(3) In the case of the death of a qualified manager, that a replacement manager is qualified within 90 days.

§426.10. Fees.

(a) The fees submitted to the Commission shall be the same as provided in §1702.062, Texas Occupations Code unless otherwise specified in Article V of the General Appropriations Act in accordance with §316.043 of the Government Code, whether for an original application, renewal, reciprocal or provisional license, registration or security officer Commission.

(b) FEES NOT REFUNDABLE. Fees collected by the Commission are not refundable or transferable.

(c) METHOD OF PAYMENT OF FEES. Payment of fees shall be made by licensed company check, cashier's check, or money order or by an attorney on behalf of his client paid on the attorney's trust fund account.

(d) ORIGINAL FEES NOT PRORATED. Original fees shall not be prorated. The full license fee shall accompany all applications for original license.

§426.11. Operation without Manager.

When a qualified manager or supervisor of a license has terminated his position, and the Commission has been timely notified of the termination in writing within 14 days of the termination, the business shall be operated by an owner, officer, partner or shareholder. No license shall be operated without a manager for a period exceeding 60 days after the date of the previous manager's termination.

§426.12. Fingerprint Submission.

All applicants for any license, registration, security officer commission, permit or approval issued by the Commission shall submit two sets of classifiable fingerprints on fingerprint cards obtained from the Commission along with any required fees to the Commission for the purpose of a criminal history check.

(1) One set of classifiable fingerprints shall be submitted by the Commission to the Texas Department of Public Safety.

(2) One set of classifiable fingerprints shall be submitted to the Federal Bureau of Investigation.

§426.13. Change of Expiration date of: License.

A licensee desiring to change the expiration date of his license may make such a request to the Commission during the renewal period as defined in §1702.302 of the Act.

(1) The expiration date desired shall be the last day of any of the 12 months in a calendar year.

(2) The renewal fee shall be prorated on a monthly basis.

§426.14. Reapplication after Revocation.

An applicant who has had a license or registration revoked by the Commission is not eligible to re-apply for any license or registration issued under this Act unless the fifth anniversary of any such revocation has occurred.

§426.15. Private Security Consultants.

(a) Effective September 1, 2001 any applicant for private security consultant or any person renewing their registration as a private security consultant shall meet all requirements under subsection (b) of this section.

(b) In addition to compliance with all other applicable Commission rules a private security consultant shall:

(1) Meet all requirements under §§1702.110, 1702.113, 1702.117, and 1702.124 as appropriate; and

(2) Not have engaged in conduct that is grounds for disciplinary action under §1702.361(b).

(3) Provide to the Executive Director or his designee, proof that prior to the date of application, have two years of lawful experience in the security services field. The experience shall be determined by the Executive Director, or his designee, to be adequate to qualify the applicant to engage in the business of a private security consultant.

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 October 30, 2001.

TRD-200106697
Dr. Jerry L. McGlasson
Executive Director
Texas Commission on Private Security
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2088

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CHAPTER 427. ADMINISTRATIVE HEARINGS

22 TAC §§427.1 - 427.3

The Texas Commission on Private Security proposes new §§427.1 -427.3, concerning Administrative Hearings. The new sections are being proposed to limit commissioned security officers or personal protection officers to carry only a firearm of which they have been formally trained and filed with the Commission.

Dr. Jerry L. McGlasson, Executive Director, has determined that for the first five years the rules are in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the rules.

Dr. McGlasson has determined that for the first five years the rules are in effect the public benefit will be derived through the promulgation of the rules as the result of strengthened enforcement of the regulated industry thereby raising the level of public safety. There will be no fiscal implications for individuals who are required to comply with these rules, and are specifically directed towards the conduct of licensees for the protection of the public and consumers. There will be no fiscal implications for small businesses who are required to comply with these rules.

Comments on the proposal may be submitted to Dr. Jerry L. McGlasson, Executive Director, Texas Commission on Private Security, P.O. Box 13509, Austin, Texas 78711.

The new sections are proposed under Chapter 1702, Texas Occupations Code, which provides the Texas Commission on Private Security with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the code that is affected by these rules: Texas Occupations Code.

§427.1. Administrative Hearings Procedures.

Hearings and Appeal Procedures related to all Administrative Hearings conducted by the Commission are governed by Section 2001 of the Government, V.A.C.S.

§427.2. Service of Notice in Non-Rulemaking Proceedings.

(a) Chapter 2001, Government Code, S§1702 of the Occupations Code, and Commission Rules govern notice of any summary suspension, summary denial, imposition of penalty, preliminary hearing, pre-hearing conference, hearing before the Commission, notice of a contested case hearing before the State Office of Administrative Hearings or Orders of the Commission.

(b) All Licensees, Letters of authority, Schools, Permit holders, Letters of approval, Letters of authorization, Branch office licenses, or (similar entity) including any applicants for any of the above shall at all times maintain on file with the Commission the current mailing and principal place of business address. Notification to the Commission shall be made in writing and received in the Austin office of the Commission within 14 days of the date of the change of address.

(c) All registrants, commissioned security officers, alarm response runners, alarm salespersons, security officers, or any applicants for any of the above shall at all times maintain on file with the Commission their current residence address. Notification to the Commission shall be made in writing and received in the Austin office of the Commission within 14 days of the date of the change of address.

(d) The Commission may serve the notice of any summary suspension, summary denial, preliminary hearing, pre-hearing conference, hearing before the Commission, notice of a contested case hearing before the State Office of Administrative Hearings or Orders of the Commission, by mailing the notice by certified or registered mail to the last known mailing address on file with the Commission at the time of the notice of those persons shown in subsection (b) of this section, by mailing the notice by certified or registered mail to the last known residence address on file with the Commission of those persons listed in subsection (c) of this section, or otherwise delivering the notice to such person. Additionally, the Commission will mail a copy of the notice of hearing by regular mail to any person that was mailed a notice by certified or registered mail. Service by mail is complete upon deposit of the document enclosed in a postage paid, properly addressed envelope in a U.S. Post office or official depository under the care and control of the U.S. Postal Service.

§427.3. Penalty Range.

The Commission shall develop, utilize and publish guidelines for administrative penalties and ranges of violations of the Act and Commission Rules.

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

Filed with the Office of the Secretary of State, on October 30, 2001.

TRD-200106698
Dr. Jerry L. McGlasson
Executive Director
Texas Commission on Private Security
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2088

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CHAPTER 429. GUARD DOGS

22 TAC §429.1

The Texas Commission on Private Security proposes new §429.1, concerning Guard Dogs. The new section is being proposed to limit commissioned security officers or personal protection officers to carry only a firearm of which they have been formally trained and filed with the Commission.

Dr. Jerry L. McGlasson, Executive Director, has determined that for the first five years the rule is in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the rule.

Dr. McGlasson has determined that for the first five years the rule is in effect the public benefit will be derived through the promulgation of the rules as the result of strengthened enforcement of the regulated industry thereby raising the level of public safety. There will be no fiscal implications for individuals who are required to comply with the rule, and are specifically directed towards the conduct of licensees for the protection of the public and consumers. There will be no fiscal implications for small businesses who are required to comply with the rule.

Comments on the proposal may be submitted to Dr. Jerry L. McGlasson, Executive Director, Texas Commission on Private Security, P.O. Box 13509, Austin, Texas 78711.

The new section is proposed under Chapter 1702, Texas Occupations Code, which provides the Texas Commission on Private Security with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the code that is affected by these rules: Texas Occupations Code.

§429.1. Welfare Requirements.

Each guard dog company and investigations company using dogs to conduct investigations licensed by the Commission shall comply with the following rules:

(1) All pens, spaces, rooms, runs, cages, compartments or hutches where guard dogs are housed, exercised, trained or placed shall be kept clean and maintained in a sanitary condition. Excreta shall be removed as often as necessary to prevent contamination of the inhabitants and reduce disease hazards and odors. Adequate shelter shall be provided to protect animals from any form of overheating or cold or inclement weather.

(2) All animals shall be fed at least once a day except as otherwise might be directed by a licensed veterinarian. The food shall be free from contamination, wholesome, palatable, and of sufficient quality and nutritive value to meet the normal daily requirements for the condition and size of the animal. Food receptacles shall be accessible to all animals and shall be located so as to minimize contamination by excreta. Feeding pans shall be durable and kept clean and sanitary. Disposable food receptacles may be used but must be discarded after each feeding. Self-feeders may be used for the feeding of food, and

shall be kept clean and sanitary to prevent molding, deterioration, or caking of feed.

(3) All animals shall be furnished ample water. If potable water is not accessible to the animals at all times, it shall be offered to them at least twice daily for periods of not less than one hour, except as directed by a licensed veterinarian. Watering receptacles shall be kept clean and sanitary.

(4) All animals shall be vaccinated by a licensed veterinarian against rabies by the time they are four months of age and within each subsequent 12-month intervals thereafter. Official rabies vaccination certificates issued by the vaccinating veterinarian shall contain certain standard information as designated by the Texas Department of Health. Information required is as follows:

(A) Owner's name, address and telephone number.

(B) Animal identification. Species, sex, age (three mo. to 12 mo., 12 mo. or older), size (lbs.), predominant breed, and colors.

(C) Vaccine used, producer, expiration date and serial number.

(D) Date Vaccinated.

(E) Rabies tag number.

(F) Veterinarian's signature and license number

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

Filed with the Office of the Secretary of State, on October 30, 2001.

TRD-200106699
Dr. Jerry L. McGlasson
Executive Director
Texas Commission on Private Security
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2088

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CHAPTER 430. COMMISSIONED OFFICERS/PERSONAL PROTECTION OFFICERS

22 TAC 430.1, 430.5, 430.10, 430.20- 430.22, 430.31, 430.35, 430.36, 430.40, 430.45, 430.50

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

The Texas Commission on Private Security proposes the repeal of Chapter 430, §§430.1, 430.5, 430.10, 430.20 - 430.22, 430.31, 430.35, 430.36, 430.40, 430.45, and 430.50, concerning Commissioned Officers/Personal Protection Officers. The Commission by way of an Ad-Hoc Committee has under taken a comprehensive review of its commission rules that were in effect prior to December 31, 2001. The Commission staff and the Ad-Hoc Committee have also reviewed suggestions and recommendations from individuals and various trade associations. As a result of this review all of the Commission Rules in effect prior to December 31, 2001, are being repealed, and a new substantive revision of Commission Rules have been complied.

Dr. Jerry L. McGlasson, Director, has determined that for the first five years the repeal is in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the repeal.

Dr. McGlasson has also determined that for the first five years the repeal is in effect the public benefit will be derived through the promulgation of the rules as the result of strengthened enforcement of the regulated industry thereby raising the level of public safety. There will no fiscal implications for individuals who are required to comply with the repeal. There will be no fiscal implications for small business who are required to comply with the repeal.

Comments on the proposal may be submitted to Dr. Jerry L. McGlasson, Director, Texas Commission on Private Security; P.O. Box 13509, Austin, Texas 78711.

The repeal is proposed under §1702.061, Texas Occupations Code which provides the Texas Commission on Private Security with the authority "to adopt rules and general policies to guide the agency in the administration of this chapter."

The following is the code that is affected by the proposed repeal: Chapter 1702, Texas Occupations Code.

§430.1. Requirements for Issuance of a Personal Protection Authorization.
§430.5. Requirements of Personal Protection Officer Employer.
§430.10. Violations of the Act by Personal Protection Officers.
§430.20. Renewal of Security Officer Commission.
§430.21. Requirements for Issuance of a Governmental Letter of Authority.
§430.22. Requirements for Issuance of a Private Business Letter of Authority.
§430.31. Requirements for Issuance of a Security Officer Commission by the Commission.
§430.35. Application for a Security Officer Commission.
§430.36. Drug Testing Required for Commissioned Security Officers.
§430.40. Violations by Commissioned Security Officers.
§430.45. Carrying of a Security Officer Commission.
§430.50. Uniform Requirements.

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

Filed with the Office of the Secretary of State, on October 30, 2001.

TRD-200106681
Dr. Jerry L. McGlasson
Executive Director
Texas Commission on Private Security
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2088

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CHAPTER 430. COMMISSIONED SECURITY OFFICERS

22 TAC §§430.1 - 430.6

The Texas Commission on Private Security proposes new, §§430.1 - 430.6 concerning Commissioned Security Officers.

The new sections are being proposed to limit commissioned security officers or personal protection officers to carry only a firearm of which they have been formally trained and filed with the Commission.

Dr. Jerry L. McGlasson, Executive Director, has determined that for the first five years the rules are in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the rules.

Dr. McGlasson has determined that for the first five years the rules are in effect the public benefit will be derived through the promulgation of the rules as the result of strengthened enforcement of the regulated industry thereby raising the level of public safety. There will be no fiscal implications for individuals who are required to comply with these rules, and are specifically directed towards the conduct of licensees for the protection of the public and consumers. There will be no fiscal implications for small businesses who are required to comply with these rules.

Comments on the proposal may be submitted to Dr. Jerry L. McGlasson, Executive Director, Texas Commission on Private Security, P.O. Box 13509, Austin, Texas 78711.

The new sections are proposed under Chapter 1702, Texas Occupations Code, which provides the Texas Commission on Private Security with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the code that is affected by these rules: Texas Occupations Code.

§430.1. Requirements for Issuance of a Security Officer Commission by the Commission.

(a) Applicant shall have successfully completed a Commission approved 30-hour training program and be awarded a certificate of completion from a Commission approved security officer training school.

(b) The licensed company shall submit and maintain on file with the Commission color photographs of the company uniform(s) shown in full length and as worn by its security officer employees, size 8 inches by 10 inches desired, 3 inches by 5 inches minimum acceptable. The photographs shall show the entire uniform, including a close-up of the badge, shoulder patch, and nameplate

§430.2. Application for a Security Officer Commission.

A completed security officer commission application shall be submitted on the most current version of the form provided by the Commission.

(1) The application shall include:

(A) The required fee;

(B) At least two sets of fingerprints on fingerprint cards obtained from the Commission and the $25.00 FBI Fingerprint Check Fee;

(C) A copy of the applicant's Level I and Level II certificate of completion; and

(D) A copy of the certificate of completion provided to the applicant from a Commission approved Level III training school.

(E) The employer shall affix one recent color photograph to the pocket card when received from the Commission.

(F) The photograph shall be 1" x 1 1/4"

(2) Incomplete applications cannot be processed and will be returned for clarification or missing information.

§430.3. Drug Testing Required for Commissioned Security Officers.

(a) At least 20% of a licensee's commissioned security officers at the main office and branch offices must submit to a commercially available means of drug screening, or be examined by a licensed physician each quarter and be declared in writing to show no trace of drug dependency or illegal drug use.

(b) Any drug test performed under subsection (a) of this section shall include tests for at least methamphetamine, THC and other cannibinoids, cocaine, opiates and amphetamines.

(c) No licensee shall place on duty any commissioned security officer who tests positive for any drug(s) or substance(s) until a successive test indicates no trace of the drug(s) or substance(s) for which the tests are performed.

§430.4. Violations by Commissioned Security Officers.

In additional to other rules, a commissioned security officer shall not:

(1) Perform commissioned security officer duties for any person(s) other than the employer as indicated in the Commission records;

(2) Carry a pocket card to which the security officer has failed to affix his signature and photograph to the commission card issued by the Commission;

(3) Fail to timely surrender his commission card upon written notice served by the Commission;

(4) Possess or use any security officer commission which has been altered; or

(5) Deface or allow improper use of his security officer commission.

§430.5. Carrying of A Security Officer Commission.

A private security officer who has been issued a security officer commission by the Commission shall carry it while on duty and going to and from the place of assignment and shall present it upon request by a peace officer or to an investigator employed by the Commission.

§430.6. Renewal of Security Officer Commission.

The renewal period for security officer commissions shall be the calendar month prior to the expiration of the security officer 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 October 30, 2001.

TRD-200106700
Dr. Jerry L. McGlasson
Executive Director
Texas Commission on Private Security
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2088

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CHAPTER 431. PERSONAL PROTECTION OFFICERS

22 TAC §§431.1 - 431.3

The Texas Commission on Private Security proposes new, §§431.1 - 431.3, concerning Personal Protection Officers. The

new sections are being proposed to limit commissioned security officers or personal protection officers to carry only a firearm of which they have been formally trained and filed with the Commission.

Dr. Jerry L. McGlasson, Executive Director, has determined that for the first five years the rules are in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the rules.

Dr. McGlasson has determined that for the first five years the rules are in effect the public benefit will be derived through the promulgation of the rules as the result of strengthened enforcement of the regulated industry thereby raising the level of public safety. There will be no fiscal implications for individuals who are required to comply with these rules, and are specifically directed towards the conduct of licensees for the protection of the public and consumers. There will be no fiscal implications for small businesses who are required to comply with these rules.

Comments on the proposal may be submitted to Dr. Jerry L. McGlasson, Executive Director, Texas Commission on Private Security, P.O. Box 13509, Austin, Texas 78711.

The new sections are proposed under Chapter 1702, Texas Occupations Code, which provides the Texas Commission on Private Security with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the code that is affected by these rules: Texas Occupations Code.

§431.1. Requirements for Issuance of a Personal Protection Authorization.

(a) An applicant for Personal Protection Authorization shall:

(1) Submit a written application for a personal protection authorization on a form prescribed by the Commission;

(2) Be at least 21 years of age;

(3) Have a valid Security Officer Commission issued prior to applying for a personal protection authorization;

(4) Submit proof that the applicant has successfully completed the Personal Protection Officer Course taught by a Commission approved Personal Protection Officer Instructor; and

(5) Submit proof of completion of the Minnesota Multiphasic Personality Inventory test or equivalent (Proof of completion of the Minnesota Multiphasic Personality Inventory test shall be in the form of the Commission approved Declaration of Psychological and Emotional Health and shall be signed by a licensed psychologist).

(b) A personal protection officer may transfer his registration as a personal protection officer to another employer if:

(1) The personal protection officer has transferred his security officer commission to the new employer; and

(2) Submits the appropriate form and transfer fee to the Commission's Austin office within in 14 days of the transfer of employment to the new employer.

§431.2. Requirement for Personal Protection Employer.

Personal Protection Officer employers shall:

(1) Issue the Personal Protection Officer authorization pocket card issued by the Commission to the Personal Protection Officer when received from the Commission and affix a color photograph to the pocket card;

(2) Maintain on file for Commission inspection, contracts for Personal Protection Officer services; and

(3) Maintain current records on all persons issued a personal protection authorization on file for Commission inspection. The records shall contain:

(A) Current residence of personal protection officer.

(B) The personal protection officer's name, address and telephone number;

(4) Upon receipt of a subpoena, provide:

(A) The name of the client being protected and contract information; and

(B) The hours and dates of duty assignment.

§431.3. Violations of the Act by Personal Protection Officers.
In addition to other rules, a personal protection officer shall not:

(1) Perform personal protection officer duties for any person(s) other than the employer indicated in the Commission records;

(2) Fail to affix his or her signature and color photograph to the personal protection officer pocket card issued by the Commission;

(3) Fail to timely surrender the personal protection officer pocket card upon written notice served by the Commission or his employer;

(4) While in the course and scope of his or her employment as a personal protection officer, provide or engage in any other service regulated by the Act or Commission Rules other than providing personal protection from bodily harm to one or more individuals;

(5) Fail to conceal his firearm on his person;

(6) Fail to carry on his or her person, the issued security officer commission and personal protection authorization while performing the officer's duties as a personal protection officer; or

(7) Fail to present his or her security officer commission and personal protection authorization card upon request made by a peace officer or investigator employed 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 October 30, 2001.

TRD-200106701
Dr. Jerry L. McGlasson
Executive Director
Texas Commission on Private Security
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2088

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CHAPTER 432. LETTERS OF AUTHORITY

22 TAC §432.1, §432.2

The Texas Commission on Private Security proposes new, §432.1 and §432.2, concerning Letters of Authority. The new sections are being proposed to limit commissioned security officers or personal protection officers to carry only a firearm of which they have been formally trained and filed with the Commission.

Dr. Jerry L. McGlasson, Executive Director, has determined that for the first five years the rules are in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the rules.

Dr. McGlasson has determined that for the first five years the rules are in effect the public benefit will be derived through the promulgation of the rules as the result of strengthened enforcement of the regulated industry thereby raising the level of public safety. There will be no fiscal implications for individuals who are required to comply with these rules, and are specifically directed towards the conduct of licensees for the protection of the public and consumers. There will be no fiscal implications for small businesses who are required to comply with these rules.

Comments on the proposal may be submitted to Dr. Jerry L. McGlasson, Executive Director, Texas Commission on Private Security, P.O. Box 13509, Austin, Texas 78711.

The new sections are proposed under Chapter 1702, Texas Occupations Code, which provides the Texas Commission on Private Security with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the code that is affected by these rules: Texas Occupations Code.

§432.1. Requirements for Issuance of a Private Business Letter of Authority.

(a) The security department of a private business that protects only the property of that private business may apply for and upon approval, receive, a letter of authority for purposes of complying with §1702.223 of the Act.

(b) A security department of a private business shall not provide guard company services to a third party for contracted compensation.

(c) A private business letter of authority shall:

(1) Be obtained by a private business entity that employs commissioned or noncommissioned security officers to protect only its own property.

(2) Register any unarmed security officers who come into contact with the public while protecting only the property of the private business in compliance with the provisions of the Act and Commission Rules.

(3) Be issued a number with each private business letter of authority approved by the Commission and this number shall be used on all applications submitted to the Commission.

(4) Be valid for one year and shall be renewed upon receipt of a Commission approved renewal application and the renewal fee.

(5) Be renewed during the calendar month preceding the month of expiration.

(6) Qualify a manager who meets the requirements set forth in §1702.113 and §1702.117 of the Act as they pertain to a security services contractor.

(7) Maintain on file with the Commission a certificate of proof of insurance as prescribed in §1702.124 of the Act.

(d) Holders of a letter of authority shall be subject to all rules established under the Act unless specifically exempted by the Executive Director.

§432.2. Requirements for Issuance of A Government Letter of Authority.

(a) A governmental letter of authority shall:

(1) Be obtained by a governmental entity that employs commissioned security officers.

(2) Be issued a number with each governmental letter of authority approved by the Commission and this number shall be used on all applications submitted to the Commission.

(3) Be valid for one year and shall be renewed upon receipt of an acceptable renewal application.

(4) Be renewed during the calendar month preceding the month of expiration.

(b) Holders of a letter of authority shall be subject to all rules of the Act and Commission, unless specifically exempted by the Executive Director.

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

Filed with the Office of the Secretary of State, on October 30, 2001.

TRD-200106702
Dr. Jerry L. McGlasson
Executive Director
Texas Commission on Private Security
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2088

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CHAPTER 433. GENERAL REGISTRATION REQUIREMENTS

22 TAC §§433.1 - 433.5

The Texas Commission on Private Security proposes new §§433.1 - 433.5, concerning General Registration Requirements. The new sections are being proposed to limit commissioned security officers or personal protection officers to carry only a firearm of which they have been formally trained and filed with the Commission.

Dr. Jerry L. McGlasson, Executive Director, has determined that for the first five years the rules are in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the rules.

Dr. McGlasson has determined that for the first five years the rules are in effect that the public benefit will be derived through the promulgation of the rules as the result of strengthened enforcement of the regulated industry thereby raising the level of public safety. There will be no fiscal implications for individuals who are required to comply with the rules, and is specifically directed towards the conduct of licensees for the protection of the public and consumers. There will be no fiscal implications for small businesses who are required to comply with the rules.

Comments on the proposal may be submitted to Dr. Jerry L. McGlasson, Executive Director, Texas Commission on Private Security, P.O. Box 13509, Austin, Texas 78711.

The new sections are proposed under Chapter 1702, Texas Occupations Code, which provides the Texas Commission on Private Security with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the code that is affected by these rules: Texas Occupations Code.

§433.1. Employment Requirements.

(a) A registrant or commissioned security officer of a licensed company must meet the specifications defined by the Internal Revenue Service as an "employee" or "contract laborer."

(b) A licensee shall not make application for any person knowing that the conditions of that person's employment do not conform to subsection (a) of this section.

(c) In the public interest and to ensure the good conduct of applicants for a registration or a security officer commission, they shall meet the requirements of §1702.113 of the Act.

(d) No licensee shall place on duty any employee who tests positive for any drug(s) or substance(s) until a successive test indicates no trace of the drug(s) or substance(s) for which the tests are performed.

§433.2. Fingerprints.

(a) An applicant for a registration, security officer commission or license under the provisions of this Act whose registration or commission has been expired for a period of time less than six months is not required to submit new fingerprint cards when making application.

(b) Notwithstanding Commission §433.5 of this title (relating to Registration Deadline) a licensee shall obtain the fingerprints of an applicant for a registration or security officer commission prior to assigning the applicant to duty.

§433.3. Exhibit Pocket Card.

Any person who has been issued a registration pocket card shall carry the pocket card on or about his person while on duty and shall present same upon request from a peace officer or to an investigator employed by the Commission.

§433.4. Licensed Company Responsible for the Registration of Employees.

It shall be the responsibility of the licensed company to register all employees required to register under the Act, with the Commission.

§433.5. Registration Deadline.

Any person required to be registered with the Commission must have their application on file with the Commission within 14 days after commencing employment. Failure to comply may, at the discretion of the Director, result in denial of the application.

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

Filed with the Office of the Secretary of State, on October 30, 2001.

TRD-200106703
Dr. Jerry L. McGlasson
Executive Director
Texas Commission on Private Security
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2088

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CHAPTER 434. COMPANY RECORDS

22 TAC §§434.1 - 434.5

The Texas Commission on Private Security proposes new, §§434.1 - 434.5, concerning Company Records. The new sections are being proposed to limit commissioned security officers or personal protection officers to carry only a firearm of which they have been formally trained and filed with the Commission.

Dr. Jerry L. McGlasson, Executive Director, has determined that for the first five years the rules are in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the rules.

Dr. McGlasson has determined that for the first five years the rules are in effect that the public benefit will be derived through the promulgation of the rules as the result of strengthened enforcement of the regulated industry thereby raising the level of public safety. There will be no fiscal implications for individuals who are required to comply with these rules, and are specifically directed towards the conduct of licensees for the protection of the public and consumers. There will be no fiscal implications for small businesses who are required to comply with these rules.

Comments on the proposal may be submitted to Dr. Jerry L. McGlasson, Executive Director, Texas Commission on Private Security, P.O. Box 13509, Austin, Texas 78711.

The new sections are proposed under Chapter 1702, Texas Occupations Code, which provides the Texas Commission on Private Security with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the code that is affected by these rules: Texas Occupations Code.

§434.1. Employee Records.

Licensed companies shall keep records of all registered or commissioned employees. Records shall be maintained for a period of two years from the last date of employment. The following records shall be maintained:

(1) Full name of employee, date of employment, position and address;

(2) Social Security Number;

(3) Last date of Employment;

(4) Date and place of birth; and

(5) One color photograph; and

(6) The results of any drug screens for commissioned security officers.

§434.2. Location of Records.

Records of registered employees shall be maintained at the following locations:

(1) If a company has no branch offices, the records shall be maintained at the principal place of business.

(2) If a company has one or more branch offices, the records shall be maintained at the branch office where the registrant or commissioned security officer is employed.

(3) A company shall notify the Commission of any centralization of records when a branch is closed or if records from area branch offices are centralized.

§434.3. Records to be Available for Inspection.

All records required to be kept under the provisions of the Act and Commission Rules shall be made available for inspection by Commission staff during normal business hours.

§434.4. Pre-Employment Check.

The employer of a commissioned security officer or registrant shall exercise due diligence in ensuring that an applicant's qualifications meet the provisions of §1702.113 of the Act, prior to duty assignment.

§434.5. Records Required on Commissioned Security Officers.

The employer of a commissioned security officer shall maintain current records on all persons issued a security officer commission for Commission inspection. The records shall contain:

(1) Current residence of the security officer;

(2) Current duty assignment and location of assignment; and

(3) Results of any drug screens administered;

(4) Documented information on training required and provided.

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 October 30, 2001.

TRD-200106704
Dr. Jerry L. McGlasson
Executive Director
Texas Commission on Private Security
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2088

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CHAPTER 435. REGISTRANTS

22 TAC §§435.1 - 435.4, 435.10

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

The Texas Commission on Private Security proposes the repeal of Chapter 435, §§435.1 - 435.4 and §435.10, concerning Registrants. The Commission by way of an Ad-Hoc Committee has under taken a comprehensive review of its commission rules that were in effect prior to December 31, 2001. The Commission staff and the Ad-Hoc Committee have also reviewed suggestions and recommendations from individuals and various trade associations. As a result of this review all of the Commission Rules in effect prior to December 31, 2001, are being repealed, and a new substantive revision of Commission Rules have been complied.

Dr. Jerry L. McGlasson, Director, has determined that for the first five years the repeal is in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the repeal.

Dr. McGlasson has also determined that for the first five years the repeal is in effect the public benefit will be derived through the promulgation of the rules as the result of strengthened enforcement of the regulated industry thereby raising the level of public safety. There will no fiscal implications for individuals who are required to comply with the repeal. There will be no fiscal implications for small business who are required to comply with the repeal.

Comments on the proposal may be submitted to Dr. Jerry L. McGlasson, Director, Texas Commission on Private Security; P.O. Box 13509, Austin, Texas 78711.

The repeal is proposed under §1702.061, Texas Occupations Code which provides the Texas Commission on Private Security with the authority "to adopt rules and general policies to guide the agency in the administration of this chapter."

The following is the code that is affected by the proposed repeal: Chapter 1702, Texas Occupations Code.

§435.1. Employment Requirements.

§435.2. Fingerprints.

§435.3. Exhibit Pocket Card.

§435.4. Licensed Company Responsible for the Registration of Employees.

§435.10. Registration Deadline.

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 October 30, 2001.

TRD-200106682
Dr. Jerry L. McGlasson
Executive Director
Texas Commission on Private Security
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2088

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CHAPTER 435. RECIPROCITY

22 TAC §435.1, §435.2

The Texas Commission on Private Security proposes new, §435.1 and §435.2, concerning Reciprocity. The new sections are being proposed to limit commissioned security officers or personal protection officers to carry only a firearm of which they have been formally trained and filed with the Commission.

Dr. Jerry L. McGlasson, Executive Director, has determined that for the first five years the rules are in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the rules.

Dr. McGlasson has determined that for the first five years the rules are in effect that the public benefit will be derived through the promulgation of the rules as the result of strengthened enforcement of the regulated industry thereby raising the level of public safety. There will be no fiscal implications for individuals who are required to comply with these rules, and are specifically directed towards the conduct of licensees for the protection of the public and consumers. There will be no fiscal implications for small businesses who are required to comply with these rules.

Comments on the proposal may be submitted to Dr. Jerry L. McGlasson, Executive Director, Texas Commission on Private Security, P.O. Box 13509, Austin, Texas 78711.

The new sections are proposed under Chapter 1702, Texas Occupations Code, which provides the Texas Commission on Private Security with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the code that is affected by these rules: Texas Occupations Code.

§435.1. General Reciprocity.

(a) The Commission shall identify those criteria for licensing from a state with whom a reciprocal agreement has been made that meet the requirements of the Act and Commission Rules.

(b) The Commission shall establish an agreement of reciprocity for use in implementing reciprocal agreements with other states. The terms of the reciprocal agreement shall be binding upon the parties thereto and shall be enforceable through the dissolution of the agreement in the event of violation of its terms.

(c) The Commission shall design an application form to be used by applicants for a reciprocal license. The applicant shall contain:

(1) The applicant's name, business address and telephone number;

(2) The type of license(s) or other authorization(s) currently held by the applicant and the identifying number(s) of such license(s) or other authorization(s);

(3) The dates of licensure or other authorization(s) and expiration date of the applicant's current license(s) or other authorization(s);

(4) In the case of individual applicants, any company affiliation(s);

(5) A statement that the applicant has read, and agrees to comply with all provisions of the rules, regulations and statutes governing investigations and security contractor providers in the State of Texas;

(6) A statement that the applicant agrees to cooperate with any investigation initiated by the Texas Commission on Private Security;

(7) The payment of all applicable fees;

(8) Any and all items or documents required under the provisions of the Act or Commission Rules needed to complete the application as shall be specified in the reciprocal agreement with the applicant's state of license origin.

(9) An irrevocable consent that service of process, in connection with any complaint or disciplinary action filed against the applicant arising out of the applicant's investigation or security contractor activities in the reciprocating state may be made by the delivery of such process on the administrator of the originating state regulatory agency; and

(10) A statement that the applicant's investigations company or security contractor license or other authorization has not been suspended and/or revoked within a period of ten years immediately preceding that application of previously-satisfied qualifications or reciprocal licensure.

(d) An agreement to enter a reciprocal agreement with another state shall be approved by the Governor of Texas.

§435.2. Limited Reciprocity.

(a) The Executive Director may enter into a limited reciprocal agreement with another state in compliance with Title 10 Chapter 1702.1183 permitting private investigators to enter Texas for limited periods of time.

(b) All limited reciprocal agreements will be for completion of contracts executed in the state where the investigator is licensed and in good standing.

(c) The governing Commission/Board of each state/party to the agreement shall, through the signature of the Chairman, approve any agreement made under this provision.

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 October 30, 2001.

TRD-200106705
Dr. Jerry L. McGlasson
Executive Director
Texas Commission on Private Security
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2088

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CHAPTER 440. CONTINUING EDUCATION

22 TAC §440.1

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

The Texas Commission on Private Security proposes the repeal of Chapter 440, §440.1, concerning Continuing Education. The Commission by way of an Ad-Hoc Committee has under taken a comprehensive review of its commission rules that were in effect prior to December 31, 2001. The Commission staff and the Ad-Hoc Committee have also reviewed suggestions and recommendations from individuals and various trade associations. As a result of this review all of the Commission Rules in effect prior to December 31, 2001, are being repealed, and a new substantive revision of Commission Rules have been complied.

Dr. Jerry L. McGlasson, Director, has determined that for the first five years the repeal is in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the repeal.

Dr. McGlasson has also determined that for the first five years the repeal is in effect the public benefit will be derived through the promulgation of the rules as the result of strengthened enforcement of the regulated industry thereby raising the level of public safety. There will no fiscal implications for individuals who are required to comply with the repeal. There will be no fiscal implications for small business who are required to comply with the repeal.

Comments on the proposal may be submitted to Dr. Jerry L. McGlasson, Director, Texas Commission on Private Security; P.O. Box 13509, Austin, Texas 78711.

The repeal is proposed under §1702.061, Texas Occupations Code which provides the Texas Commission on Private Security with the authority "to adopt rules and general policies to guide the agency in the administration of this chapter."

The following is the code that is affected by the proposed repeal: Chapter 1702, Texas Occupations Code.

§440.1. Continuing Education Courses.

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 October 30, 2001.

TRD-200106683
Dr. Jerry L. McGlasson
Executive Director
Texas Commission on Private Security
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2088

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CHAPTER 440. TRAINING

22 TAC §§440.1, 440.2, 440.4 - 440.19

The Texas Commission on Private Security proposes new, §§440.1, 440.2, 440.4 - 440.19, concerning Application for a Training School Approval. The new sections are being proposed to limit commissioned security officers or personal protection officers to carry only a firearm of which they have been formally trained and filed with the Commission.

Dr. Jerry L. McGlasson, Executive Director, has determined that for the first five years the rules are in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the rules.

Dr. McGlasson has determined that for the first five years the rules are in effect that the public benefit will be derived through the promulgation of the rules as the result of strengthened enforcement of the regulated industry thereby raising the level of public safety. There will be no fiscal implications for individuals who are required to comply with these rules, and are specifically directed towards the conduct of licensees for the protection of the public and consumers. There will be no fiscal implications for small businesses who are required to comply with these rules.

Comments on the proposal may be submitted to Dr. Jerry L. McGlasson, Executive Director, Texas Commission on Private Security, P.O. Box 13509, Austin, Texas 78711.

The new sections are proposed under Chapter 1702, Texas Occupations Code, which provides the Texas Commission on Private Security with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the code that is affected by these rules: Texas Occupations Code.

§440.1. Application for a Training School Approval.

(a) An application for training school approval shall be on a form prescribed by the Commission to show proof that the applicant has:

(1) Developed an adequate training course or is using the Commission's most current version training manual as its curriculum:

(2) Adequate space, qualified instructors, and proper instructional material; and

(3) Appointed a qualified manager who will be responsible for training.

(b) The Letter of Approval shall be valid for one year and may be renewed by submitting an application for renewal 30 days prior to the expiration date.

(c) An entity having a private business letter of authority or a governmental letter of authority may seek approval for a training school approval by meeting requirements of §§440.1, 432.1, or 432.2 of this title where applicable.

(d) A training school approval granted under this section shall be limited to training employees of the letter of authority only.

§440.2. Attendance, Progress, and Completion Records Required.

(a) Commission approved training school shall have a qualified manager who shall comply with the requirements of the Act and Commission rules. This manager shall:

(1) Issue an original Certificate of Completion to each qualifying student, within seven days after the student qualifies;

(2) Maintain adequate records to show attendance, progress, of grades of students and maintain on file a copy of each certificate issued to students at the Commission approved training school; and

(3) Make all required records available to investigators employed by the Commission for inspection during reasonable business hours.

(b) Upon renewal, any Commission approved training school that has not submitted applications to register its owners, officers, partners, shareholders and qualified a manager shall be required to do so before the renewal can be completed along with any applications, fees, or fingerprints that may be required for licensing.

§440.4. Commission Refusal of Certificate of Completion.

The Commission may refuse to accept a Certificate of Completion from a training school upon receipt of evidence of violation of the Act or Commission Rules involving an owner, officer, partner, shareholder, qualified manager or instructor.

§440.5. Withdrawal of Training School Approval.

The Commission may withdraw approval of a training school upon evidence the school has operated in violation of the Act or Commission Rules.

§440.6. Notification of Denial or Withdrawal of a Letter of Approval.

The Commission, upon review and consideration of an application for training school approval, shall set forth in writing the reasons for denial of approval.

§440.7. Application for a Training Instructor Letter of Approval.

An application for approval as an instructor shall contain evidence of qualification as required by the Commission. Instructors may be approved for classroom and/or firearm training. An individual may apply for approval for one or both of these categories. To qualify for a classroom or firearm instructor approval the applicant for approval must submit acceptable certificates of training for each category. The classroom instructor and firearm certificates shall each have consisted of a minimum of 40 hours of Commission approved instruction.

(1) Proof of qualification as a classroom instructor shall include, but not be limited to:

(A) An instructor's certificate issued by Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE).

(B) An instructor's certificate issued by federal, state or political subdivision law enforcement academy.

(C) An instructor's certificate issued by the Texas Education Agency.

(D) An instructor's certificate relating to law enforcement, private security or industrial security issued by a junior college, college or university.

(2) Proof of qualification as a firearm training instructor shall include, but not be limited to:

(A) An instructor's certificate issued by the Law Enforcement Activities Division of the National Rifle Association (NRA).

(B) An instructor's certificate issued by TCLEOSE.

(C) A firearm instructor's certificate issued by a federal, state or political subdivision law enforcement agency approved by the Executive Director.

(3) A Letter of Approval from the Commission shall be issued to each approved instructor and shall be valid for a period of one year. The instructor's approval may be renewed during the month preceding the month in which the approval expires for a period of one year after expiration, upon application to the Commission and payment of the renewal fee.

(4) The Commission may revoke or suspend an instructor's approval or deny the application or renewal thereof upon evidence that:

(A) The instructor or applicant has violated any provisions of the Act or Commission Rules;

(B) The qualifying instructor's certificate has been revoked or suspended by the issuing agency;

(C) A material false statement was made in the application; or

(D) The instructor does not meet the qualifications set forth in the provisions of the Act and Commission Rules as amended.

§440.8. Training Courses.

(a) Guard Training Courses

(1) In accordance with the Act, the following training shall be required of registrants and commissioned security officers:

(A) Level I--All registrants, and commissioned security officers including noncommissioned security officers, private investigators, branch office managers, licensed managers, alarm systems monitors, dog trainers and security consultants and excluding alarm installers, alarm salespersons, owner, officers, partners, and shareholders. A certificate indicating completion of Level I training shall be submitted to the Commission along with the application to register the individual within 14 days after they commence employment.

(B) Level II--All noncommissioned security officers and commissioned security officers. A certificate indicating completion of Level II training shall be submitted to the Commission within 14 days after they commence employment.

(C) Level III Training--shall be completed by applicants for a security officer commission and a personal protection officer authorization. A certificate indicating completion of Level III Training shall be submitted to the Commission along with the application to register the individual within 14 days after employment is commenced.

(2) Level I and Level II may be taught by the manager, the manager's designee or a Commission approved school and Commission approved instructor using the most current version of the respective Commission Level I and Level II Training Course manual.

(3) Level III and IV shall be taught by a Commission approved school and Commission approved instructor using the most current version of the respective Commission Level III and IV manuals.

(4) Training manuals for Levels I, II, III, and IV will be prepared by Commission staff and other qualified individuals selected by the Executive Director.

(5) The passing grade for all examinations shall be a minimum of 75% correct answers.

(b) Alarm Training Courses

(1) In accordance with the Act, the following training shall be required of an alarm systems installer and a security salesperson:

(A) Alarm Level I--All individuals employed as an alarm systems installer or a security salesperson must hold a certification by a Commission approved training program to renew an initial registration. An original certificate indicating successful completion of an Alarm Level I training program shall be submitted to the Commission along with the proper application to renew an initial registration.

(B) The passing grade for all Alarm Level I examinations shall be a minimum of 70% correct answers.

(C) An Alarm Level I program shall be taught by a Commission approved Alarm Instructor.

(2) A Commission approved Alarm Instructor may teach Commission approved continuing education courses.

§440.9. Firearm Courses.

(a) In addition to the firearm qualification requirements as set forth in the Act, a firearm instructor may qualify a student by using:

(1) The Texas Department of Public Safety Practical Combat Pistol Course;

(2) The Federal Law Enforcement Training Center Practical Pistol Course;

(3) The Texas Department of Public Safety Approved Concealed Handgun Weapons Range Qualifications course; or

(4) Other training as may be approved by the Executive Director.

(b) All individuals qualifying with a firearm to satisfy the requirements of the Act or Commission rules shall qualify with an actual demonstration by the individual of their ability to safety and proficiently use the category of firearm for which the individual seeks qualification.

(c) The categories of handguns are:

(1) SA: any handgun, whether semi-automatic or not; and

(2) NSA: handguns that are not semi-automatic.

(d) The category for any shotgun is STG.

§440.10. Shotgun Training.

Competency with a shotgun shall be determined by the firearms training instructor after instructing the student in the operation of a shotgun, and the satisfactory completion of the Shotgun Training requirements of §440.11 of this title.

§440.11. Shotgun Training Requirements.

Any commissioned security officer licensed by the Commission who, in the performance of his/her duties, has a shotgun available to assist in the protection of life or property must demonstrate competency by successfully completing the course of fire for shotgun training. The course of fire shall consist of nine rounds of nine pellet "00" buckshot fired as follows:

(1) From a standing position at a distance of 15 yards, three rounds of "00" buckshot in 12 seconds;

(2) From a standing position at a distance of ten yards, three rounds of "00" buckshot in ten seconds;

(3) From a standing position at a distance of five yards, three rounds of "00" buckshot in ten seconds; or

(4) An alternate course of fire may be approved by the Executive Director upon receipt of written application.

(5) A biennial familiarization of six rounds of "00" buckshot shall be required for renewal of a security officer commission.

(A) The course of fire shall be as outlined in §440.11 of this title reducing the number of rounds from three to two with a commensurate halving of time in each category.

(B) The Executive Director may approve an alternate course of fire upon receipt of written application.

§440.12. Training School and Instructor Approval.

For the purpose of this Act, approval as a security officer training school and/or instructor shall be considered a license with respect to suspension, revocation or denial.

§440.13. Security Officer Training Manual and Examination.

(a) The Commission's most current version training manual shall be used by all Commission approved Level III training schools.

(b) All students of a Level III training school shall be tested with the most current version examination prepared by and obtained from the Commission.

(c) The passing grade of all examinations shall be a minimum of 75% correct answers.

§440.14. Alarm Installer and Alarm Systems Salesperson Training and Testing/Application for Alarm Training Program Approval.

(a) An application for alarm installer or alarm systems salesperson training program approval shall be on a form prescribed by the Commission.

(b) A Letter of Approval shall be granted by the Executive Director to all qualified alarm training programs and shall be valid for one year and may be renewed by submitting an application for renewal no later than 30 days prior to the expiration date along with any required fees.

(c) A qualified manager for an alarm training program in addition to meeting the requirements of §1702.113 and a qualified alarm training instructor must have successfully completed a Commission approved program in alarm installation. Approval by the Commission of alarm training program directors and qualified alarm training instructors shall be valid for one year.

§440.15. Attendance, Progress and Completion Records Required.

(a) A Commission approved alarm training program shall:

(1) Issue an original Certificate of Completion to each qualifying student within 7 days after the student qualifies;

(2) Maintain adequate records to show attendance, progress, and grades of students; and

(3) Make all records required to be maintained available for inspection by Commission staff during business hours.

(b) Qualified Alarm Training Program Instructors shall maintain records on file for inspection by Commission staff during business hours as proof of attendance and progress of grades of students.

§440.16. Alarm Systems Installer or Alarm Systems Salesperson

(a) The Certificate of Completion shall contain:

(1) Name and approval number of the school;

(2) Approval number(s) of qualified class room instructor(s);

(3) Date of completion;

(4) Name and signature of the manager of the school; and

(5) Full name and social security number of the student.

(b) The Certificate of Completion shall indicate that the student has passed the required test and shall contain the words "has successfully completed the alarm installers or alarm systems salespersons alarm training program approved by the Texas Commission on Private Security."

§440.17. Records Required on Manager.

(a) Each Commission approved alarm training program shall:

(1) Have a qualified manager, and they shall comply with the requirements of §1702.113 of the Act.

(2) Register any owners, officers, partners, shareholders, and qualify a manager, and they shall meet the requirements under §1702.113 of the Act.

(b) Each owner, officer, partner or shareholder and qualified manager of a Commission approved alarm training program shall, with 14 days after commencement of employment, submit an application to the Commission, the appropriate fees, and two sets of Commission approved fingerprint cards.

(c) A Commission approved alarm training program shall register its owners, officers, partners, shareholders and qualified manager prior to renewal of the training program.

§440.18. Statutory or Rules Violations.

(a) The Commission may refuse to accept a Certificate of Completion from an alarm training program upon receipt of proof of violation of the Act or Commission Rules involving an owner, officer, partner, shareholder, manager, or alarm training program instructor.

(b) The Commission may withdraw, suspend or revoke an approval of an alarm training program or approval of an alarm training instructor upon receipt of evidence that the program or instructor has violated the Act or Commission Rules.

§440.19. Certificate of Completion.

(a) The Certificate of Completion shall reflect the particular course or courses completed by a student during the training period.

(b) All Certificates of Completion shall contain:

(1) Name and approval number of the school;

(2) Date of completion;

(3) Name, signature and approval number of training instructor;

(4) Name and signature of the qualified manager; and

(5) Full name and social security number of student;

(6) The date of final completion of the entire course;

(7) The specific date of firearm qualification along with the name and approval number of the firearms instructor on those certificates designating completion of Level III; and

(8) The certificate of completion for firearms qualification shall:

(A) Note the category of firearm as defined in §446.15(c)(1) and (2), (d)(1) and §440.9(c) and (d) of this title.

(B) Note the caliber of firearm, and

(C) Be on a certificate form designed or 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 October 30, 2001.

TRD-200106706
Dr. Jerry L. McGlasson
Executive Director
Texas Commission on Private Security
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2088

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CHAPTER 441. PERSONAL PROTECTION OFFICERS TRAINING

22 TAC §441.1

The Texas Commission on Private Security proposes new §441.1, concerning Personal Protection Officers Training. The new section is being proposed to limit commissioned security officers or personal protection officers to carry only a firearm of which they have been formally trained and filed with the Commission.

Dr. Jerry L. McGlasson, Executive Director, has determined that for the first five years the rule is in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the rule.

Dr. McGlasson has determined that for the first five years the rule is in effect that the public benefit will be derived through the promulgation of the rules as the result of strengthened enforcement of the regulated industry thereby raising the level of public safety. There will be no fiscal implications for individuals who are required to comply with the rule, and are specifically directed towards the conduct of licensees for the protection of the public and consumers. There will be no fiscal implications for small businesses who are required to comply with the rule.

Comments on the proposal may be submitted to Dr. Jerry L. McGlasson, Executive Director, Texas Commission on Private Security, P.O. Box 13509, Austin, Texas 78711.

The new section is proposed under Chapter 1702, Texas Occupations Code, which provides the Texas Commission on Private Security with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the code that is affected by these rules: Texas Occupations Code.

§441.1. Training--Personal Protection Officers.

(a) The personal protection officer course may only be offered by Commission approved commissioned personal protection officer training schools and taught by Commission approved Personal Protection Officer Instructors who are employed by the approved school. Personal Protection Officer Training Instructors must be approved to instruct Level Four training. To receive Commission approval, a school or instructor must submit an application to the Commission on a form provided by the Commission. Any person applying for approval as an instructor shall submit proof of qualification as required by the Commission. Proof of qualification as an instructor shall include, but not be limited to, the following:

(1) An instructor's certificate issued by the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE) along with proof that the individual has instructed nonlethal self-defense or nonlethal defense of a third party for 3 or more years. Evidence may include:

(A) Affidavit from employer;

(B) A copy of curriculum taught;

(2) An instructor's certificate issued by federal, state or political subdivision law enforcement academy along with proof that the individual has instructed nonlethal self-defense or nonlethal defense of a third party for 3 or more years. Evidence may include:

(A) Affidavit from employer;

(B) A copy of curriculum taught;

(3) An instructor's certificate issued by the Texas Education Agency (TEA) along with proof that the individual has instructed nonlethal self-defense or nonlethal defense of a third party for 3 or more years. Evidence may include:

(A) Affidavit from employer;

(B) A copy of curriculum taught;

(4) An instructor's certificate relating to law enforcement, private security or industrial security issued by a junior college, college or university along with proof that the individual has instructed nonlethal self-defense or nonlethal defense of a third party for 3 or more years. Evidence may include:

(A) Affidavit from employer;

(B) A copy of curriculum taught; or

(5) Evidence of attending and successfully completing a Commission approved training course for Personal Protection Officer Instructors.

(A) A letter of approval from the Commission shall be issued to each approved instructor and shall be valid for a period of one year. The instructor's approval may be renewed for a period of one year upon application to the Commission and payment of the renewal fee.

(B) A letter of approval for a personal protection officer instructor shall be considered a license with respect to suspension, revocation or denial.

(C) Notice shall be given in writing to the Commission within 14 days after a change in address of the approved instructor.

(b) LEVEL IV TRAINING (PERSONAL PROTECTION OFFICER TRAINING COURSE). The Personal Protection Officer Training Course shall consist of a minimum of 15 classroom hours and shall

be offered by Commission approved personal protection officer training schools and taught by Commission approved personal protection training instructors. All training shall be conducted with Commission approved instructor present during all instruction. All students of a Personal Protection Officer Training Course shall be tested with an examination prepared by and obtained from the Commission. Commission official Personal Protection Officer Training Video Tapes shall be obtained from the Commission and used as the curriculum.

(c) PERSONAL PROTECTION OFFICER TRAINING MANUAL, EXAMINATION

(1) The Commission's current version of the Personal Protection Officer Training Manual shall be used by all Commission approved personal protection officer schools and instructors as their curriculum and shall be obtained from the Commission.

(2) All students of a Personal Protection Officer Training Course shall be tested with the current version of an examination prepared by and obtained from the Commission.

(3) The passing grade of the Personal Protection Officer Training Course shall be a minimum of 75% correct answers on academic studies and must meet the minimum standards as set forth by the approved instructor on practical simulations.

(d) CERTIFICATE OF COMPLETION--PERSONAL PROTECTION OFFICER TRAINING

(1) The certificate of completion shall contain the:

(A) Name and approval number of the school;

(B) Name and signature of the school director;

(C) Name, signature and approval number of the personal protection training instructor;

(D) Date of completion;

(E) Full name and social security number of the student; and

(F) Complete address of the location where the training was conducted.

(2) Certificates of completion shall be issued by a Commission approved training school.

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 October 30, 2001.

TRD-200106707
Dr. Jerry L. McGlasson
Executive Director
Texas Commission on Private Security
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2088

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CHAPTER 442. CONTINUING EDUCATION

22 TAC §442.1

The Texas Commission on Private Security proposes new §442.1, concerning Continuing Education. The new section is being proposed to limit commissioned security officers or personal protection officers to carry only a firearm of which they have been formally trained and filed with the Commission.

Dr. Jerry L. McGlasson, Executive Director, has determined that for the first five years the rule is in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the rule.

Dr. McGlasson has determined that for the first five years the rule is in effect that the public benefit will be derived through the promulgation of the rules as the result of strengthened enforcement of the regulated industry thereby raising the level of public safety. There will be no fiscal implications for individuals who are required to comply with the rule, and are specifically directed towards the conduct of licensees for the protection of the public and consumers. There will be no fiscal implications for small businesses who are required to comply with the rule.

Comments on the proposal may be submitted to Dr. Jerry L. McGlasson, Executive Director, Texas Commission on Private Security, P.O. Box 13509, Austin, Texas 78711.

The new section is proposed under Chapter 1702, Texas Occupations Code, which provides the Texas Commission on Private Security with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the code that is affected by the rule: Texas Occupations Code.

§442.1. Continuing Education Courses.

(a) A license may not be renewed until the required minimum hours of Commission approved continuing education credits have been obtained in accordance with the Act and Commission rules. Proof of the required continuing education must be maintained by the employer and contained in the personnel file of the registrant's employing company.

(1) All registrants not specifically addressed in this section shall complete a total of eight hours of continuing education, seven hours of which must be in subject matter that relates to the type of registration held, and one hour of which must cover ethics;

(2) Non-participating owners, partners, shareholders, non-commissioned security officers and administrative support personnel are specifically exempted from the continuing education requirements.

(3) Private investigators and managers of Class A and Class C licenses shall complete a total of 16 hours of continuing education, 14 hours of which must be in subject matter that relates to the type of registration held, and two hours of which must be over ethics;

(4) Any person registered as a private investigator who fails to complete 16 hours of continuing education during the 24 months of an initial registration is not eligible to make new or renewal application until such time as the training requirement for the previous registration period has been satisfied.

(5) Commissioned security officers and personal protection officers shall complete six hours of continuing education. Continuing education for commissioned security officers and personal protection officers must be taught by schools and instructors approved by the Commission to instruct commissioned security officers as defined in §1702.1685. Commissioned security officers shall submit a firearms proficiency certificate along with their renewal application.

(6) All registrants shall indicate they have completed the required minimum hours of Commission-approved continuing education credits on their application for renewal. A renewal application

shall also include name of school, school number, seminar number, seminar date, and credits earned.

(7) Continuing education schools shall report attendees of continuing education classes to Commission within 30 days of class completion. This report shall include the school number, instructor number, date and location of school. In addition to the following information for each participate: name, SSN and continuing education credit earned.

(8) During the 1st 24 months of initial registration each person employed as an alarm system installer or alarm systems salesperson must complete 20 hours of classroom instruction, as described in Chapter 1702 Occupation Code. Any person employed as an alarm systems installer or alarm systems salesperson must obtain 8 hours of continuing education credits in alarm related field during each subsequent 24 month period preceding the expiration date of registration in order to renew the registration.

(9) Any person licensed as an alarm systems installer or alarm systems salesperson who fails to complete 20 hours of training during the 24 months of initial licensure or who fails to complete 8 hours of continuing education during any subsequent licensing period is not eligible to make new or renewal application until such time as all training requirements for the previous license period have been satisfied.

(10) Alarm monitors shall complete four hours of continuing education in subject matter that relates to the duties and responsibilities of an alarm monitor.

(11) The Executive Director or his designee shall approve classes for continuing education that are determined to meet the qualifications of the Act and Commission rules.

(12) Any person licensed by the Commission as an alarm instructor shall be authorized to instruct all alarm continuing education courses approved by the Commission.

(13) Any person licensed by the Commission as a Level III or Level IV shall be authorized to instruct all continuing education courses approved by the Commission excluding alarm continuing education.

(b) Continuing education instructors shall provide a certificate of completion to each person successfully completing the continuing education course within 7 days after the date of course completion.

(1) The continuing education certificate of completion shall contain:

(A) The name and social security number of the person attending the course;

(B) The title and topic of the course;

(C) The number of hours of instruction provided;

(D) The signature of the instructor; and

(E) Any information deemed necessary by the Executive Director.

(2) The manager of a commissioned security officer training school conducting a continuing education course for commissioned security officers shall provide a certificate of completion to each person successfully completing the course within 7 days after the date the course was completed.

(3) The certificate of completion for commissioned security officers shall contain:

(A) The name and social security number of the person attending the course;

(B) The title and topic of the course;

(C) The number of hours of instruction provided;

(D) The signature of the instructor and school director; and

(E) Any information deemed necessary by the Executive Director.

(c) To receive Commission approval, a continuing education course shall contain instruction relating to one or more of the following:

(1) Investigative procedures and practices;

(2) Business practices;

(3) Legal aspects of private investigation or private security;

(4) Ethical aspects of private investigation or private security;

(5) Handgun proficiency as defined under §1702.168 of the Act; and/or

(6) Any other course of instruction approved by the Executive Director.

(d) To receive Commission approval, a continuing education course shall contain at least one clock hour of instruction.

(e) The Executive Director shall approve courses for continuing education that are determined to meet the qualifications of these rules and the Act.

(1) Courses may be provided for and taught by any organization or person that, in the Executive Director's discretion, has the education, knowledge and experience to provide such information.

(2) A person wishing to conduct a continuing education course must provide the Executive Director a description of the contents of the curriculum and the qualifications of any instructor.

(3) The Executive Director shall inform the person wishing to conduct the course of the approval or disapproval within 10 working days of receiving the request.

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 October 30, 2001.

TRD-200106708
Dr. Jerry L. McGlasson
Executive Director
Texas Commission on Private Security
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2088

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CHAPTER 445. EMPLOYEE RECORDS

22 TAC §§445.1 - 445.5

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

The Texas Commission on Private Security proposes the repeal of Chapter 445, §§445.1 - 445.5, concerning Employee Records. The Commission by way of an Ad-Hoc Committee has under taken a comprehensive review of its commission rules that were in effect prior to December 31, 2001. The Commission staff and the Ad-Hoc Committee have also reviewed suggestions and recommendations from individuals and various trade associations. As a result of this review all of the Commission Rules in effect prior to December 31, 2001, are being repealed, and a new substantive revision of Commission Rules have been complied.

Dr. Jerry L. McGlasson, Director, has determined that for the first five years the repeal is in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the repeal.

Dr. McGlasson has also determined that for the first five years the repeal is in effect the public benefit will be derived through the promulgation of the rules as the result of strengthened enforcement of the regulated industry thereby raising the level of public safety. There will no fiscal implications for individuals who are required to comply with the repeal. There will be no fiscal implications for small business who are required to comply with the repeal.

Comments on the proposal may be submitted to Dr. Jerry L. McGlasson, Director, Texas Commission on Private Security; P.O. Box 13509, Austin, Texas 78711.

The repeal is proposed under §1702.061, Texas Occupations Code which provides the Texas Commission on Private Security with the authority "to adopt rules and general policies to guide the agency in the administration of this chapter."

The following is the code that is affected by the proposed repeal: Chapter 1702, Texas Occupations Code.

§445.1. Employee Records.

§445.2. Location of Records.

§445.3. Records To Be Available for Inspection.

§445.4. Pre-Employment Check.

§445.5. Records Required on Commissioned Security Officers.

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 October 30, 2001.

TRD-200106684

Dr. Jerry L. McGlasson

Executive Director

Texas Commission on Private Security

Earliest possible date of adoption: December 9, 2001

For further information, please call: (512) 936-2088

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CHAPTER 446. SCHOOLS/INSTRUCTORS/TRAINING

22 TAC §§446.1 - 446.25

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

The Texas Commission on Private Security proposes the repeal of Chapter 446, §§446.1 - 446.25, concerning Schools/Instructors/Training. The Commission by way of an Ad-Hoc Committee has under taken a comprehensive review of its commission rules that were in effect prior to December 31, 2001. The Commission staff and the Ad-Hoc Committee have also reviewed suggestions and recommendations from individuals and various trade associations. As a result of this review all of the Commission Rules in effect prior to December 31, 2001, are being repealed, and a new substantive revision of Commission Rules have been complied.

Dr. Jerry L. McGlasson, Director, has determined that for the first five years the repeal is in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the repeal.

Dr. McGlasson has also determined that for the first five years the repeal is in effect the public benefit will be derived through the promulgation of the rules as the result of strengthened enforcement of the regulated industry thereby raising the level of public safety. There will no fiscal implications for individuals who are required to comply with the repeal. There will be no fiscal implications for small business who are required to comply with the repeal.

Comments on the proposal may be submitted to Dr. Jerry L. McGlasson, Director, Texas Commission on Private Security; P.O. Box 13509, Austin, Texas 78711.

The repeal is proposed under §1702.061, Texas Occupations Code which provides the Texas Commission on Private Security with the authority "to adopt rules and general policies to guide the agency in the administration of this chapter."

The following is the code that is affected by the proposed repeal: Chapter 1702, Texas Occupations Code.

§446.1. Commission Approved Personal Protection Officer Instructor/Level Four Training/Approved Commissioned Security Officer Training Schools.

§446.2. Level Four Training (Personal Protection Officer Training Course).

§446.3. Personal Protection Officer Training Manual, Examination.

§446.4. Certificate of Completion--Personal Protection Officer Training.

§446.5. Attendance, Progress and Completion Records Required.

§446.6. Application for a Training Course Approval.

§446.7. Attendance, Progress and Completion Records Required.

§446.8. Certificate of Completion.

§446.9. Records Required on Commission Approved Training School, and Registrants of Any Commission Approved Training Schools.

§446.10. Commission Refusal of Certificate of Completion.

§446.11. Withdrawal of Training School Approval.

§446.12. Notification of Denial or Withdrawal of a Letter of Approval.

§446.13. Application for a Training Instructor Letter of Approval.

§446.14. Training Courses.

§446.15. Firearm Courses.

§446.16. Shotgun Training.

§446.17. Shotgun Training Requirements.

§446.18. Training School and Instructor Approval.

§446.19. Security Officer Training Manual and Examination.

§446.20. Alarm Installer and Alarm Systems Salesperson Training and Testing/Application for Alarm Training Program Approval.

§446.21. Attendance, Progress and Completion Records Required.

§446.22. Alarm Systems Installer or Alarm Systems Salesperson.

§446.23. Records Required on Manager.

§446.24. Statutory or Rules Violations.

§446.25. Continuing Education.

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

Filed with the Office of the Secretary of State, on October 30, 2001.

TRD-200106685
Dr. Jerry L. McGlasson
Executive Director
Texas Commission on Private Security
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2088

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CHAPTER 448. RECIPROCITY

22 TAC §§448.1 - 448.4, 448.10, 448.20, 448.25, 448.30, 448.35

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

The Texas Commission on Private Security proposes the repeal of Chapter 448, §§448.1 - 448.4, 448.10, 448.20, 448.25, 448.30, 448.35, concerning Reciprocity. The Commission by way of an Ad-Hoc Committee has under taken a comprehensive review of its commission rules that were in effect prior to December 31, 2001. The Commission staff and the Ad-Hoc Committee have also reviewed suggestions and recommendations from individuals and various trade associations. As a result of this review all of the Commission Rules in effect prior to December 31, 2001, are being repealed, and a new substantive revision of Commission Rules have been complied.

Dr. Jerry L. McGlasson, Director, has determined that for the first five years the repeal is in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the repeal.

Dr. McGlasson has also determined that for the first five years the repeal is in effect the public benefit will be derived through the promulgation of the rules as the result of strengthened enforcement of the regulated industry thereby raising the level of public safety. There will no fiscal implications for individuals who are required to comply with the repeal. There will be no fiscal implications for small business who are required to comply with the repeal.

Comments on the proposal may be submitted to Dr. Jerry L. McGlasson, Director, Texas Commission on Private Security; P.O. Box 13509, Austin, Texas 78711.

The repeal is proposed under §1702.061, Texas Occupations Code which provides the Texas Commission on Private Security with the authority "to adopt rules and general policies to guide the agency in the administration of this chapter."

The following is the code that is affected by the proposed repeal: Chapter 1702, Texas Occupations Code.

§448.1. Reciprocity.

§448.2. Fees.

§448.3. Fees Not Refundable.

§448.4. Method of Payment of Fees.

§448.10. Operation Without Manager.

§448.20. Fingerprint Submission.

§448.25. Original Fees Not Prorated.

§448.30. Change of Expiration Date of License.

§448.35. Reapplication After Revocation.

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 October 30, 2001.

TRD-200106686
Dr. Jerry L. McGlasson
Executive Director
Texas Commission on Private Security
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2088

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CHAPTER 449. AUTHORITY TO WAIVE RULES

22 TAC §449.1

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

The Texas Commission on Private Security proposes the repeal of Chapter 449, §449.1, concerning Authority to Waive Rules. The Commission by way of an Ad-Hoc Committee has under taken a comprehensive review of its commission rules that were in effect prior to December 31, 2001. The Commission staff and the Ad-Hoc Committee have also reviewed suggestions and recommendations from individuals and various trade associations. As a result of this review all of the Commission Rules in effect prior to December 31, 2001, are being repealed, and a new substantive revision of Commission Rules have been complied.

Dr. Jerry L. McGlasson, Director, has determined that for the first five years the repeal is in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the repeal.

Dr. McGlasson has also determined that for the first five years the repeal is in effect the public benefit will be derived through the promulgation of the rules as the result of strengthened enforcement of the regulated industry thereby raising the level of public safety. There will no fiscal implications for individuals who are required to comply with the repeal. There will be no fiscal implications for small business who are required to comply with the repeal.

Comments on the proposal may be submitted to Dr. Jerry L. McGlasson, Director, Texas Commission on Private Security; P.O. Box 13509, Austin, Texas 78711.

The repeal is proposed under §1702.061, Texas Occupations Code which provides the Texas Commission on Private Security with the authority "to adopt rules and general policies to guide the agency in the administration of this chapter."

The following is the code that is affected by the proposed repeal: Chapter 1702, Texas Occupations Code.

§449.1. Specific Authority To Waive Rules.

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

Filed with the Office of the Secretary of State, on October 30, 2001.

TRD-200106687
Dr. Jerry L. McGlasson
Executive Director
Texas Commission on Private Security
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2088

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CHAPTER 449. DELEGATION OF AUTHORITY

22 TAC §449.1

The Texas Commission on Private Security proposes new, §449.1, concerning Delegation of Authority. The new section is being proposed to limit commissioned security officers or personal protection officers to carry only a firearm of which they have been formally trained and filed with the Commission.

Dr. Jerry L. McGlasson, Executive Director, has determined that for the first five years the rule is in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the rule.

Dr. McGlasson has determined that for the first five years the rule is in effect that the public benefit will be derived through the promulgation of the rules as the result of strengthened enforcement of the regulated industry thereby raising the level of public safety. There will be no fiscal implications for individuals who are required to comply with the rule, and is specifically directed towards the conduct of licensees for the protection of the public and consumers. There will be no fiscal implications for small businesses who are required to comply with the rule.

Comments on the proposal may be submitted to Dr. Jerry L. McGlasson, Executive Director, Texas Commission on Private Security, P.O. Box 13509, Austin, Texas 78711.

The new section is proposed under Chapter 1702, Texas Occupations Code, which provides the Texas Commission on Private Security with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the code that is affected by the rule: Texas Occupations Code.

§449.1. Executive Director.

The Commissioners have determined that good cause exists to:

(1) Delegate to the Executive Director

(A) The authority to add new courses;

(B) The authority to change the curriculum of existing courses;

(C) The authority to add new examinations or to update existing examinations;

(D) The authority to waive any rule;

(E) The authority to conduct special projects;

(F) For others reasons as may be authorized by law.

(2) The Executive Director may delegate the authority to, under his general supervision, have this provision exercised by the Deputy Director or a division chief.

(3) Any temporary waiver or change outlined above will be reported to the Commission in a timely fashion.

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 October 30, 2001.

TRD-200106709
Dr. Jerry L. McGlasson
Executive Director
Texas Commission on Private Security
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 936-2088

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TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 37. MATERNAL AND INFANT HEALTH SERVICES

SUBCHAPTER K. EPILEPSY PROGRAM

The Texas Department of Health (department) proposes the repeal of §§37.211 - 37.224, and new §§37.211 - 37.222, concerning the Epilepsy Program. The repeal and new sections provide for clarity and consistency of language and facilitate compliance with and administration of the rules.

In accordance with the requirements of the Government Code, §2001.039, the sections have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed. However, the sections require revision as described in the preamble.

The department published a notice of Intention to Review for §§37.211 - 37.224 in the *Texas Register* on August 31, 2001 (26 TexReg 6736). No comments were received as a result of the publication of the notice.

Specifically, the sections cover purpose; delegation of authority; definitions; recipient requirements; residency and residency documentation requirements; applications and eligibility date; financial criteria; limitations and benefits provided; participating

providers; notice of intent to take actions and reconsideration; and notice and fair hearing.

The new rules define medical, financial and residency requirements, benefits and limitations for applicants, the selection criteria and selection process for providers, and the reconsideration and fair hearing process.

Phillip W. Walker, Chief, Bureau of Kidney Health Care, has determined that for the first five-year period the sections are in effect there will be no fiscal implications to state government as a result of enforcing or administering the sections. There is no anticipated economic effect on local government.

Mr. Walker 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 is that program access and eligibility will be easier to comply with and understand. There will be no costs to micro-businesses or small businesses to comply with the sections as proposed because none of the entities or persons affected constitute micro-businesses or small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Phillip W. Walker, Chief, Bureau of Kidney Health Care, 1100 West 49th Street, Austin, Texas 78756, (512) 685-3100. Comments will be accepted for 30 days following the date of publication of this proposal in the *Texas Register*.

25 TAC §§37.211 - 37.224

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

The repeals are proposed under the Health and Safety Code, §40.003, which provides the Texas Board of Health (board) with the authority to adopt rules to define the scope of the epilepsy program and the medical and financial standards for eligibility; and §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 of health.

The repeals affect Health and Safety Code, Chapter 40.

§37.211. Introduction and Program Description.
§37.212. Definitions.
§37.213. Scope of Services.
§37.214. Eligibility Requirements.
§37.215. Applications and Eligibility Date.
§37.216. Residency.
§37.217. Financial Eligibility Criteria.
§37.218. Provision of Services.
§37.219. Public Awareness and Educational Services.
§37.220. Denial of Application; Modification, Suspension, and Termination of Program Benefits.
§37.221. Selection of Service Providers.
§37.222. Denial of Application; Modification, Suspension, or Termination of Provider Participation.
§37.223. Confidentiality of Information.
§37.224. Nondiscrimination Statement.

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 October 26, 2001.

TRD-200106568
Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 458-7236

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25 TAC §§37.211 - 37.222

The new sections are proposed under the Health and Safety Code, §40.003, which provides the Texas Board of Health (board) with the authority to adopt rules to define the scope of the epilepsy program and the medical and financial standards for eligibility; and §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 of health.

The new sections affect Health and Safety Code, Chapter 40.

§37.211. General.

(a) Purpose. The purpose of this chapter is to establish rules for the Epilepsy Program. The authority for these rules is granted in the Texas Health and Safety Code, Chapter 40.

(b) Delegation of Authority. Under the Texas Health and Safety code, Chapter 11, §11.013, the Board of Health (board) delegates to the Commissioner of Health (commissioner), or to the person acting as commissioner in the commissioner's absence, the authority to administer the Epilepsy Program, exclusive of rulemaking authority.

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

(1) Action--A denial, termination, suspension or reduction of Epilepsy Program services or eligibility.

(2) Applicant--An individual whose application for Epilepsy Program benefits has been submitted to a contracted provider and has not received a final determination of eligibility. This includes an individual whose application is submitted by a representative or person with legal authority to act for the individual.

(3) Board--The Texas Board of Health.

(4) Commissioner--The commissioner of the Texas Department of Health.

(5) Contracted Provider--Any individual or entity with Epilepsy Program approval to furnish covered services to Epilepsy Program recipients.

(6) Department--The Texas Department of Health.

(7) Epilepsy--A chronic neurological condition characterized by abnormal electrical discharges in the brain manifested by two or more seizures. It is characterized by sudden, brief attacks of altered consciousness, motor activity, or sensory phenomena. Convulsive seizures are the most common form of attacks, but any recurrent seizure pattern is considered epilepsy.

(8) Fair hearing--The informal hearing process the department follows under §37.219 of this title (relating to Notice and Fair Hearing).

(9) Final decision--A decision that is reached by a decision maker after conducting a fair hearing under this title.

(10) Recipient--An individual who is eligible to receive Epilepsy Program benefits.

(11) Reconsideration--The administrative process the Epilepsy Program follows under §37.218 of this title (relating to Notice of Intent to Take Action and Reconsideration).

(12) Request for Proposal (RFP)--A document intended to solicit proposals from interested parties which details qualifications and plans for provision of a specific service or range of services. Services may be targeted to a selected geographic area and/or special population group, or statewide coverage.

§37.212. Recipient Requirements.

(a) A person shall meet all of the following requirements to be eligible for Epilepsy Program benefits:

(1) have a diagnosis of epilepsy certified by a licensed physician, or be suspected of having epilepsy;

(2) if younger than 21 years of age, not be eligible for benefits from the Children With Special Health Care Needs Program (CSHCN);

(3) be a resident of Texas as determined in §37.213 of this title (relating to Residency and Residency Documentation Requirements); and not be:

(A) incarcerated in city, county, state, or federal jail, or prison;

(B) a ward of the state; or

(C) a Medicaid-eligible nursing home recipient.

(4) submit an application for benefits through a contracted provider; and

(5) meet, or the person(s) who has a legal obligation to support the applicant meet, the financial guidelines as outlined in §37.215 of this title (relating to Financial Criteria);

(b) If an applicant meets all recipient requirements as outlined in subsection (a) of this section except for the financial guidelines outlined in subsection (a)(5) of this section, the applicant is eligible only for support services as outlined in §37.216 of this title (relating to Limitations and Benefits Provided).

(c) A recipient may have all Epilepsy Program benefits modified, suspended, or terminated for any of the following reasons:

(1) failure to maintain Texas residency or, upon demand, furnish evidence of such using the criteria in §37.213 of this title (relating to Residency and Residency Documentation Requirements);

(2) failure to provide income data as requested by the contracted provider to determine continued Epilepsy Program eligibility;

(3) recipient is incarcerated in a city, county, state, or federal jail, or prison;

(4) recipient becomes a ward of the state;

(5) the contracted provider determines that the recipient has made a material mis-statement or misrepresentation on their application or any document required to support their application;

(6) failure to continue premium payments on individual or group insurance, prepaid medical plan, and health insurance plans under the Social Security Act, Title XVIII, as amended, where such plans provide benefits for the care and treatment of persons who have epilepsy and the person's eligibility for benefits under the plan(s) was effective prior to eligibility for the Epilepsy Program, or provide a statement on the application form outlining the reason(s) why such insurance cannot be maintained; or

(7) failure to receive services through a contracted provider.

(d) In order to requalify for the Epilepsy Program, an applicant shall reapply and requalify for Epilepsy Program benefits when eligibility for program benefits is terminated.

(e) A recipient whose benefits are modified, suspended or terminated may appeal the Epilepsy Program's decision under the procedure contained in §37.218 of this title (relating to Notice of Intent to Take Action and Reconsideration) and §37.219 of this title (relating to Notice and Fair Hearing).

(f) The Epilepsy Program may not terminate program participation until a final decision is rendered under the department's reconsideration and fair hearings process, if a reconsideration or hearing is requested by the recipient.

§37.213. Residency and Residency Documentation Requirements.

(a) The following conditions shall be met by an applicant and maintained by a recipient to satisfy the residency requirements in this section:

(1) physically reside within the state; and

(2) maintain a home or dwelling within the state.

(b) If the applicant is a minor child; or a legal dependent of, and residing with, a resident (such as an adult child or spouse); or a person under a legal guardianship, then the parent or parent(s), resident providing support, or legal guardian of the applicant shall meet all of the requirements of subsection (a) of this section.

(c) If the applicant is a parent residing with their adult child who is a resident of Texas, residency may be determined through the adult child. If the applicant is a parent being supported by their adult child, whether or not the child is a resident of Texas, the residency may be determined by the adult child providing the required documents supporting the Texas residency of the parent. These provisions apply even if no legal guardianship has been established.

(d) All documents submitted to establish the residency of an applicant shall be in English, or if required by the contracted provider, accompanied by an accurate English translation.

(1) An applicant who is currently a Texas resident and has been currently approved to receive Texas Medicaid benefits is not required to provide additional residency verification.

(2) An applicant, or person establishing residency for the applicant under subsections (b) and (c) of this section, may submit a copy of any one of the following documents as evidence of residency. All documents shall be in the applicant's name, or in the name of the person establishing residency for the applicant, and provide some verification of a Texas address or domicile:

(A) a valid Texas driver's license, or an identification card issued by the Texas Department of Public Safety;

(B) a valid Texas voter's registration card, or a copy of a validated (at the county clerk's office) application for a voter's registration card;

(C) a current Texas motor vehicle registration or automobile license plate registration renewal form;

(D) a mortgage payment receipt from any of the three months immediately preceding the date of the application;

(E) a rent payment receipt from any of the three months immediately preceding the date of the application;

(F) a notarized statement reflecting that the applicant is currently receiving rent-free housing. The statement must be signed by the individual providing the rent-free housing and must include the address and phone number of the individual providing the rent-free housing;

(G) a utility payment receipt from any of the three months immediately preceding the date of the application;

(H) a Texas property tax receipt for the most recently completed tax year;

(I) a payroll or retirement check dated within the three months immediately preceding the date of the application;

(J) employment/unemployment records prepared within the three months immediately preceding the date of the application;

(K) a statement from a financial institution issued within the three months preceding the date of the application; or

(L) social security supplemental income or disability income records or social security retirement benefit records issued within the three months immediately preceding the date of the application.

(e) Applications submitted under subsections (b) and (c) of this section shall also include evidence of the legal relationship between the applicant and the resident, such as:

(1) a marriage license or declaration of non-ceremonial marriage to document the marriage of the applicant and spouse;

(2) a birth certificate establishing the parent/child relationship between the applicant and the resident;

(3) a final order showing the appointment of the resident as guardian for the minor;

(4) a final order naming the applicant's managing conservator; or

(5) an income tax return showing name and relationship of the applicant to the resident.

(f) Any difference between the name of the applicant and the name on any document must be explained by additional documentation (Example: marriage license, divorce decree, or adoption decree).

§37.214. Applications and Eligibility Date.

Persons meeting the eligibility requirements set forth in §37.212(a)(1), (2), (3) and (5) of this title (relating to Recipient Requirements) must make an application for benefits through an approved Epilepsy Program contracted provider.

(1) Complete application. A complete application is required before any eligibility determination will be made. A complete application shall consist of all of the following:

(A) a complete Application for Benefits, with the applicant's, or the applicant's representative's original signature or "mark";

(B) a diagnosis of epilepsy certified by a licensed physician, or a statement that the applicant is suspected of having epilepsy;

(C) documentation of Texas residency as required by §37.213 of this title (relating to Residency and Residency Documentation Requirements);

(D) applicant financial data. Acceptable data to establish the applicant's financial qualifications shall be submitted with the application.

(2) Verification of Information. The contracted provider shall make the final determination of eligibility based on the information submitted with a completed application.

(3) Eligibility date for Epilepsy Program benefits. The date on which a person's eligibility will be determined will be the date upon which a properly completed application is received by the contracted provider. The Epilepsy Program eligibility date will be the later of:

(A) the date the contracted provider receives a completed application;

(B) the date the applicant is no longer considered a ward of the state;

(C) the date the applicant is no longer incarcerated in a city, county, state, or federal jail, or prison; or

(D) the date the applicant established Texas residency.

§37.215. Financial Criteria.

Financial need is established annually on the basis of income legally available to the applicant or the person(s) who have a legal obligation to support the applicant.

(1) The income used to determine eligibility is the combined gross income (or the adjusted gross income if self-employed) of the applicant and of all persons who have a legal obligation to support the applicant.

(2) Income includes earned wages, pensions or allotments, alimony, or any monies received on a regular basis for support purposes. Supplemental Security Income (SSI) for the disabled applicant is not included as income. Verification of income will be required as set out in §37.214(3) of this title (relating to Applications and Eligibility Date).

(3) The income level for eligibility is established at 200% of the Federal Poverty Level Guidelines, currently published by the U.S. Health and Human Services and adopted by the Texas Department of Health (department).

§37.216. Limitations and Benefits Provided.

(a) Benefits provided by the Epilepsy Program are outlined in the contract with each provider and may include:

(1) diagnosis and treatment of epilepsy;

(2) management of continuity of care; and

(3) integration of the personal, social, and vocational support services into the treatment plan.

(b) All Epilepsy Program benefits are limited to services received in Texas at a contracted provider.

(c) Depending on the recipient's eligibility status, services will be provided based upon:

(1) available funds;

(2) any contract between the Texas Department of Health (department) and the recipient's service provider; and

(3) any third-party liability.

(d) The Epilepsy Program is payor of last resort. Benefits are payable only after all third parties or government entities (e.g., private/group insurance or the Veterans Administration) have met their liability.

§37.217. Participating Providers.

(a) Selection of Service Providers. Providers are solicited and selected by a Request for Proposal (RFP) process. An organization may apply to become a contracted provider by responding to an RFP to participate in the Epilepsy Program that has been published in the Texas Register. The RFP must be accompanied by documentation which is acceptable to the Texas Department of Health (department) and which is sufficient to demonstrate that the organization:

(1) can provide the range of medical, non-medical and support activities outlined in the RFP and deemed necessary by the department to effectively serve eligible persons in the designated geographic area;

(2) agrees to comply with the department's Uniform Grant Management Standards as promulgated by the State of Texas Governor's Office; and

(3) agrees to cooperate with the department in accordance with Texas Health and Safety Code, Chapter 40; Title 25 Texas Administrative Code §§37.211 - 37.222; and the Texas Family Code, §231.006.

(b) Provision of Services. Epilepsy Program services shall be furnished by providers under contract with the department.

(c) Suspension or Termination of Service Providers. Any contracted provider may be terminated or suspended from participation in the Epilepsy Program for any of the following reasons:

(1) providing false or misleading information regarding any participation criteria;

(2) a material breach of any contract or agreement with the Epilepsy Program;

(3) failure to maintain the participation criteria contained in subsection (a) of this section.

(d) Appeal of Termination or Suspension. A contracted provider may appeal a termination or a suspension through the department's reconsideration and fair hearings process, as contained in §37.218 of this title (relating to Notice of Intent to Take Action and Reconsideration) and §37.219 of this title (relating to Notice and Fair Hearing).

(1) The Epilepsy Program may not terminate program participation until a final decision is rendered under the department's reconsideration and fair hearing process.

(2) The Epilepsy Program shall not enter into, extend, or renew a contract or agreement with a contracted provider until a final decision is rendered under the department's reconsideration and fair hearings process.

(3) A contracted provider may not appeal a termination of a contract which results from limitations in appropriations or funding for covered services or benefits or which terminates under its own terms.

§37.218. Notice of Intent to Take Action and Reconsideration.

(a) When notice of intent to take action is required. An Epilepsy Program applicant, recipient, or provider is entitled to a notice of intent to take action under this section anytime the Epilepsy Program intends to take action.

(b) Time of notice of intent to take action. A notice of intent to take action shall be mailed to the applicant, recipient, or provider not less than 20 days prior to the time the Epilepsy Program intends to take an action.

(c) Content of notice of intent to take action. The notice shall contain the following information:

(1) a statement of the action the Epilepsy Program intends to take;

(2) an explanation of the reasons for the action the Epilepsy Program intends to take;

(3) an explanation of the applicant's, recipient's, or provider's right to request a reconsideration before the action is taken;

(4) the procedure by which the applicant, recipient, or provider may request a reconsideration from the Epilepsy Program, including the address where written requests shall be submitted and any phone number the applicant, recipient, or provider may call to request assistance or a reconsideration; and

(5) a statement that the applicant, recipient, or provider shall make a request for reconsideration within 20 days of the date on the notice and that if the applicant, recipient, or provider does not request a reconsideration, the applicant's, recipient's, or provider's right to a reconsideration and fair hearing will be waived and the action will become final.

(d) No request. If a request for reconsideration is not received within the time allowed, the action shall become final 20 days after the date on the notice and the right to reconsideration or a fair hearing is waived.

(e) Reconsideration procedure. If an applicant, recipient, or provider contacts the Epilepsy Program requesting a reconsideration, the Epilepsy Program will conduct a review of the request and the action shall not become final until a decision is made as described in this subsection.

(1) The Epilepsy Program will conduct a comprehensive review of the request within 180 days of the Epilepsy Program's receipt of the request. The Epilepsy Program will:

(A) obtain any additional medical information or documentation required or available to support the request; and

(B) review the request along with all supporting documentation.

(2) If the Epilepsy Program determines that the request is approved based on the comprehensive review, the Epilepsy Program will notify the applicant, recipient, or provider that the request is approved.

(3) If the Epilepsy Program determines that the request is not approved and that an action will be taken, the Epilepsy Program will notify the applicant, recipient, or provider of their right to a fair hearing as described in §37.219 of this title (relating to Notice and Fair Hearing).

§37.219. Notice and Fair Hearing.

(a) Notice required. An applicant, recipient, or provider will be notified of their right to a fair hearing if the Epilepsy Program does not approve the applicant's, recipient's, or provider's request after a reconsideration.

(b) Content of notice. The notice shall contain the following information:

(1) a statement of the action the Epilepsy Program intends to take;

(2) an explanation of the reasons for the action the Epilepsy Program intends to take;

(3) an explanation of the applicant's, recipient's, or provider's right to request a hearing;

(4) the procedure by which the applicant, recipient, or provider may request a fair hearing from the Texas Department of Health (department), including the address where written requests shall be submitted;

(5) an explanation that the applicant, recipient, or provider may represent themselves, or use legal counsel, a relative, a friend, or another spokesperson;

(6) an explanation that the applicant, recipient, or provider may request that the fair hearing be conducted based on the written information used in the reconsideration process and any additional written information submitted without the necessity of taking oral testimony; and

(7) a statement that the applicant, recipient, or provider shall make a request for a fair hearing within 20 days of the date of the notice and that if the applicant, recipient, or provider does not request a fair hearing, the applicant's, recipient's, or provider's right to a fair hearing will be waived.

(c) Fair hearing procedure. A fair hearing will be conducted under the department's fair hearing procedures at §§1.51 - 1.55 of this title (relating to Fair Hearing Procedures).

(d) Fair hearing decision. A final decision shall be made by the department within 90 days from the date the applicant, recipient, or provider makes a request for a fair hearing, unless waived in writing by the applicant, recipient, or provider.

§37.220. Forms.

Forms which have been developed by the Texas Department of Health (department) for use in the Epilepsy Program will be provided to applicants and contracted providers, as necessary.

§37.221. Confidentiality of Information.

(a) All information required by this chapter to be submitted may be verified at the discretion of the Texas Department of Health (department) and without notice to the applicant or recipient of benefits of the Epilepsy Program, or to the providers of Epilepsy Program services. This information is confidential to the extent authorized by law.

(b) Information may be disclosed in summary, statistical, or other forms which does not identify particular individuals.

§37.222. Nondiscrimination Statement.

The Texas Department of Health (department) operates in compliance with the Civil Rights Act of 1964, Title VI (Public Law 88-352); 45 Code of Federal Regulations Part 80 so that no person will be excluded for participation in, be denied benefits, or otherwise subjected to discrimination on the grounds of race, color, or national origin, sex, creed, handicap or age.

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 October 26, 2001.

TRD-200106567

Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 458-7236

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CHAPTER 61. CHRONIC DISEASES

SUBCHAPTER C. BREAST AND CERVICAL CANCER CONTROL PROGRAM

25 TAC §§61.31 - 61.42

The Texas Department of Health (department) proposes amendments to §§61.31-61.42 concerning the operation of the Texas Breast and Cervical Cancer Control Program (program). In accordance with the requirements of Government Code, §2001.039, the sections have been reviewed, and the department has determined that reasons for their adoption continue to exist because rules on this subject are needed. However, the sections require revision as described in this preamble.

The department published a Notice of Intention to Review for §§61.31-61.42 in the *Texas Register* on January 7, 2000 (25 TexReg 218). No comments were received.

Specifically, the sections concern purpose and scope; federal authorization and requirements; eligible applicants; target population; selection process; program requirements; financial eligibility and screening guidelines; quality assurance standards; follow-up; maintenance of current services; reimbursement of costs; and client charges.

An amendment to §61.31 updates the purpose and scope of the program. An amendment to §61.32 incorporates references to the re-authorization of the enabling federal legislation and clarifies the department's role in managing the program. An amendment to §61.33 clarifies the program income eligibility requirements and the types of organizations eligible to apply for program funds. An amendment to §61.34 clarifies the target population and describes the priority populations for program services. An amendment to §61.35 clarifies the criteria for selection of program service providers. An amendment to §61.36 clarifies the requirements that applicant organizations must meet to qualify for program funding, including the addition of requirements for maintenance of effort and matching contributions. An amendment to §61.37 clarifies program financial eligibility and updates requirements for screening and diagnostic services. An amendment to §61.38 repeals a reference to publications listed in §61.32 containing quality assurance standards. An amendment to §61.39 adds requirements for follow-up and case management. An amendment to §61.40 updates the intent of the program to provide diagnostic services, client education, professional education, and case management in addition to screening services. An amendment to §61.41 revises the reimbursement method used by the program and updates the method for determining reimbursement rates. Additionally, the amendment describes the conditions under which administrative and other costs are reimbursed. An amendment to §61.42 clarifies program policy prohibiting the charging of fees to program clients.

Rosamaria Murillo, LMSW, Program Director, has determined that for each year of the first five years the sections are in effect, there will be no fiscal implications to state or local governments as a result of administering the sections as proposed because

the amendments involve no changes in the scope or operation of the program.

Ms. Murillo has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections will be the continued availability of screening, diagnostic, and follow-up services for breast and cervical cancer. Since no current program contractors are for-profit entities, and no prior contractors have been for-profit entities, Ms. Murillo anticipates no impact on micro-businesses or small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Rosamaria Murillo, LMSW, Director, Breast and Cervical Cancer Control Program, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7644. Comments will be accepted for 30 days following publication of this proposal in the Texas Register.

The amendments are proposed under Health and Safety Code §12.001, which provides the Texas Board of Health (board) with authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The amendments affect Health and Safety Code, Chapter 61.

§61.31. Purpose [and Scope].

[(a)] These [The purpose of these] sections implement [is to establish] requirements and procedures established by the federal government, the State of Texas, and the Texas Department of Health (department) for the delivery of screening, diagnostic, and follow-up services for breast and cervical cancer through [concerning the implementation of] the department's [Texas] Breast and Cervical Cancer Control Program [(program)].

[(b) The scope of the sections cover federal requirements and procedures concerning the program and Texas Department of Health requirements and procedures concerning the implementation of screening and follow-up services for the program.]

§61.32. Federal Authorization and Requirements.

[(a)] The Breast and Cervical Cancer Mortality Prevention Act of 1990 (Act), Public Law 101-354, and its re-authorization, the Women's Health Research and Prevention Amendments of 1998, Public Law 105-340, establish [establishes] a program of grants to states, territories, and tribal organizations for prevention and control of breast and cervical cancer. The Texas Department of Health, through a cooperative agreement with the Centers for Disease Control and Prevention and in compliance with the Act and its reauthorization, manages the statewide Breast and Cervical Cancer Control Program (program). [Under authority of the Act, the United States Department of Health and Human Services, Centers for Disease Control and Prevention (DHHS/CDC), has published documents containing the requirements, guidelines, and instructions covering the program. The documents are titled "1991 Early Detection and Control of Breast and Cervical Cancer (Announcement Number 121); Program Guidance, Application Instructions and Information," "Quality Assurance Guidelines for Cervical Cytology Services Under Public Law 101-354 CDC Program Announcement Numbers 121,122," and "Mammography Quality Assurance Guidelines for Facilities Participating in Breast and Cervical Prevention and Control Programs Supported by the Centers for Disease Control."]

[(b) In order to participate in the program, the Department of Health (department) is required to follow the provisions in the Act and in the DHHS/CDC document issued under authority of the Act. Accordingly, the department adopts by reference the provisions in the Act and the DHHS/CDC documents described in subsection (a) of this section. Copies of the Act and the DHHS/CDC document are available for public review in the office of the Chronic Disease Prevention Program, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, during regular business hours.]

§61.33. Eligible Applicants.

Health [Eligible applicants for the Breast and Cervical Cancer Control Program include local health] care providers serving women with incomes at or below 200% of the federal poverty level are eligible to apply as participants in the Breast and Cervical Cancer Control Program. Eligible applicants [These] include, but are not limited to, community health centers, migrant health centers, local and regional health departments, family planning clinics, community cancer centers, hospitals, primary care programs, and other providers of health services to the target and priority populations [population].

§61.34. Target and Priority Populations [Population].

(a) The target population for the Breast and Cervical Cancer Control Program (program) is women with incomes at or [medically underserved women who are] below 200% of the federal poverty level and who do not have access to third-party payment for breast and cervical cancer screening or diagnostic services. [Special efforts should be made to reach minority women.]

(b) Priority populations for breast cancer screening services include:

(1) women age 50-64;

(2) African American women;

(3) American Indian women; and

(4) other populations designated by the program.

(c) Priority populations for cervical cancer screening services include:

(1) women age 18-64 who have never been screened or who have not been screened within the previous five years;

(2) American Indian women; and

(3) other populations designated by the program.

§61.35. Selection Process.

Selection [Funding] of [new and current] applicants eligible to provide program services, as defined in §61.33 of this title (relating to Eligible Applicants), will be based on previous performance as service providers, and/or the merits [merit] of proposals submitted by eligible applicants [proposals which will be evaluated] using criteria in §61.34 [§61.36] of this title (relating to Target and Priority Populations [Program Requirements]).

§61.36. Program Requirements.

To be funded to provide [for the] Breast and Cervical Cancer Control Program (program) services, applicants shall demonstrate [must provide]:

(1) evidence of a population in need;

(2) evidence of ability to contact and serve priority populations [access to the targeted population and ability to reach high-risk clients];

(3) evidence of [demonstrated] ability to comply with tracking, follow-up, and reporting requirements;

(4) evidence of [demonstrated] ability to comply with [meet] quality assurance standards;

(5) evidence of identified local diagnostic and treatment resources [~~coordination with existing breast and cervical cancer programs~~];

(6) evidence of intent to comply with program screening policies and guidelines [~~assurance that Breast and Cervical Cancer Control Program elements are integrated into health care delivery systems~~];

(7) evidence of ability to apply financial eligibility standards [~~identified diagnostic and treatment resources~~];

(8) evidence of ability to comply with all other program standards, policies, and requirements; [~~intent to adhere to American Cancer Society screening guidelines; and~~]

(9) evidence that program funds will not be used to supplant existing services; and [~~of ability to apply financial eligibility standards.~~]

(10) evidence that the applicant has received funding for and budgeted the match sources and allowances of nonfederal contributions for the program.

§61.37. Program ~~[Financial]~~ Eligibility Requirements ~~[and Screening Guidelines]~~.

[~~(a)~~] Service providers shall [~~Applicants must~~] demonstrate their ability to apply [~~adhere to~~] the following financial eligibility and screening services requirements: [~~guidelines.~~]

(1) Only women [~~No person~~] with incomes [~~income~~] at or below [~~above~~] 200% of the federal poverty level and [~~or~~] who have no access to [~~has~~] third-party payment for screening and/or diagnostic services are [~~is~~] eligible to receive Breast and Cervical Cancer Control Program (program) services. The program must be the payer of last resort.

(2) Breast cancer screening shall include a clinical breast examination and a mammogram [~~Only women age 40 or older will be eligible for screening mammography~~].

(3) Only women age 40 or older are eligible for program-funded breast cancer screening services. Women under age 40 are eligible for diagnostic services only [~~Screening will include a clinical breast examination and mammography according to American Cancer Society (ACS) guidelines for women age 40 or older~~].

(4) Cervical cancer screening shall include a clinical breast examination, pelvic examination, and a [~~All women who are, or have been sexually active, or who have reached the age of 18, will be eligible for an annual~~] Pap test [~~and pelvic examination~~].

(5) Women age 18 or older are eligible for program-funded cervical cancer screening and diagnostic services [~~After a woman has had three or more consecutive satisfactory normal annual examinations, the Pap test may be performed less frequently at the discretion of her physician~~].

(6) Participating providers

[~~(b)~~] [~~Applicants shall provide the breast exam and~~] may subcontract with other [~~local~~] providers for clinical [~~screening and diagnostic mammography~~] services [~~(repeat mammography; diagnostic mammography), including interpretations. Applicants will provide the pelvic exam and take the Pap smear, will use state-contracted laboratories for interpretation of Pap smears, and will either provide or contract for diagnostic services related to Pap smears (i.e., colposcopy; biopsy)~~].

§61.38. Quality Assurance Standards.

[~~Quality assurance is essential to ensure that superior standards for mammography and cytological laboratory procedures are followed by all program providers.~~] All participating [~~program~~] providers in the Breast and Cervical Cancer Control Program (program) shall [~~must~~] deliver or assure the delivery of mammography and cytological laboratory services [~~be~~] in compliance with quality assurance standards specified by the program [~~guidelines adopted by reference in §61.32 of this title (relating to Federal Authorization and Requirements)~~].

§61.39. Follow-up and Case Management.

Timely [~~Providing~~] follow-up and continuity of care are [~~is an~~] essential components [~~component~~] of the Breast and Cervical Cancer Control Program (program) [~~any comprehensive breast and cervical cancer control program~~]. Women eligible for program services who have abnormal breast or cervical cancer screening or diagnostic results shall receive follow-up services, including case management, until a diagnosis is reached and/or treatment for cancer is initiated. Participating program providers shall offer follow-up and case management services in compliance with the following requirements: [~~A tracking system must be in place to assure appropriate screening, referrals, follow-up, and treatment for those women who receive services through the Breast and Cervical Cancer Control Program.~~]

(1) Providers shall establish protocols for making referrals [~~Tracking system. Applicants shall maintain a tracking system to assure a minimum data set consistent with state efforts for monitoring the number and characteristics of women screened and outcomes of screening. The tracking system should be used to assure that recommended periodic screening occurs~~].

(2) Providers shall assure that services for each eligible client include assessment, planning, and monitoring within the minimum time frames indicated in the program standards and policies [~~Data collection and submission. The Breast and Cervical Cancer Control Program will provide a comprehensive data collection form for tracking clients from initial contact to treatment if indicated. All funded screening programs shall use this form so that data collected will be consistent with the needs for statewide program evaluation. Programs shall maintain collected data in a database and submit data in a standardized format and on a scheduled basis as specified by the Breast and Cervical Cancer Control Program~~].

(3) Providers shall assure that each client has the opportunity to participate in the assessment and planning processes of case management [~~Client education. Every client shall be counseled and tracked to ensure compliance with recommended follow-up procedures and encouraged to repeat exams at intervals. Clients shall be provided information on the recommended frequency of breast and cervical screenings according to the American Cancer Society guidelines~~].

(4) Case management services shall be provided following the receipt of an abnormal screening or diagnostic result.

(5) Providers shall notify and/or intervene with clients more quickly than normal if indicated by the severity of the screening and diagnostic results.

(6) Providers shall attempt to contact clients who have abnormal screening or diagnostic results. Attempts to contact such clients shall be documented in accordance with program policies before such clients are reported as refusing services or lost to follow-up.

(7) Providers shall document follow-up, diagnostic, and treatment services in each client's record according to program policy.

(8) Providers shall be responsible for assuring diagnosis and treatment of clients regardless of the availability of program funds or the status of the provider's contract with the program.

(9) Providers shall periodically assess client satisfaction with screening, referral, and case management services.

§61.40. Maintenance of Current Services.

The intent of the Breast and Cervical Cancer Control Program program) is to provide breast and cervical cancer [expand] screening and diagnostic services[.] , client education concerning breast and cervical cancer, professional education to clinicians providing services to clients receiving program-funded services, and case management to program clients with abnormal screening or diagnostic results. Program funds may not be used [Applicants shall not use program funds] to supplant existing services.

§61.41. Reimbursement for Services [of Costs].

(a) Reimbursement for clinical screening and diagnostic services [Monthly reimbursement for services provided] shall be on a fee-for-service [unit cost] basis. [Unit costs will be subject to audit by the Texas Department of Health (department). The unit cost for the following screening, follow-up, and diagnostic procedures will be determined by the applicant and shall not exceed the maximum cost as determined by the department:]

[(1) breast and cervical cancer screening;]

[(2) breast screening only;]

[(3) cervical screening only;]

[(4) repeat and diagnostic mammograms;]

[(5) repeat Pap tests;]

[(6) colposcopy; and]

[(7) colposcopy and biopsy.]

(b) Reimbursement will be subject to audit by the department. The Breast and Cervical Cancer Control Program (program) shall approve all covered procedures and reimbursement rates, which shall not exceed the maximum state Medicare rate for that procedure. A list of procedures approved for reimbursement shall be included in all program requests for proposals, contracts, and the program Manual of Operations.

(c) [(b)] The program shall reimburse providers for administrative costs. Administrative costs include costs associated with the following activities [The maximum unit cost for each procedure includes costs for performing activities involving]:

(1) eligibility determination [outreach];

(2) outreach [eligibility determination];

(3) client education [counseling/education]; [and]

(4) data collection [tracking] and reporting; and [follow-up.]

(5) other activities authorized in advance.

[(c) Indirect costs shall be included in the unit cost calculation.]

(d) In order to be reimbursed for administrative costs, a provider must request such reimbursement in its annual proposed budget. Administrative cost reimbursement shall not exceed 10% of a service provider's budget for clinical services. [Applicants may not include the following costs in determining their unit cost for each procedure:]

[(1) diagnostic procedures, except those specified in this section;]

[(2) treatment or treatment services;]

[(3) services already being provided;]

[(4) building construction, alteration, or renovations; and]

[(5) purchased equipment except as justified in relation to conducting the screening program, and which has received specific written approval from the department.]

§61.42. Client Charges.

Participating providers [Contractors] may not charge clients fees for services reimbursed by the program [to clients who are provided services under the Breast and Cervical Cancer Control Program].

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 October 26, 2001.

TRD-200106593
Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 458-7236

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CHAPTER 129. OPTICIANS' REGISTRY

25 TAC §129.4

The Texas Department of Health (department) proposes an amendment to §129.4, concerning the voluntary registration and regulation of dispensing opticians. Specifically, the amendment covers fees and is necessary to implement provisions of House Bill 3465, 77th Legislature, 2001, which amended the Occupations Code, Chapter 352 (Opticians' Registry Act) to remove the cap on registration and renewal fees. Additionally, the amendment is necessary to increase fees in order to cover the costs of administering the program.

L. Jann Melton-Kissel, Chief of Staff, Associateship for Consumer Health Protection, has determined that the fiscal impact on state government for each year of the first five years the section is in effect there will be an increase in revenue of approximately $21,000. There will be no fiscal implication for local governments.

Ms. Melton-Kissel 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 enforcing the section will be to provide a means by which the public can identify providers of opthalmic dispensing services and products that meet minimum standards of competence. The amendment, as proposed, is not expected to have a measurable impact on small businesses or micro-businesses because the Opticians' Registry Act provides only for the voluntary registration of natural persons. The anticipated costs to persons with a single registration in spectacle dispensing or contact lens dispensing will incur an increase of $20 per year. Persons who hold dual registrations in both spectacle and contact lens dispensing will incur an increase of $30 per year. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Heather Muehr, Program Administrator, Opticians' Registry Program, Professional Licensing and Certification Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3783, (512)

834-6661. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The amendment is proposed under Texas Occupations Code, Chapter 352, which provides the Board of Health (board) with the authority to adopt rules; and Health and Safety Code, §12.001, which provides the board with authority to adopt rules to implement every duty imposed by law on the board, the department and the commissioner of health.

The amendment affects Texas Occupation Code, Chapter 352, and Health and Safety Code, Chapter 12.

§129.4. Fees.

(a) Schedule of fees. The fees are as follows:

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

(3) registration renewal fee--$50 [~~$30~~];

(4) dual registration renewal fee--$80 [~~$50~~];

(5) - (7) (No change.)

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

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

Filed with the Office of the Secretary of State, on October 26, 2001.

TRD-200106590
Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 458-7236

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CHAPTER 130. CODE ENFORCEMENT REGISTRY

25 TAC §130.12, §130.20

The Texas Department of Health (department) proposes an amendment to §130.12 and new §130.20 concerning the registration of code enforcement officers. Specifically, the amendment covers requirements for registration renewal related to continuing education. The new section prescribes the continuing education requirements, including the number of hours; establishes an approved curriculum; and provides that the curriculum be taught by suitable public agencies and private entities. The proposed sections are necessary to implement House Bill 2437 (2001), which amended the Code Enforcement Officers' Registration Act, Texas Revised Civil Statutes, Article 4447bb (the Act).

The Board of Health (board) is authorized by the Act, to adopt rules concerning the registration of code enforcement officers. The amendment and new section are necessary to implement House Bill 2437, which requires the board to adopt rules prescribing the requirements for continuing education for registered code enforcement officers and code enforcement officers in training.

L. Jann Melton-Kissel, Chief of Staff, Associateship for Consumer Health Protection, has determined that for each year of the first five years the sections are in effect, there will be no fiscal implications to state government as a result of enforcing or administering the sections as proposed. There may be fiscal implications to local government if city or county governments choose to reimburse employees for attendance at continuing education activities or if the city or county governments choose to provide or arrange for in-house training for employees. Cost estimates are not available because programs do not currently exist in six-hour blocks that would meet the continuing education requirements. Costs for existing activities such as the annual conference of the Code Enforcement Officers' Association of Texas or the Intermediate Code Enforcement Officers' Training course offered by the Texas Engineer Extension Service, Texas A & M University, will vary in costs based on conference or program registration fees and the cost of travel for individuals to attend. A primary consideration in determining the required number of hours and the types of acceptable activities and sponsors was to establish the opportunity for all registered code enforcement officers to have access to the training without incurring the costs associated with attending professional association conferences or university programs.

Ms. Melton-Kissel has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the sections will be to assure that the code enforcement officers meet higher standards of education and training as a result of complying with the new requirements for continuing education. The proposed rules are not expected to have an impact on small businesses or micro-businesses, because registered code enforcement officers are employed by local governments rather than commercial businesses. There are minimal anticipated economic costs to persons who are required to comply with the sections as proposed, which are limited to expenses not reimbursed the employer for the cost of taking the required course(s), including travel. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Yvonne Feinleib, Program Administrator, Code Enforcement Officer Registration Program, 1100 West 49th Street, Austin, Texas 78756, (512) 834-4523. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendment and new section are proposed under the Texas Revised Civil Statutes, Article 4447bb, which provides the board with the authority to adopt rules concerning continuing education for registered code enforcement officers and code enforcement officers in training; and the Health and Safety Code, §12.001, which provides the Board of Health (board) with authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The amendment and new section affect Texas Revised Civil Statutes, Article 4447bb.

§130.12. Code Enforcement Registration Renewal.

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

(c) Registration renewal.

(1) At least 30 days prior to the expiration date of a person's registration, the department will send notice to the registrant at the address in the department's records of the expiration date of the registration, the amount of the renewal fee due, the number of continuing education hours required for renewal, and a renewal form which the registrant must complete and return to the department with the required renewal fee.

(2) The renewal form for all registrants shall require the provision of the preferred mailing address, primary employment address and telephone number, category of employment, and a statement of any [~~all~~] misdemeanor and felony offenses for which the registrant has been convicted and a statement attesting to completion of the required continuing education hours. The registration renewal form for code enforcement officers in training shall be accompanied by a current supervision contract on department forms complying with §130.6(c)(3) of this title (relating to Registration Qualification Requirements).

(3) A registrant has renewed the registration when the registrant has mailed the renewal form and the required renewal fee to the department prior to the expiration date of the registration, unless selected for random audit of continuing education. The postmark date shall be considered as the date of mailing.

(4) (No change.)

(d) Late renewal.

(1) (No change.)

(2) Persons renewing late are automatically subject to audit and must submit copies of continuing education certificates.

(3) [~~(2)~~] A person whose registration has expired for not more than one year may renew the registration by submitting to the department the registration renewal form, copies of continuing education certificates, the renewal fee, and the reinstatement fee. The renewal must be mailed to the department not more than one year after the expiration date of registration. The postmark date shall be considered as the date of mailing.

(4) [~~(3)~~] A person whose registration has been expired for more than one year may not renew. The person may obtain a new registration by complying with the then current requirements and procedures for obtaining a registration.

(e)-(f) (No change.)

§130.20. Continuing Education.

(a) Each registered code enforcement officer and code enforcement officer in training must meet the renewal requirements set out in this section.

(b) Code enforcement officers in training who apply to upgrade prior to the expiration of their registration are not required to submit continuing education hours in order to upgrade.

(c) Each registered code enforcement officer and code enforcement officer in training must obtain and show proof of not less than six continuing education hours as set forth in this section within the twelve months preceding renewal of their registration, at least one hour of which must be in legal/legislative issues as provided in subsection (j)(12) of this section.

(d) Only continuing education activities conducted in accordance with this section shall be considered approved by the department and may be represented to the public as acceptable for registration renewal for registered code enforcement officers in Texas.

(e) Department approved continuing education activities for license renewal include the following:

(1) conferences;

(2) home-study training modules (including professional journals requiring successful completion of a test document);

(3) lectures;

(4) panel discussions;

(5) seminars;

(6) accredited college or university courses;

(7) video or film presentations with live instruction;

(8) field demonstrations;

(9) teleconferences; or

(10) other activities approved by the department.

(f) Only continuing education activities approved by the department or its designee in accordance with this section shall serve as a basis for registration renewal.

(g) Continuing education activities must meet the following criteria if they are to be acceptable for continuing education credit:

(1) the activity must cover one or more of the curriculum areas listed in subsection (j) of this section;

(2) the activity must be conducted by an organization which is:

(A) an accredited college or university;

(B) a governmental agency, including local, state or federal agencies;

(C) an association with a membership of 25 or more persons, or it's affiliate; or;

(D) a commercial education business;

(3) the activity must have a record keeping procedure which includes a register of who took the course and the number of continuing education units earned;

(4) the organization must implement procedures for verifying participant's attendance;

(5) the activity must be at least 50 minutes in length of actual instruction time. Round table discussions and more than one speaker for the total of 50 minutes per activity is permissible. No credit will be given for time used for other non-relevant activities; and

(6) the activity must be conducted in compliance with all applicable federal and state laws, including the Americans with Disabilities Act (ADA) requirements for access to activities.

(h) Organizations shall send, e-mail, or fax notification of upcoming continuing education to the department at least 15 days prior to the event which includes the:

(1) date(s) of the continuing education activity;

(2) time of the continuing education activity ;

(3) location of the continuing education activity;

(4) title of the activity; and

(5) name of the instructor(s).

(i) Commercial education businesses, in addition to the items listed in subsection (h) of this section, shall submit a request for approval on department forms; and shall not represent any course as approved until such approval is granted by the department in writing.

(j) The curriculum of an approved activity must include one or more of the following subjects:

(1) zoning and zoning ordinance enforcements;

(2) sign regulations;

(3) home occupations;

(4) housing codes and ordinances;

(5) building abatement;

(6) nuisance violations;

(7) abandoned vehicles;

(8) junk vehicles;

(9) health ordinances;

(10) basic processes of law related to code enforcement;

(11) professional, supervisory or management training related to the profession of code enforcement; or

(12) legislative or legal updates related to the profession of code enforcement.

(k) Documentation of continuing education activity shall be maintained by the organization for three years, including:

(1) a roster which shall include the following:

(A) name, address, phone number, code enforcement officer or code enforcement officer in training registration number, social security number (used to coordinate continuing education activity information with the department's records), and signature of the registrant; and

(B) number of continuing education hours earned by each individual;

(2) copy of notification and method transmitted to the department; and

(3) copies of all program materials sufficient to demonstrate compliance with this section.

(l) At the conclusion of the activity the organization shall distribute to those registered code enforcement officer and code enforcement officer in training who have successfully completed the activity a certificate of completion which shall include the name of the registrant; the name of the organization providing the training, the title of the activity; the date and location of the activity, and the continuing education hours earned. The certificate shall state "Approved in accordance with 25 Texas Administrative Code, §130.20 for code enforcement officer/code enforcement officer in training registration renewal in Texas." It shall include a breakdown of the hours earned on each topic listed under subsection (j) of this section.

(m) Each registered code enforcement officer and code enforcement officer in training shall collect and keep certificates of completion of approved courses. These certificates of completion will be used to document the attendance of a registered code enforcement officer or code enforcement officer in training at approved courses. The department will conduct random audits for compliance with this requirement.

(n) Failure to comply with the annual continuing education hour requirements for the registered code enforcement officer or code enforcement officer in training registration issued by the department will:

(1) result in suspension of a code enforcement officer or code enforcement officer in training registration until the necessary credits for continuing education are successfully completed; and

(2) require the registered code enforcement officer or code enforcement officer in training to make new application for registration as a code enforcement officer or code enforcement officer in training, if the registered code enforcement officer or code enforcement officer in training does not renew within one year after the original registration expired.

(o) The department may fail to accept any or all courses for registration renewal if an organization fails to file a timely notice of upcoming continuing education, fails to retain documentation related to the activity as required by this section, or fails to comply with any other requirements that are a basis for approval or that are a part of this subchapter.

(p) A registered code enforcement officer or code enforcement officer in training registration may file a written request for an extension of time for compliance with any deadline in this subsection. Such request for extension, not to exceed 30 days, shall be granted by the department if the registered code enforcement officer or code enforcement officer in training files appropriate documentation to show good cause for failure to comply timely with the requirements of this subsection. Good cause includes, but is not limited to, extended illness, extended medical disability, or other extraordinary hardship which is beyond the control of the person seeking the extension.

(q) Transition.

(1) Any course taught between September 1, 2001, and the effective date of these rules will be accepted by the Code Enforcement Officer Registration Program for renewals between September 1, 2002, and August 31, 2003, provided that the course:

(A) covers one or more of the subjects listed in subsection (j) of this section;

(B) is taught in Texas by an organization listed in subsection (g)(2) of this section; and

(C) provides each attendee with a certificate listing the number of contact hours earned.

(2) A continuing education course approved for registration renewal under this section must be taken in the 12 months immediately preceding renewal to be considered acceptable.

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 October 26, 2001.

TRD-200106597
Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 458-7236

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CHAPTER 134. PRIVATE PSYCHIATRIC HOSPITALS AND CRISIS STABILIZATION UNITS

SUBCHAPTER A. GENERAL PROVISIONS

25 TAC §134.3

Texas Department of Health (department) proposes an amendment to §134.3, concerning the regulation of private psychiatric hospitals and crisis stabilization units. Specifically, the section covers fees.

The proposal increases the license fee for private psychiatric hospitals. The license fee for an initial license or a renewal license will change from the current fee of $10 per bed based upon the design capacity of the hospital with a minimum license fee of $200, to $15 per bed with a minimum license fee of $1,000. Health and Safety Code, §577.006(f) requires the department to annually review the fee schedules to ensure that the fees charged are based on the estimated costs to and level of effort expended by the department. The result of the review indicates that license fees must be increased to the maximum permitted by statute to help defray the cost of administering the private psychiatric hospital licensing program and investigating complaints.

Jann Melton-Kissel, Associateship of Consumer Health Protection, has determined that for each year of the first five year period the section is in effect, there will be fiscal implications as a result of enforcing or administering the section as proposed. The proposed change in the license fee is estimated to generate additional revenues of $15,000 each year of fiscal years 2002 - 2006 for state government. There will be no effect on local government unless a local government operates a private psychiatric hospital. In that case, the local government would be subject to the increased license fee.

Ms. Melton-Kissel also 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 enforcing or administering the section will be the continuation of licensing program activities. There will be no cost to micro businesses to comply with the section as proposed because private psychiatric hospitals are not micro businesses. The proposed increase in the license fee from $10 to $15 per bed, and the proposed increase in the minimum fee from $200 to $1,000 will impose an additional cost to persons who are required to comply with the section as proposed, including small and large businesses. The cost is the same for both small and large businesses. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to John M. Evans, Jr., Director, Hospital Licensing Program, Health Facility Licensing and Compliance Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 834-6648. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The amendment is proposed under Health and Safety Code, §577.006, concerning fees, and Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and commissioner of health.

The proposed section affects Health and Safety Code, Chapters 577 and 12.

§134.3. Fees.

(a) (No change.)

(b) License fees.

(1) The fee for an initial license or a renewal license is $15 [~~$10~~] per bed based upon the design bed capacity of the hospital. The total fee may not be less than $1,000 [~~$200 or more than $10,000~~]. The design bed capacity of a hospital is determined as follows.

(A) - (C) (No change.)

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

(c) - (e) (No change.)

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

Filed with the Office of the Secretary of State, on October 26, 2001.

TRD-200106589
Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 438-7236

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 3. LIFE, ACCIDENT AND HEALTH INSURANCE AND ANNUITIES

SUBCHAPTER Y. STANDARDS FOR LONG-TERM CARE INSURANCE COVERAGE UNDER INDIVIDUAL AND GROUP POLICIES

28 TAC §§3.3803 - 3.3805, 3.3810, 3.3819, 3.3821, 3.3829, 3.3831, 3.3832, 3.3837, 3.3839, 3.3844

The Texas Department of Insurance proposes amendments to §§3.3803 - 3.3805, 3.3810, 3.3819, 3.3821, 3.3829, 3.3831, 3.3832, 3.3837, 3.3839, and 3.3844 concerning standards for long-term care insurance coverage under individual and group policies. These amendments provide definitions and procedures necessary to implement House Bill 2482 enacted by the 77th Legislature, which added Texas Insurance Code Article 3.70-12, §5A. House Bill 2482 authorizes the department to adopt rules to stabilize long-term care insurance premium rates. The rules are necessary to ensure that: initial rates are adequate; any rate schedule increases after policy issuance are justified, adequate, and reasonable in relation to benefits provided policy/certificate holders; the policies/certificates contain appropriate terms; and policy/certificate holders affected by rate schedule increases are protected.

In accordance with the requirements of HB 2482, the rules are to be consistent with nationally recognized models relating to the stabilization of long-term care premium rates. The proposed amendments make Subchapter Y consistent with the rating practices and consumer disclosure amendments of the Long-Term Care Insurance Model Regulations promulgated by the National Association of Insurance Commissioners (NAIC) in October 2000 (10/00 Model Regulations) and the corresponding provisions of the Long-Term Care Insurance Model Act promulgated by the NAIC in April 2000 (4/00 Model Act).

The proposed amendments to §3.3803 clarify the types of policies, certificates, and riders to which Subchapter Y applies. The amendments clarify that the subchapter applies to policies defined in Insurance Code Article 3.70-12, §2(4) and riders attached to life insurance policies or certificates, or annuity contracts or certificates delivered or issued for delivery in this state. The amendments also clarify the types of policies to

which the subchapter does not apply. The proposed amendments to §3.3804 clarify that riders attached to life insurance policies or certificates, or annuity contracts or certificates, must comply with the provisions of Subchapter Y. They also add definitions for attained age rating, exceptional premium rate increases, level premium long-term care policy, long-term care benefit classifications, qualified actuary, and similar policy forms and expand the definition for group long-term care insurance and make a clarifying change to the definition of home health agency.

Proposed new subsection (b) to §3.3805 clarifies that life insurance policies or certificates or annuity contracts or certificates to which a long-term care rider is attached are subject to the statutes and regulations applicable to those policies, contracts or certificates; however, the long-term care rider attached to those forms is subject to Subchapter Y. Proposed new subsection (c) to §3.3810 specifies when the term "level premium" may be used.

The proposed amendments to §3.3819 clarify that reserves for long-term care policies must be determined in accordance with Subchapter GG of Chapter 3 of this title. The proposed amendment to §3.3821 clarifies that the section's provisions apply to group long-term care coverage under group policies described in Insurance Code Article 3.50, §1(6).

Proposed amendments to §3.3829 provide for required rating disclosures in the policy and at the time of application; require the applicant to sign an acknowledgement that disclosure was provided; authorize the use of a standard form prescribed by the department or, if the prescribed form is not used, require the insurer to file the form with the department; require notice of premium rate schedule increases and identify the timing of such notice; and amend the title of the section for consistency with the proposed amendments to the section.

The proposed amendments to §3.3831 clarify applicability of loss ratio standards and identify the type of information an insurer must provide to the department in connection with an initial premium rate filing and when the information must be provided. The amendments also describe the requirements for premium rate increases, including the information insurers must provide to the department prior to the provision of notice to the insured; the method by which premium rate schedule increases must be determined; and the information that the insurer must file with the department annually for the three years following implementation of the increase. The amendments contain additional requirements for insurers if the revised premium rate schedule is greater than 200% of the initial premium rate schedule. The amendments also provide that the department may require an insurer to take certain action if the insurer's actual experience following a rate increase does not match projections.

The proposed amendments to §3.3831 also identify additional information that insurers are required to file with the department for policies or certificates that are eligible for contingent benefit upon lapse. For certain types of rate increase filings, the amendments require the department to determine if significant adverse lapsation has occurred or is anticipated and to determine if a rate spiral exists. If a rate spiral exists, the department may require the insurer to take certain action. The amendments also authorize the department to take additional action upon a determination that an insurer has exhibited a persistent practice of filing inadequate initial premium rates. The amendments clarify that specific provisions of the subsection do not apply to certain types of group insurance.

The proposed amendment to §3.3832(b)(12) replaces the former telephone number for the Texas Department of Aging with the current telephone number. The proposed amendments to §3.3832(b)(15) require disclosure of contingent lapse benefit upon rejection of a nonforfeiture offer, remove the hyphen from the word "nonforfeiture," and delete a row of unnecessary figures from the example contained in §3.3832(b)(15)(A). The proposed amendment to §3.3837(a) adds paragraph (5), which clarifies when insurers are to file the annual rate filing required by Insurance Code Article 3.70-12, §4(b). The proposed amendment to §3.3839(a) adds paragraph (6), which requires that the terms "non-cancellable" and "level premium" be used only to describe policies and certificates that conform to §3.3810.

The proposed amendments to §3.3844 clarify that the section applies to contingent benefits as well as to nonforfeiture benefits, and also require an insurer, on or after July 1, 2002, to provide contingent benefits upon lapse to policyholders and certificate holders who decline to purchase policies that contain nonforfeiture benefits. The proposed amendments also require that if a group policyholder decides to offer nonforfeiture benefits to the certificate holder, the certificate must provide either the nonforfeiture benefit or the contingent benefit upon lapse. The amendments clarify when the contingent benefit upon lapse becomes effective and provide that it is subject to the loss ratio requirements of §3.3831. In addition, the amendments to §3.3844 delete the definition for attained age rating because that definition now is contained in §3.3804. The amendments clarify when the contingent benefit upon lapse is triggered and what the insurer is required to do when the benefit is triggered, and provide a method an insurer that purchased or otherwise assumed long-term care policies from another insurer must utilize to determine whether contingent nonforfeiture upon lapse provisions are triggered.

Kim Stokes, Senior Associate Commissioner, Life, Health and Licensing, has determined that for each year of the first five years the proposed sections will be in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the rule. There will be no measurable effect on local employment or the local economy as a result of administering or enforcing the proposed amendments.

Ms. Stokes has determined that for each year of the first five years the sections are in effect, the public benefits anticipated as a result of the sections will be: the stabilization of long-term care insurance premium rates; adequate disclosure of rate practices to consumers, enabling them to make more informed choices; the achievement of uniformity in methods used to develop rates for long-term care coverages; and the effective and consistent regulation of long-term care insurance coverage. Ms. Stokes has determined further that the public benefit also includes the protection of consumers who do not purchase nonforfeiture benefits by the provision of contingency benefits in case of lapse. The economic costs to any insurers required to comply with these proposed amendments are a direct result of the enactment of HB 2482, 77th Leg., and its directive that the Commissioner adopt rules consistent with nationally recognized models relating to the stabilization of long-term care premium rates, and not as a result of the proposed rule. Any other economic costs associated with compliance with the rule will be minimal. The proposed amendments are consistent with the rating practices and consumer disclosure amendments of the Long-Term Care Insurance Model Regulation, promulgated by the National Association of Insurance Commissioners (NAIC)

in October 2000 and the corresponding provisions of the Long-Term Care Insurance Model Act promulgated by the NAIC in April 2000.

The proposed amendments, like the NAIC model regulations, require insurers to provide certain disclosures to applicants. The department is developing a disclosure form that insurers will be able to use in providing this disclosure. Insurers who use the form prescribed by the department should not incur costs relating to the disclosure requirements beyond those anticipated by HB 2482. The proposed amendments provide insurers with the option of using other disclosure forms. However, if an insurer elects to use such a form, the insurer will be required to file the form with the department. Insurers who elect not to use the prescribed disclosure form will incur costs associated with the filing of the form with the department. Based on the department's knowledge of the industry, it is anticipated that most insurers who elect to use non-prescribed forms will use first class U.S. Postal Service delivery to file these forms. If the U.S. Postal Service is used, Ms. Stokes estimates that the cost of filing these disclosure forms will cost no more than $1.50 per form. This cost includes manual or electronic production of the form, the paper, the envelope, the manual or electronic addressing of the envelope, and the postage. The actual total cost to each insurer would depend on the number of disclosure forms that the insurer seeks to use. The additional cost for filing the disclosure form would be incurred only by those insurers who elect not to use the disclosure form prescribed by the department.

Ms. Stokes has determined that there is no adverse economic impact on insurers that qualify as a small business or micro-business under Government Code §2006.001 as a result of these proposed amendments. The economic costs to any small business or micro-business insurer required to comply with these proposed amendments are a direct result of the enactment of HB 2482 and its directive that the commissioner adopt rules consistent with nationally recognized models relating to the stabilization of long-term care premium rates and consumer disclosures. The determining factor in the costs that would be incurred by an insurer in complying with these amendments is not related to the size of the entity, but rather, is dependent upon whether the entity elects not to use the disclosure form prescribed by the department. The size of the business, therefore, has no bearing upon the applicability of these proposed amendments. Because of this and because the intent of HB 2482 is to stabilize long-term care insurance premium rates among all long-term care insurers, it is neither legal nor feasible to exempt small business or micro-business insurers from the requirements of these proposed sections.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on December 10, 2001 to Lynda H. Nesenholtz, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Diane Moellenberg, Chief Director of Regulatory Development, Life, Health and Licensing, Mail Code 107-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. A request for a public hearing should be submitted separately to the Office of the Chief Clerk.

The amendments to Subchapter Y are proposed under Insurance Code Article 3.70-12 and §36.001. Article 3.70-12 provides that the department may adopt rules that are necessary and proper to implement the article. Under section 7 of that article, any rules adopted by the commissioner regarding long-term care insurance shall include requirements no less favorable than the minimum standards for long-term care insurance adopted in any model laws or regulations relating to minimum standards for benefits for long-term care insurance and in accordance with all applicable federal law. New Article 3.70-12, §5A, enacted pursuant to House Bill 2482, authorizes the commissioner to adopt rules that are consistent with nationally recognized models relating to the stabilization of long-term care insurance premium rates and consumer disclosures. It further authorizes the commissioner to adopt rules that contribute to the uniformity of state laws and that protect consumers. Section 36.001 provides that the Commissioner of Insurance may adopt rules to execute the duties and functions of the Texas Department of Insurance as authorized by statute.

The following articles are affected by this proposal: Insurance Code, Article 3.70-12.

§3.3803. Applicability and Scope.

In accordance with Insurance Code Article 3.70-12, [~~The sections in~~] this subchapter applies [~~apply~~] to all long-term care insurance policies as that term is defined in §2(4) of the article, and riders attached to life insurance policies or certificates, or annuity contracts or certificates delivered or issued for delivery in this state except:

(1) certificates delivered or issued for delivery in this state under a single employer or labor union group policy that is delivered or issued for delivery outside this state; or

(2) a policy which is not designed, advertised, marketed, or offered as long-term care or nursing home insurance. [~~and group long-term insurance certificates other than those certificates issued or delivered pursuant to out-of-state single employer or labor union group policies, delivered or issued for delivery in this state on or after the effective date of this subchapter by insurers; by fraternal benefit societies, to the extent they are subject to provisions of the Insurance Code, Article 3.70-12; and by nonprofit health, hospital, and medical service corporations, including a company subject to the Insurance Code, Chapter 20; except that they do not apply to a policy which is not designed, advertised, marketed, nor offered as long-term care insurance or nursing home insurance. The provisions of these sections also apply to evidences of coverage delivered or issued for delivery in this state by health maintenance organizations under the Texas Health Maintenance Organization Act (Texas Insurance Code, Chapter 20A).~~]

§3.3804. Definitions.

(a) Except as otherwise provided by law or this subchapter, no long-term care insurance policy, [~~or~~] certificate, [~~or~~] group hospital service corporation subscriber contract, rider attached to a life insurance policy or certificate, or annuity contract or certificate may be delivered or issued for delivery in this state, unless it complies with, and contains definitions in conformance with, this subchapter.

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

(1) Activities of daily living--Bathing, continence, dressing, eating, toileting and transferring, as those terms are defined in this subsection.

(2) Acute condition--The individual's medical condition is medically unstable. Such an individual requires frequent monitoring by medical professionals, such as physicians and registered nurses, in order to maintain his or her health status.

(3) Adult Day Care--A social and health-related services program provided during the day in a community group setting, for the

purpose of supporting frail, impaired elderly, or other disabled adults who can benefit from care in a group setting outside the home.

(4) Adult Day Care Facility--Provider of Adult Day Care services, operated pursuant to the provisions of the Human Resources Code, Chapter 103 (concerning licensing and quality of care requirements in the provision of adult day care).

(5) Applicant--The person who seeks to contract for benefits or services, in the instance of an individual long-term care insurance policy; or the proposed certificate holder or enrollee, in the instance of a group long-term care insurance policy.

(6) Attained age rating--A schedule of premiums starting from the issue date which increases with age at least one percent per year prior to age 50, and at least three percent per year beyond age 50.

(7) [~~(6)~~] Bathing--Washing oneself by sponge bath or in either a tub or shower, including the task of getting into or out of the tub or shower.

(8) [~~(7)~~] Care--Terms referring to care, such as "home health care," "intermediate care," "maintenance or personal care," "skilled nursing care," and other services, shall be defined in relation to the level of skill required, the nature of the care, and the setting in which the care must be delivered.

(9) [~~(8)~~] Certificate--Any certificate issued under a group long-term care insurance policy, which certificate has been delivered or issued for delivery in this state. For purposes of these sections, the term:

(A) Also includes any evidence of coverage issued pursuant to a group health maintenance organization contract for long-term care health coverage.

(B) Does not include certificates that are delivered or issued for delivery in this state under a single employer or labor union group policy that is delivered or issued for delivery outside this state.

(10) [~~(9)~~] Continence--The ability to maintain control of bowel and bladder function; or, when unable to maintain control of bowel or bladder function, the ability to perform associated personal hygiene (including caring for catheter or colostomy bag).

(11) [~~(10)~~] Dressing--Putting on and taking off all items of clothing and any necessary braces, fasteners or artificial limbs.

(12) [~~(11)~~] Eating--Feeding oneself by getting food into the body from a receptacle (such as a plate, cup or table) or by a feeding tube or intravenously.

(13) Exceptional premium rate increases--Increases filed by an insurer as exceptional and for which the department determines the need for the premium rate increase is justified:

(A) due to changes in laws or regulations applicable to long-term care coverage in this state; or

(B) due to increased and unexpected utilization that affects the majority of insurers of similar long term care products.

(14) [~~(12)~~] Group long-term care insurance--A long-term care insurance policy or certificate of group long-term care insurance which is delivered or issued for delivery in this state, and issued to an eligible group as defined by the Insurance Code[~~,~~] Article 3.51-6, §1(a), or a long-term care rider issued to an eligible group as defined by Insurance Code Article 3.50 §1.

(15) [~~(13)~~] Home health agency--A business which provides home health service and is licensed by the Texas Department of Health[~~under Texas Civil Statutes, Article 4447u~~].

(16) [~~(14)~~] Home health care services--Medical or non-medical services provided to ill, disabled or infirm persons in their residences. Such services may include homemaker services, assistance with activities of daily living, respite care services, case management services, and maintenance or personal care services.

(17) Level premium long-term care policy--A non-cancellable long-term care policy.

(18) Long-term care benefit classifications--Institutional long-term care benefits only, non-institutional long-term care benefits only, or comprehensive long-term care benefits.

(19) [~~(15)~~] Long-term care insurance contract--Any insurance policy, group certificate, rider to such policy or certificate, or evidence of coverage issued by a health maintenance organization subject to the Texas Health Maintenance Organization Act (Texas Insurance Code, Chapter 20A) which is advertised, marketed, offered, or designed to provide coverage for not less than 12 consecutive months for each covered person on an expense-incurred, indemnity, prepaid, per diem or other basis, and which provides insurance protection only for one or more necessary or medically necessary services of the following types, administered in a setting other than an acute care unit of a hospital: diagnostic, preventive, therapeutic, curing, treating, mitigating, rehabilitative, maintenance or personal care. The term "long-term care insurance contract" shall not include any insurance policy, group certificate, subscriber contract, or evidence of coverage which is offered primarily to provide basic Medicare supplement coverage, basic hospital expense coverage, basic medical-surgical expense coverage, hospital confinement indemnity coverage, major medical expense coverage, disability income protection coverage, accident only coverage, specified disease or specified accident coverage, or limited benefit health coverage. The term includes a policy or rider, other than a group or individual annuity or life insurance policy, that provides for payment of benefits based on the impairment of cognitive ability or the loss of functional capacity.

(20) [~~(16)~~] Maintenance or Personal Care Services--Any care the primary purpose of which is the provision of needed assistance under §3.3818 of this title (relating to Standards for Eligibility for Benefits), including the protection from threats to health and safety due to impairment of cognitive ability.

(21) [~~(17)~~] Medicare--"The Health Insurance for the Aged Act, Title XVIII of the Social Security Amendments of 1965 as Then Constituted or Later Amended," or "Title I, Part I of Public Law 89-97, as Enacted by the Eighty-Ninth Congress of the United States of America and popularly known as the Health Insurance for the Aged Act, as then constituted and any later amendments or substitutes thereof," or words of similar import.

(22) [~~(18)~~] Mental or Nervous Disorder--A neurosis, psychoneurosis, psychopathy, psychosis, or mental or emotional disease or disorder of any kind.

(23) [~~(19)~~] Policy--Any policy, contract, subscriber agreement, rider, or endorsement, delivered or issued for delivery in this state by an insurer, fraternal benefit society, nonprofit group hospital service corporation, or health maintenance organization subject to the Texas Health Maintenance Organization Act (Texas Insurance Code, Chapter 20A).

(24) [~~(20)~~] Preexisting Condition--A condition for which medical advice was given or treatment was recommended by, or received from, a physician within six months before the effective date of coverage.

(25) Qualified actuary--An actuary who is a member of either the Society of Actuaries or the American Academy of Actuaries.

(26) [~~(21)~~] Qualified long-term care insurance contract--A long-term care insurance contract meeting the requirements as contained in Internal Revenue Code of 1986, §7702B(b).

(27) [~~(22)~~] Qualified long-term care services--As the term is defined in Internal Revenue Code of 1986, §7702B(c).

(28) Similar policy forms--All of the long-term care insurance policies and certificates issued by an insurer in the same long-term care benefit classification as the policy form being considered. Those certificates issued or delivered pursuant to one or more employers or labor union organizations, or to a trust or to the trustees of a fund established by one or more employers or labor organizations, or a combination thereof, for employees or former employees or a combination thereof or for members or former members or a combination thereof, of the labor organizations, are not considered similar to certificates or policies otherwise issued as long-term care insurance, but are similar to other comparable certificates with the same long-term care benefit classifications.

(29) [~~(23)~~] Toileting--Getting to and from the toilet, getting on and off the toilet, and performing associated personal hygiene.

(30) [~~(24)~~] Transferring--Sufficient mobility to move into or out of a bed, chair or wheelchair or to move from place to place, either via walking, a wheelchair or other means.

§3.3805. Standards in Policies.

(a) Except as otherwise provided by law or this subchapter, no long-term care insurance policy or certificate or group hospital service corporation subscriber contract, delivered or issued for delivery in this state, may contain provisions respecting the matters set forth in §§3.3812 (relating to Policy Standards for Provider), 3.3815 (relating to Standards for Home Health and Adult Day Care Benefits), and 3.3818 (relating to Standards for Eligibility for Benefits) of this title.

(b) A life insurance policy or certificate or annuity contract or certificate to which a long-term care rider is attached is subject to all statutes and regulations applicable to such life policy or certificate or annuity contract or certificate; however, a long-term care rider attached to such policy, certificate or contract is subject to this subchapter.

§3.3810. Policy or Certificate Standards for Noncancellability.

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

(c) The term "level premium" may only be used to describe long-term care coverage that is non-cancellable.

§3.3819. Requirement for Reserve.

Reserves for long-term care benefits provided pursuant to the terms and conditions of policies or certificates which are subject to the provisions of this subchapter shall be determined in accordance with Subchapter GG of this chapter (relating to Minimum Reserve Standards for Individual and Group Accident and Health Insurance) [~~an acceptable method of reserving established by a qualified actuary, consistent with all statutory and regulatory requirements of the state relating to minimum reserves for accident and health insurance, and approved by the Texas Department of Insurance concurrent with approval of the policy~~].

§3.3821. Limits on Group Long-term Care Insurance.

No group long-term care insurance coverage may be offered to a resident of this state under a group policy issued in another state to a group described in the Insurance Code, Article 3.51-6, §1(a)(6) and Article 3.50 §1(6), unless the Texas Department of Insurance has made a determination that the group long-term care insurance requirements adopted by the State of Texas have been met, and the certificate for group long-term insurance coverage has been properly filed and approved by the department.

§3.3829. Required Disclosures [~~Disclosure Provisions~~].

(a) Required Disclosure of Policy Provisions.

(1) [~~(a)~~] Long-term care insurance policies and certificates shall contain a renewability provision as required by §3.3822 of this title (relating to Minimum Standard for Renewability of Long-term Care Coverage). Such provision shall be appropriately captioned, shall appear on the first page of the policy, and shall clearly state the duration, where limited, of renewability and the duration of the coverage for which the policy is issued and for which it may be renewed.

(2) [~~(b)~~] Except for riders or endorsements by which the insurer effectuates a request made in writing by the policyholder under a long-term care insurance policy and/or certificate, all riders or endorsements added to a long-term care insurance policy and/or certificate after the date of issue or at reinstatement or renewal, which reduce or eliminate benefits or coverage in the policy and/or certificate, shall require a signed acceptance by the policyholder. After the date of policy issue, any rider or endorsement which increases benefits or coverage with a concomitant increase in premium during the policy term must be agreed to in writing signed by the policyholder, except if the increased benefits or coverage are required by law. Where a separate additional premium is charged for benefits in connection with riders or endorsements, such premium charge shall be set forth in the policy, certificate, rider, or endorsement.

(3) [~~(c)~~] A long-term care insurance policy and certificate which provides for the payment of benefits on standards described as usual and customary, reasonable and customary, or words of similar import, shall include a definition of such terms and an explanation of such terms in its accompanying outline of coverage.

(4) [~~(d)~~] If a long-term care insurance policy or certificate contains any limitations with respect to preexisting conditions, such limitations shall appear as a separate paragraph of the policy or certificate and shall be labeled as "Preexisting Condition Limitations."

(5) [~~(e)~~] Long-term care insurance applicants shall have the right to return the policy or certificate within 30 days of its delivery and to have the premium refunded if, after examination of the policy or certificate, the applicant is not satisfied for any reason. Long-term care insurance policies and certificates shall have a notice prominently printed on the first page or attached thereto stating in substance that the applicant shall have the right to return the policy or certificate within 30 days of its delivery and to have the premium refunded if, after examination of the policy or certificate, the applicant is not satisfied for any reason.

(6) [~~(f)~~] A long-term care insurance policy or certificate containing any limitations or conditions for eligibility other than those prohibited in the Insurance Code, Article 3.70-12, or §3.3824 of this title (relating to Preexisting Conditions Provisions) shall set forth a description of such limitations or conditions in a separate paragraph of the policy and certificate and shall label each paragraph "Limitations or Conditions on Eligibility for Benefits."

(7) [~~(g)~~] Long-term care insurance policies and certificates shall appropriately caption and describe the nonforfeiture benefit provision, if elected.

(8) [~~(h)~~] Long-term care insurance policies and certificates shall contain a claim denial provision which shall be appropriately captioned. Such provision shall clearly state that if a claim is denied, the insurer shall make available all information directly relating to such denial within 60 days of the date of a written request by the policyholder

or certificate holder, unless such disclosure is prohibited under state or federal law.

(9) [~~(i)~~] A long-term care insurance policy and certificate which includes benefit provisions under §3.3818(b) of this title (relating to Standards for Eligibility for Benefits) shall disclose, within a common location and in equal prominence, a description of all benefit levels payable for the coverage described in §3.3818(b). Criteria utilized to determine eligibility for benefits shall be disclosed in all long-term care insurance policies and certificates, in the manner prescribed by §3.3818.

(10) [~~(j)~~] If the insurer intends for a long-term care insurance policy or certificate to be a qualified long-term care insurance contract as defined by the Internal Revenue Code of 1986, §7702B(b), the policy or certificate shall include disclosure language substantially similar to the following. "This policy is intended to be a qualified long-term care contract as defined by the Internal Revenue Code of 1986, §7702B(b)."

(11) [~~(k)~~] If the insurer does not intend for the policy to be a qualified long-term care insurance contract as defined by the Internal Revenue Code of 1986, §7702B(b), the policy or certificate shall include disclosure language substantially similar to the following. "This policy is not intended to be a qualified long-term care insurance contract. This long-term care insurance policy does not qualify the insured for the favorable tax treatment provided for in the Internal Revenue Code of 1986, §7702B."

(12) A long-term care policy or certificate which provides for increases in rates shall include a provision disclosing that notice of an upcoming premium rate increase will be provided no later than the 45th day preceding the date of the implementation of the rate increase.

(b) Required disclosure of rating practices.

(1) Other than non-cancellable policies, the required disclosures of rating practices, as set forth in paragraph (2) of this subsection, shall apply to any long-term care policy or certificate delivered or issued for delivery in this state on or after July 1, 2002, except for certificates issued under a group long-term care policy delivered or issued for delivery in this state and issued to one or more employers or labor organizations, or to a trust or to the trustees of a fund established by one or more employers or labor organizations, or a combination thereof, for employees or former employees or a combination thereof or for members or former members or a combination thereof, of the labor organizations that was in effect on January 1, 2002, in which case this subsection shall apply on the policy anniversary following January 1, 2003.

(2) Insurers shall provide the following information to the applicant at the time of application or enrollment or, if the method of application does not allow for delivery at that time, the information shall be provided at the time of delivery of the policy or certificate:

(A) a statement that the policy may be subject to rate increases in the future;

(B) an explanation of potential future premium rate revisions, including an explanation of contingent benefit upon lapse, and the policyholder's or certificate holder's option in the event of a premium rate revision;

(C) the premium rate or rate schedules applicable to the applicant that will be in effect until a request is made for an increase;

(D) a general explanation for applying premium rate or rate schedule adjustments that shall include:

(i) a description of when premium rate or rate schedule adjustments will become effective (e.g., next anniversary date, next billing date, etc.); and

(ii) the right to a revised premium rate or rate schedule as provided in paragraph (B) of this subsection if the premium rate or rate schedule is changed;

(E) Information regarding each premium rate increase on this policy form or similar policy forms over the past 10 years for this state or any other state that, at a minimum, identifies:

(i) the policy forms for which premium rates have been increased;

(ii) the calendar years when the form was available for purchase; and

(iii) the amount or percent of each increase. The percentage may be expressed as a percentage of the premium rate prior to the increase, and also may be expressed as minimum and maximum percentages if the rate increase is variable by rating characteristics.

(3) Insurers may, in a manner that is not misleading, provide in addition to the information required in paragraph (2)(E) of this subsection, explanatory information related to the rate increases.

(4) Insurers may exclude from the disclosure required by paragraph (2)(E) of this subsection premium rate increases that only apply to blocks of business acquired from other nonaffiliated insurers or the long-term care policies acquired from other nonaffiliated insurers when those increases occurred prior to the acquisition.

(5) If an acquiring insurer files for a rate increase either on a long-term care policy form acquired from a nonaffiliated insurer, or on a block of policy forms acquired from a nonaffiliated insurer on or before January 1, 2002 or the end of the 24-month period after the date of the acquisition of the block or policies, the acquiring insurer may exclude that rate increase from the disclosure. However, the nonaffiliated selling insurer shall include the disclosure of that rate increase in accordance with paragraph (2)(E) of this subsection.

(6) If the acquiring insurer in paragraph (5) of this subsection files for a subsequent rate increase, even within the 24-month period, on the same policy form acquired from a nonaffiliated insurer or block of policy forms acquired from a nonaffiliated insurer referenced in paragraph (5), the acquiring insurer shall make all disclosures required by paragraphs (2)(E), (3), (4) and (5) of this subsection.

(7) An applicant shall sign an acknowledgement at the time of application that the insurer has made the disclosure(s) required under paragraph (2) of this subsection. If due to the method of application the applicant cannot sign an acknowledgement at the time of application, the applicant shall sign no later than at the time of delivery of the policy or certificate.

(8) An insurer may use such form as the department prescribes to comply with the requirements of this section. Persons may obtain the required form by making a request to the Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9107 or 333 Guadalupe, Austin, Texas 78701, or by accessing the department website at www.tdi.state.tx.us. Insurers who elect not to use the prescribed form shall file the disclosure form with the Life/Health Division of the department for review 60 days prior to use.

(9) An insurer shall provide notice of an upcoming premium rate schedule increase to all policyholders or certificate holders, as applicable, at least 45 days prior to the implementation of the premium rate schedule increase by the insurer. The notice shall include

the information required by paragraph (2) of this subsection when the rate increase is implemented.

§3.3831. [~~Loss Ratio~~]Standards and Rates.

(a) Loss ratio standards. Except as noted in subsections (b) and (c) of this section, this subsection shall apply to all long-term care insurance policies and certificates.

(1) [~~(a)~~] Benefits provided under long-term care insurance policies and certificates shall be deemed reasonable in relation to premiums charged if the expected loss ratio is at least 60%, calculated in a manner which provides for adequate reserving of the long-term care insurance risk. In evaluating the expected loss ratio, due consideration shall be given to all relevant factors, including:

(A) [~~(1)~~] statistical credibility of incurred claims experience and earned premiums;

(B) [~~(2)~~] the period for which rates are computed to provide coverage;

(C) [~~(3)~~] experienced and projected trends;

(D) [~~(4)~~] concentration of experience within early policy duration;

(E) [~~(5)~~] expected claim fluctuation;

(F) [~~(6)~~] experience refunds, adjustments, or dividends;

(G) [~~(7)~~] renewability features;

(H) [~~(8)~~] all appropriate expense factors;

(I) [~~(9)~~] interest;

(J) [~~(10)~~] experimental nature of the coverage;

(K) [~~(11)~~] policy reserves;

(L) [~~(12)~~] mix of business by risk classification; and

(M) [~~(13)~~] product features such as long elimination periods, high deductibles, and high maximum limits.

(2) [~~(b)~~] Prior to the use of any long-term care policy or certificate form in this state, every insurer shall submit to the commissioner an actuarial memorandum for each such policy which includes claim experience data and assumptions made thereon to sufficiently explain how the rates for such policy form are calculated. The actuarial memorandum submitted shall at least provide information which includes premium rate tables and/or schedules for each risk class and any fees, assessments, dues, or other considerations that will be included in the premium.

(b) Initial premium rate filing.

(1) Sixty days prior to the use of any long-term care policy or certificate to be issued in this state on or after July 1, 2002, an insurer shall submit the following information to the department:

(A) a copy of the disclosure form required by §3.3829(b) of this subchapter (relating to Required Disclosures);

(B) an actuarial memorandum or certification which includes at least the following:

(i) a statement that the initial premium rate schedule is sufficient to cover anticipated costs under moderately adverse experience and that the premium rate schedule is reasonably expected to be sustainable over the life of the form with no future premium increases anticipated;

(ii) a statement that the policy design and coverage provided have been reviewed and taken into consideration;

(iii) a statement that the underwriting and claims adjudication processes have been reviewed and taken into consideration;

(iv) a complete description of the basis for contract reserves that are anticipated to be held under the form, to include:

(I) sufficient detail or sample calculations provided so as to have a complete depiction of the reserve amounts to be held;

(II) a statement that the assumptions used for reserves contain reasonable margins for adverse experience;

(III) a statement that the net valuation premium for renewal years does not increase (except for attained-age rating where permitted); and

(IV) a statement that the difference between the gross premium and the net valuation premium for renewal years is sufficient to cover expected renewal expenses; or, if such a statement cannot be made, a complete description of the situations where this does not occur. The description may include a demonstration of the type and level of change in the reserve assumptions that would be necessary for the difference to be sufficient;

(-a-) an aggregate distribution of anticipated issues may be used as long as the underlying gross premiums maintain a reasonably consistent relationship;

(-b-) if the gross premiums for certain age groups appear to be inconsistent with this requirement, the department may request a demonstration under paragraphs (2) and (3) of this subsection based on a standard age distribution; and

(v) either a statement or comparison as follows:

(I) a statement that the premium rate schedule is not less than the premium rate schedule for existing similar policy forms also available from the insurer except for reasonable differences attributable to benefits; or

(II) comparison of the premium schedules for similar policy forms that are currently available from the insurer with an explanation of the differences. An insurer will not be required to provide a comparison of every age and set of benefits, period of payment or elimination period; instead, a broad range of expected combinations designed to provide a fair presentation is to be provided.

(2) The department may request, and the insurer shall provide, at any time, an actuarial demonstration that benefits are reasonable in relation to premiums. If requested:

(A) the actuarial demonstration shall include either premium and claim experience on similar policy forms, adjusted for any premium or benefit differences, relevant and credible data from other studies, or both; and

(B) the period in subsection (b)(1) of this section does not include the period during which the insurer is preparing the requested information.

(c) Premium rate schedule increases. This subsection applies to premium rate increases for any long-term care policy or certificate delivered or issued for delivery in this state on or after July 1, 2002, except for certificates under a group long-term care insurance policy issued to one or more employers or labor organizations, or to a trust or to the trustees of a fund established by one or more employers or labor organizations, or a combination thereof, for employees or former employees or a combination thereof or for members or former members or a combination thereof, of the labor organizations, which was in force on July 1, 2002, the provisions of this section shall apply on the policy anniversary following January 1, 2003.

(1) Exceptional premium rate increases.

(A) Exceptional premium rate increases are subject to the requirements of paragraph (2) of this subsection in addition to subparagraphs (B) and (C) of this paragraph.

(B) The department may request a review by an independent qualified actuary or a professional actuarial entity of the basis for a request that an increase be considered an exceptional premium rate increase.

(C) The department, in determining that the necessary basis for an exceptional premium rate increase exists, shall determine any potential offsets to higher claims costs.

(2) All premium rate schedule increases.

(A) An insurer shall submit a pending premium rate schedule increase, including an exceptional premium rate increase, to the department not later than the 60th day preceding the date of the notice to the policyholders, and shall include:

(i) information required by §3.3829(b) of this subchapter;

(ii) certification by a qualified actuary that:

(I) no further premium rate schedule increases are anticipated if the requested premium rate schedule increase is implemented and the underlying assumptions, which reflect moderately adverse conditions, are realized;

(II) the premium rate filing is in compliance with the provisions of this section;

(iii) an actuarial memorandum justifying the rate schedule increase request that includes:

(I) lifetime projections of earned premiums and incurred claims based on the filed premium rate schedule increase and the method and assumptions used in determining the projected values, including reflection of any assumptions that deviate from those used for pricing other forms currently available for sale, subject to the following:

(-a-) annual values for the five years preceding and the three years following the valuation date shall be provided separately;

(-b-) the projections shall include the development of the lifetime loss ratio, unless the rate increase is an exceptional increase;

(-c-) the projections shall demonstrate compliance with subparagraph (B) of this paragraph; and

(-d-) for exceptional premium rate increases:

(-1-) the projected experience shall be limited to the increases in claims expenses attributable to the approved reasons for the exceptional premium rate increase; and

(-2-) in the event the department determines, as provided in paragraph (1)(C) of this subsection that offsets may exist, the insurer shall use appropriate net projected experience;

(II) disclosure of how reserves have been incorporated in this rate increase whenever the rate increase will trigger contingent benefit upon lapse;

(III) disclosure of the analysis performed to determine why a rate adjustment is necessary, which pricing assumptions were not realized and why, and what other actions taken by the insurer have been relied on by the actuary; and

(IV) a statement that policy design, underwriting and claims adjudication practices have been taken into consideration;

(V) composite rates reflecting projections of new certificates in the event that it is necessary to maintain consistent premium rates for new certificates and certificates receiving a rate increase;

(iv) a statement that renewal premium rate schedules are not greater than new business premium rate schedules except for differences attributable to benefits, unless sufficient justification is provided to the department; and

(v) sufficient information for review of the premium rate schedule increase by the department.

(B) All premium rate schedule increases shall be determined in accordance with the following:

(i) exceptional premium rate increases shall provide that 70% of the present value of projected additional premiums from the exceptional premium rate increase will be returned to policyholders in benefits;

(ii) premium rate schedule increases shall be calculated such that the sum of the accumulated value of incurred claims, without the inclusion of active life reserves, and the present value of future projected incurred claims, without the inclusion of active life reserves, will not be less than the sum of the following:

(I) the accumulated value of the initial earned premium multiplied by 58%;

(II) 85% of the accumulated value of prior premium rate schedule increases on an earned basis;

(III) the present value of future projected initial earned premiums multiplied by 58%; and

(IV) 85% of the present value of future projected premiums not in subclause (III) of this subparagraph on an earned basis;

(iii) If a policy form has both exceptional premium rate increases and other increases, the values in subclauses (II) and (IV) of clause (ii) of this subparagraph will also include 70% for exceptional rate increase amounts; and

(iv) All present and accumulated values used to determine rate increases shall use the maximum valuation interest rate for contract reserves as specified in Subchapter GG of this chapter. The actuary shall disclose as part of the actuarial memorandum the use of any appropriate averages.

(C) For each rate increase that is effected, the insurer shall file for review by the department updated projections, as defined in paragraph (2)(A)(iii)(I) of this subsection, annually for the next three years on the anniversary of the implementation of the rate increase, and shall include a comparison of actual results to projected values. The department may extend the period for filing updated projections to more than three years if actual results are not consistent with projected values from prior projections submitted by the insurer. For group insurance policies that meet the conditions in subparagraph (K) of this paragraph, the projections required by this paragraph shall be provided to the policyholder in conjunction with filing the projections with the department.

(D) If any premium rate in the revised premium rate schedule is greater than 200% of the comparable rate in the initial premium schedule, the insurer shall file for review by the department, every five years following the end of the required period in subparagraph (C) of this paragraph, lifetime projections, as defined in paragraph (2)(A)(iii)(I) of this subsection. For group insurance policies that

meet the conditions in subparagraph (K) of this paragraph, the projections required by this paragraph shall be provided to the policyholder in conjunction with filing the projections with the department.

(E) If the department determines that the actual experience following a rate increase does not adequately match the projected experience filed by the insurer and that the current projections under moderately adverse conditions demonstrate that incurred claims will not exceed proportions of premiums specified in subparagraph (B) of this paragraph, the department may require the insurer to implement any of the following:

(i) premium rate schedule adjustments; or

(ii) other measures to reduce the difference between the projected and actual experience.

(F) In determining whether the actual experience adequately matches the projected experience under subparagraph (E) of this paragraph, consideration shall be given to paragraph (2)(A)(iii)(V) of this subsection, if applicable.

(G) If the majority of the policies or certificates to which the increase is applicable are eligible for the contingent benefit upon lapse, the insurer shall file:

(i) a plan, subject to the department's approval, for improved administration or claims processing designed to eliminate the potential for further deterioration of the policy form requiring further premium rate schedule increases, or both, or to demonstrate that appropriate administration and claims processing have been implemented or are in effect; otherwise the department may impose the condition in subparagraph (H) of this paragraph; and

(ii) the original anticipated lifetime loss ratio, and the premium rate schedule increase that would have been calculated according to subparagraph (B) of this paragraph had the greater of the original anticipated lifetime loss ratio or 58% been used in the calculations described in paragraph (2)(B)(ii)(I) and (III) of this subsection.

(H) For a rate increase filing that meets the criteria in clauses (i)-(iii) of this subparagraph, the department shall review, for all policies included in the filing, the projected lapse rates and past lapse rates during the 12 months after the date each increase becomes effective to determine if significant adverse lapsation has occurred or is anticipated:

(i) the rate increase is not the first rate increase requested for the specific policy form or forms;

(ii) the rate increase is not an exceptional premium rate increase; and

(iii) the majority of the policies or certificates to which the increase is applicable are eligible for the contingent benefit upon lapse.

(I) In the event significant adverse lapsation has occurred, is anticipated in the filing, or is evidenced in the actual results as presented in the updated projections provided by the insurer after the date of the requested rate increase, the department may determine that a rate spiral exists. Following the determination that a rate spiral exists, the department may require the insurer to offer to all in force insureds subject to the rate increase, without underwriting, the option to replace existing coverage with one or more reasonably comparable products being offered by the insurer or its affiliates.

(i) The offer shall:

(I) be subject to the approval of the department;

(II) be based on actuarially sound principles, but not be based on attained age; and

(III) provide that maximum benefits under any new policy accepted by an insured shall be reduced by comparable benefits already paid under the existing policy.

(ii) The insurer shall maintain the experience of all the replacement insureds separate from the experience of insureds originally issued the policy forms. In the event of a request for a rate increase on the policy form, the rate increase shall be limited to the lesser of:

(I) the maximum rate increase determined based on the combined experience; and

(II) The maximum rate increase determined based only on the experience of the insureds originally issued the form plus 10%.

(J) If the department determines that the insurer has exhibited a persistent practice of filing inadequate initial premium rates for long-term care insurance, the department may, in addition to the provisions of subparagraph (H) of this paragraph, prohibit the insurer from any of the following:

(i) filing and marketing comparable coverage for a period not to exceed five years; or

(ii) offering all other similar coverages and limiting marketing of new applications to the products subject to recent premium rate schedule increases.

(K) Subparagraphs (E), (H) and (I) of this paragraph shall not apply to group insurance issued to one or more employers or labor organizations, or to a trust or to the trustees of a fund established by one or more employers or labor organizations, or a combination thereof, for employees or former employees or a combination thereof or for members or former members or a combination thereof, of the labor organizations, where:

(i) the policies insure 250 or more persons, and the policyholder has 5,000 or more eligible employees of a single employer; or

(ii) the policyholder, and not the certificate holders, pays a material portion of the premium, which shall be not less than 20% of the total premium for the group in the calendar year prior to the year during which a rate increase is filed.

§3.3832. Outline of Coverage.

(a) (No change.)

(b) The outline of coverage shall be in the following format. Figure: 28 TAC §3.3832(b) (No change.)

(1) - (11) (No change.)

(12) TEXAS DEPARTMENT OF INSURANCE'S CONSUMER HELP LINE. An insurer shall include notification that the prospective insured may call the Texas Department of Insurance's Consumer Help Line at 1-800-252-3439 for agent, company, and any other insurance information, and 1-800-599-SHOP to order publications related to long-term care coverage, and the Texas Department of Aging at (1-800-252-9240 or current number if different) [~~1-800-252-0240~~] to receive counseling regarding the purchase of long-term care or other health care coverage.

(13) - (14) (No change.)

(15) OFFER OF NONFORFEITURE BENEFITS. Insurers shall include the information set out in subparagraphs (A), [~~and~~]

(B) and (C) of this paragraph regarding the offer of nonforfeiture benefits.

(A) A complete and clear explanation of each nonforfeiture option being offered, including an actual numerical example [(~~See Number 2~~)].
Figure: 28 TAC §3.3832(b)(15)(A)

(B) Disclosure of the premium and percentage increase in premium associated with each of the nonforfeiture [~~non-forfeiture~~] benefits offered.

(C) Disclosure that if the nonforfeiture offer is rejected that a contingent benefit upon lapse will be provided and a description of such benefit.

(16) - (17) (No change.)

§3.3837. Reporting Requirements.

(a) Every insurer shall maintain records, for each agent, of that agent's number and dollar amount of replacement sales as a percentage of the agent's total number and amount of annual sales attributable to long-term care products, as well as the number and dollar amount of lapses of long-term care insurance policies sold by the agent and expressed as a percentage of the agent's total annual sales attributable to long-term care products.

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

(5) Every insurer by June 30 of each year shall file the annual rate filing required by Insurance Code Article 3.70-12, §4(b).

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

§3.3839. Standards for Marketing.

(a) Every insurer, health care service plan, or other entity marketing long-term care insurance coverage in this state, directly or through its agents, shall establish marketing procedures to assure that:

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

(5) the policy shall be delivered no later than 30 days after the application for the long-term care insurance policy or certificate is approved; [~~and~~]

(6) the terms non-cancellable and level premium are used only to describe a policy or certificate that conforms to §3.3810 of this subchapter (relating to Policy or Certificate Standards for Noncancellability); and

(7) [(~~6~~)] auditable procedures are in place to verify compliance with this subsection.

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

§3.3844. Nonforfeiture and Contingent Benefits.

(a) Required Offering of Nonforfeiture Benefits and Contingent Benefits upon Lapse. No insurer or other entity may offer a long-term care insurance policy or certificate in this state unless such insurer or other entity also offers to the prospective insured, or to the group policyholder, the option to purchase a policy that contains nonforfeiture benefits. On or after July 1, 2002, in the event a policyholder or certificate holder declines the option to purchase a policy that contains nonforfeiture benefits, the insurer shall provide contingent benefits upon lapse as described in subsection (g) of this section. In the event a group policyholder elects to make the nonforfeiture benefit an option to the certificate holder, a certificate shall provide either the nonforfeiture benefit or the contingent benefit upon lapse.

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

(d) Nonforfeiture and Contingent Benefit Standards/Requirements.

(1) Except as provided in paragraph (2) of this subsection, no [~~No~~] policy or certificate shall begin a nonforfeiture benefit later than the end of the third year following the policy or certificate issue date. The contingent benefit upon lapse shall be effective during the first three years as well as thereafter.

(2) Except [~~except that~~] for a policy or certificate with attained age rating, the nonforfeiture benefit shall begin on the earlier of:

(A) The end of the tenth year following the policy or certificate issue date; or

(B) The end of the second year following the date the policy or certificate is no longer subject to attained age rating. [~~For purposes of this section, attained age rating is defined as a schedule of premiums starting from the issue date which increases with increasing age.~~]

(3) [(~~2~~)] Nonforfeiture credits may be used for all care and services qualifying for benefits under the terms of the policy or certificate, up to the limits specified in the policy or certificate.

(4) [(~~3~~)] All benefits paid by the insurer while the policy or certificate is in premium paying status and in the paid up status will not exceed the maximum benefits which would have been payable if the policy or certificate had remained in premium paying status.

(5) [(~~4~~)] There shall be no difference in the minimum nonforfeiture benefits as required under this section for group and individual policies.

(6) [(~~5~~)] Premiums charged for a policy or certificate containing nonforfeiture benefits or a contingent benefit upon lapse shall be subject to the loss ratio requirements of §3.3831 of this title (relating to [~~Loss Ratio~~]Standards and Rates) treating the policy as a whole.

(7) To determine whether the contingent nonforfeiture upon lapse provisions are triggered, a replacing insurer that purchased or otherwise assumed a block or blocks of long-term care insurance policies from another insurer shall calculate the percentage increase based on the initial annual premium paid by the insured when the policy was first purchased from the original insurer.

(8) [(~~6~~)] A qualified actuary shall certify as to the reasonability of rates charged for each nonforfeiture benefit and the reserving required by §3.3819 of this title (relating to Requirement for Reserve) shall include reserving for the nonforfeiture options.

(e) - (f) (No change.)

(g) Contingent Nonforfeiture Benefits.

(1) The contingent benefit on lapse shall be triggered every time an insurer increases the premium rates to a level which results in a cumulative increase of the annual premium equal to or exceeding the percentage of the insured's initial annual premium set forth in Triggers for Substantial Premium Increase based on the insured's issue age, and the policy or certificate lapses within 120 days of the due date of the premium so increased. Policyholders shall be notified at least 45 days prior to the due date of the premium reflecting the rate increase.
Figure: 28 TAC §3.3844(g)(1)

(2) On or after the effective date of a substantial premium increase as set forth in paragraph (1) of this subsection, the insurer shall:

(A) offer to reduce policy benefits provided by the current coverage without the requirement of additional underwriting so that required premium payments are not increased;

(B) offer to convert the coverage to a paid-up status with a shortened benefit period in accordance with the terms of subsection

(e) of this section. This option may be elected at any time during the 120-day period referenced in paragraph (1) of this subsection; and

(C) notify the policyholder or certificate holder that a default or lapse at any time during the 120-day period referenced in paragraph (1) of this subsection shall be deemed to be the election of the offer to convert in subparagraph (B) of this paragraph.

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 October 29, 2001.

TRD-200106620
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 463-6327

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CHAPTER 7. CORPORATE AND FINANCIAL REGULATION

SUBCHAPTER A. EXAMINATION AND FINANCIAL ANALYSIS

28 TAC §7.18

The Texas Department of Insurance proposes an amendment to §7.18 concerning the adoption by reference of statements of statutory accounting principles (SSAPs) which provide guidance to independent accountants, industry accountants and department analysts and examiners as to how to properly record business transactions for the purpose of accurate statutory reporting. The proposed amendment is necessary to adopt the changes to the March 2000 version of the Accounting Practices and Procedures Manual (Manual) published by the National Association of Insurance Commissioners (NAIC) which were made by the March 2001 version of the Manual, and to adopt by reference the March 2001 version of the Manual. There are seven new SSAPs in the March 2001 version of the Manual. New SSAP No. 74 provides guidance for the issuance of insurance-linked securities by a property and casualty insurer through a protected cell. New SSAP No. 75 provides guidance for reinsurance deposit accounting for property and casualty companies and amends the requirements included in SSAP 62. New SSAP No. 76 provides guidance for the reporting on the costs of start-up activities. New SSAP No. 77 provides guidance for real estate sales and amends SSAP No. 40. New SSAP No. 78 provides guidance for the Multiple Peril Crop Insurance program. New SSAP No. 79 provides guidance for depreciating nonoperating system software and amends SSAP 16. New SSAP No. 80 provides guidance on life contracts, Deposit-Type Contracts and Separate Accounts and amends SSAP Nos. 51, 52, and 56. The March 2001 version of the Manual also contains modifications to SSAP Nos. 2, 10, 11, 18, 35, 40, 41, 45, 46, 47, 53, 54, 60, 61 and 73 which clarify language or change reference material. The March 2001 Manual also adds definitions for operating and nonoperating system software system software. The department also proposes to amend the list of exceptions and additions to the Manual as follows: SSAP No. 6 concerning uncollected premium balances is proposed to be amended by clarifying the starting date used to determine the admissibility of uncollected premium balances. The department also proposes to adopt SSAP No. 81 concerning software revenue recognition; SSAP No. 82 concerning the costs of computer software developed or obtained for internal use and web site development costs; SSAP No. 83 concerning mezzanine real estate loans and SSAP No. 84 concerning health care receivables and receivables under government insured plans. While SSAP Nos. 81 - 84 are not included in the March 2001 version of the Manual, they are considered part of the March 2001 version of the Manual under the NAIC procedures for the adoption of SSAPs. The deferment of the effective date for the establishment of Interest Rate Maintenance Reserve or an Asset Maintenance Reserve for Texas domestic insurers which have not previously established the reserves is proposed for repeal by deleting paragraphs (1) and (2) in §7.18(c). The Commissioner deferred the establishment of the reserves in response to comments when the adoption of the Manual was proposed in 2000; therefore, these subsections are no longer necessary.

The department will consider the proposed amendment to §7.18 in a public hearing under Docket No. 2502, scheduled for 9:30 on November 26, 2001 in Room 102 of the William P. Hobby Jr. State Office Building, 333 Guadalupe Street in Austin, Texas. Copies of the documents proposed for adoption by reference are available for inspection in the Financial Division and Chief Clerk's Office of the Texas Department of Insurance, William P. Hobby Jr. State Office Building, 333 Guadalupe, Austin, Texas.

Ms. Betty Patterson, CPA, AFE, Senior Associate Commissioner, Financial Program, has determined that, for the first five years the amended section is in effect, there will be no fiscal implications for state or local government as a result of this amendment, and there will be no effect on local employment or the local economy.

Ms. Patterson has also determined that, for each year of the first five years the amended section is in effect, the public benefit will be the more efficient regulation of insurance and a decrease in costs to insurers that are currently required to file multiple financial statements in multiple states. The proposed adoption of the March 2001 Manual will provide for a more consistent regulatory environment and will become a single source for accounting guidance. The March 2001 Manual is available from the NAIC at a cost of $200 for a soft cover manual and $395 on CD-ROM. The cost to comply with the provisions of the Manual will vary from insurer to insurer. Based upon the department's experience, each company will have to ensure that at least one employee familiar with the company's accounting practices is instructed in the provisions of the Manual. This instruction will either be accomplished through self-study, attendance at a seminar, or a combination of the two methods. The NAIC offers a self-study course at a cost of $175 per copy. Seminars which offer instruction on the Manual cost approximately $850 per attendee for a two day course. The number of employees sent to training is largely dependent on the size and expertise of the company's accounting staff, but is not dependent on the overall size of the company. As the size of the accounting staff increases, so does the likelihood that the company will choose to send more than one employee to a seminar for training. The department estimates that companies with five or fewer accounting employees will either require the use of self-study training or send one employee to a seminar. Those companies with six to ten employees on the accounting staff will likely send one to three employees to seminars for instruction and supplement that training with self-study materials. Those companies with eleven or more employees on

the accounting staff will likely send three or more employees to seminars and supplement with self-study materials. Each employee is estimated to be compensated at a rate of $17 to $30 an hour. These estimates are based upon the department's discussions with industry representatives. Implementation of the proposed amendment may also require changes to a company's electronic accounting system. The cost of changes to accounting systems is dependent on the company's line of insurance, the complexity of the company's transactions, and whether the system is proprietary or created by third party vendors. Costs due to system changes increase with the complexity of transactions and the percentage of proprietary computer code in the system. In the department's experience, small companies do not usually rely upon internally created proprietary systems and do not generally enter complex transactions on a regular basis. Large companies are more likely to have an internally created proprietary system and enter into complex transactions. Accordingly, system change costs will be greater for large companies. Furthermore, implementation of the proposed amendment may lead to increased consultation with outside accounting firms. The cost of the consultation will vary from insurer to insurer and will cost from $100 to $350 per hour. It also appears that a smaller company will incur a lower cost. Also, as the complexity of the transactions a company enters into is reduced, so does the cost of consultation. Thus, based upon all of the foregoing, it is the department's position that the adoption of the Manual will have no adverse economic effect on small and micro businesses. Farm mutual insurance companies, mutual assessment companies, mutual aid associations, and mutual burial associations will incur no costs as a result of the proposed amendment, as they are specifically excepted from the section. Such companies have traditionally accounted for their business on a cash basis and the department has determined that compliance with the provisions of the Manual is not necessary for these types of companies. Regardless of the fiscal effect, the requirements of the section are mandated by the underlying state statutes, and considering the statutes' purposes, it is neither legal nor feasible to waive or modify the requirements of this section for small and micro businesses, as doing so would result in a disparate effect on enrollees, policyholders, and other persons affected by the section.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on December 10, 2001. All comments should be submitted to Lynda H. Nesenholtz, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments should be submitted simultaneously to Betty Patterson, CPA, AFE, Senior Associate Commissioner, Financial Program, Mail Code 305-2A, P. O. Box 149104, Austin, Texas 78714-9104.

The amendment is proposed under the Insurance Code articles 1.11, 1.15, 1.32, 3.01, 3.33, 5.61, 6.12, 8.07, 20A.22, 21.28-A, 21.39, 21.49-1, and §§32.041 and 36.001. Article 1.15 mandates that the department of insurance examine the financial condition of each carrier organized under the laws of Texas or authorized to transact the business of insurance in Texas and, by rule, adopt procedures for the filing and adoption of examination reports. Article 1.11 and §32.041 authorize the Commissioner to provide required financial statement forms. Article 21.39 authorizes the Commissioner to adopt rules for establishing reserves applicable to each line of insurance recommended by the NAIC. Article 1.32 authorizes the Commissioner to establish standards for evaluating the financial condition of an insurer. Article 20A.22 authorizes the Commissioner to promulgate rules as are necessary to carryout the provisions of the Texas Health Maintenance Organization Act. Article 5.61 provides that reserves shall be computed in accordance with rules adopted by the Commissioner for the purpose of adequately protecting insureds. Article 21.28-A authorizes the Commissioner to adopt rules necessary to accomplish the purposes of the act. Articles 6.12, 8.07 and 3.01 authorize the Commissioner to adopt rules defining electronic machines and systems, office equipment, furniture, machines and labor saving devices and the maximum period for which each such class may be amortized. Article 3.33 authorizes the Commissioner to adopt such rules, minimum standards, or limitations as may be appropriate for the implementation of the article. Article 21.49-1 authorizes the Commissioner to issue rules, and orders necessary to implement the provisions of the article. Section 36.001 authorizes the Commissioner to adopt rules for the conduct and execution of the powers and duties of the department only as authorized by statute.

The following provisions of the Insurance Code are affected by this proposal: Articles 1.11(b), 1.15, 3.01, 6.12, 8.07, 21.39 and §32.041.

§7.18. NAIC Accounting Practices and Procedures Manual.

(a) The purpose of this section is to adopt statutory accounting principles, which will provide independent accountants, industry accountants and department analysts and examiners guidance as to how to properly record business transactions for the purpose of accurate statutory reporting. The March 2001 [~~2000~~] version of the National Association of Insurance Commissioners Accounting Practices and Procedures Manual (Manual) will be utilized as the guideline for statutory accounting principles in Texas to the extent the Manual does not conflict with provisions of the Texas Insurance Code or rules of the department. The Commissioner reserves all authority and discretion to resolve any accounting issues in Texas. When making a determination on the proper accounting treatment for an insurance or health plan transaction the Commissioner shall refer to the sources in paragraphs (1)-(6) of this subsection in the respective order of priority listed. Furthermore, §§ 3.1501-3.1505, 3.1605, 3.1606, 3.7004, 7.7, 7.85 and 11.803 of this title (relating to Annuity Mortality Tables, General Requirements, Required Opinions, Contract Reserves, Subordinated Indebtedness, Audited Financial Reports and Investments, Loans and Other Assets), preempt any contrary provisions in the Manual.

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

(b) The Commissioner adopts by reference the March 2001 [~~2000~~] version of the Accounting Practices and Procedures Manual published by the NAIC, with the exceptions and additions set forth in subsections (c) and (d) of this section, as the source of accounting principles for the department when examining financial reports and for conducting statutory examinations and rehabilitations of insurers and health maintenance organizations licensed in Texas, except where otherwise provided by law. This adoption by reference shall be applied to examinations conducted as of January 1, 2002 [~~2001~~] and thereafter and also shall be used to prepare all financial statements filed with the department for periods after January 1, 2002 [~~2001~~].

(c) The Commissioner adopts the following exceptions and additions to the Manual:

(1) In addition to the statements of statutory accounting principles in the Manual, Statement of Statutory Accounting Principle number 81 concerning software revenue recognition, finalized March 26, 2001, Statement of Statutory Accounting Principle number 82 concerning the costs of computer software developed or obtained for internal use and web site development costs, finalized March 26, 2001,

and Statement of Statutory Accounting Principle number 83 concerning mezzanine real estate loans adopted by the NAIC Accounting Practices and Procedures Task Force dated October 18, 2001, are adopted by reference. Statement of Statutory Accounting Principle number 84, concerning certain health care receivables and receivables under government insured plans, adopted by the NAIC Accounting Practices and Procedures Task Force dated October 18, 2001, is adopted by reference and shall be used to prepare all financial statements for years ending on and after December 31, 2001 [~~Unless a Texas domestic insurer is licensed in a state that requires an Interest Maintenance Reserve (IMR), a Texas domestic insurer need only establish an IMR, as would be required by Statement of Statutory Accounting Principles number 7, for applicable investments disposed of after December 31, 2000~~].

(2) Retrospective premiums must be billed within 60 days of computation and audit premiums must be billed within 60 days of the completion of the audit in determining the beginning date from which the ninety day period is calculated to determine admissibility of uncollected premium balances under Statement of Statutory Accounting Principle number 6 [~~Unless a Texas domestic insurer is licensed in a state that requires an Asset Valuation Reserve (AVR), a Texas domestic insurer need only establish an AVR, as would be required by Statement of Statutory Accounting Principles number 7, on investments held as of January 1, 2001, and acquired thereafter~~].

(3) Electronic machines, constituting a data processing system or systems and operating systems software used in connection with the business of an insurance company acquired after December 31, 2000, may be an admitted asset as permitted by Texas Insurance Code Articles 3.01, 6.12, 8.07, and any other applicable law and shall be amortized as provided by the Manual. All such property acquired prior to January 1, 2001, may be an admitted asset as permitted by Texas Insurance Code Articles 3.01, 6.12, 8.07, and any other applicable law, and shall be amortized in full over a period not to exceed ten years.

(4) Furniture, labor-saving devices, machines, and all other office equipment may be admitted as an asset as permitted by Texas Insurance Code Articles 3.01, 6.12, 8.07, and any other applicable law and, for such property acquired after December 31, 2000, depreciated in full over a period not to exceed five years. All such property acquired prior to January 1, 2001, may be an admitted asset as permitted by Texas Insurance Code Articles 3.01, 6.12, 8.07, and any other applicable law, and shall be depreciated in full over a period not to exceed ten years.

(5) Written premiums for all property and casualty contracts, other than contracts for workers' compensation, shall be recorded as of the effective date of the contract rather than on the effective date of the contract as stated in Statement of Statutory Accounting Principles number 53.

(6) Goodwill, as reported on a regulated entity's statutory financial statements as of December 31, 2000, and any additional goodwill acquired thereafter, beginning January 1, 2001, shall be admitted as an asset and accounted for as permitted by Statements of Statutory Accounting Principles numbers 61 and 68. All other amounts of goodwill, including, but not limited to, such amounts that may have been previously expensed, shall not be allowed as an admitted asset. However, notwithstanding the provisions of Statements of Statutory Accounting Principles numbers 61 and 68, all methods of non-insurer subsidiary and affiliate valuation permitted by Article 21.49-1 §6A may be used for the purposes of goodwill calculation.

(7) All certificates of deposit, of any maturity, may be classified as cash and are subject to the accounting treatment contained in Statement of Statutory Accounting Principles number 2, notwithstanding the provisions of Statement of Statutory Accounting Principles number 26.

(8) Agents balances of insurers licensed only in Texas that use a managing general agency to produce a majority of their business are not subject to Statement of Statutory Accounting Principles number 6 until January 1, 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.

Filed with the Office of the Secretary of State, on October 29, 2001.

TRD-200106621
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

CHAPTER 20. RULEMAKING

30 TAC §20.4

The Texas Natural Resource Conservation Commission (commission) proposes new §20.4, Indexing, Cross-Indexing, and Availability of Certain Documents. The commission proposes this revision to Chapter 20, Rulemaking, to implement Texas Government Code, §2001.004, Requirement to Adopt Rules of Practice and Index Rules, Orders, and Decisions. This proposed new section would define and clarify procedures for indexing and cross-indexing rules; written statements of policy or interpretations that are prepared, adopted, or used by the agency in discharging its functions; final orders, decisions, and opinions.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

Texas Government Code, §2001.004(2) and (3), and the Administrative Procedure Act (APA), require all state agencies to index, cross-index to statute, and make available for public inspection all rules, final orders, decisions, opinions, and other written statements of policy or interpretations that are prepared, adopted, or used by the agency in discharging its functions.

The primary purpose of this rulemaking is to comply with the Decision of the Commission Regarding the Petition for Rulemaking Filed by Mr. Tom Lake in Docket No. 2000-1317-RUL issued December 19, 2000, that directed staff to initiate rulemaking to implement Texas Government Code, §2001.004, in response to a petition for rulemaking by Mr. Lake (the "Lake Petition"). It also relates to Sunset management recommendation New Issue 52 which requires the commission to prospectively comply with APA requirements to create indices and cross-references to its

orders, statements of policy, or interpretations and to make final orders available to the public.

Proposed new §20.4 defines and clarifies what indexing and cross-indexing mean relative to the documents specified in the statute. Section 20.4 does not add any new requirements upon agency staff. However, it does define and clarify procedures for indexing, cross-indexing, and making documents available for public inspection. The Lake Petition proposed that the agency produce a list of all its rules showing the specific statutory basis for each rule and a second list of applicable statutes showing the rules derived from each statute. Staff researched the legislative intent of the statute and subsequently determined that this approach was not necessary to comply with the statute.

Senate Bill (SB) 41 established the Administrative Procedure and Texas Register Act (APTRA) in 1975 which set forth standards for state administrative practices and procedures; procedures for adoption of rules by state agencies; the creation of a state register and its contents; and review of state agency procedures (Vernon's Ann Civ. Stat. Art. 6252-13a). Prior to adoption of the APTRA by the 64th Legislature, 1975, "Texas ha[d] no comprehensive unified body of administrative law. Each agency [was] left largely to itself to develop what it deem[ed] proper requirements for hearings, proposed rules and adopted rules. Nor [did] Texas have any sort of central journal in which rules and notices may be published." (Senate Committee on Judicial Affairs, Bill Analysis, SB 41, 64th Legislature, 1975)

Accordingly, APTRA, §4 required each agency to 1) adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available; 2) index and make available for public inspection all rules and all other written statements of policy or interpretations that are formulated, adopted, or used by the agency in discharging its functions; and 3) index and make available for public inspection all final orders, decisions, and opinions which provided for public participation in the rulemaking process as well as adequate proper public notice of proposed agency rules and agency actions through publication of a state register, part of the purposes of the legislation. (Article 6252-13a)

The APTRA was subsequently amended in 1991 by House Bill (HB) 2057 to require state agencies to cross-index rules to statute, in addition to indexing and making them available for public inspection. Similarly, all final orders, decisions, and opinions were also required to be cross-indexed to statute. "The index to the official Texas Administrative Code published under the authority of the Secretary of State and the Texas Register contain[ed] only an alphabetical listing of 'standard and familiar classifications of the rules and regulations' without reference to the statute from which the rule [was] derived." (House Committee on State Affairs, Bill Analysis, HB 2057, 72nd Legislature, 1991) Requiring the state agency proposing the rule to include the particular section or article of the [stat.] code affected [provides for] expedient cross-indexing by the Secretary of State. (Id.; Article 6252-13a, §5)

The agency complies with the statutory requirement to index the listed documents. Rules are indexed by means of a table of contents. Regulatory guidances are indexed by title and series number in the agency's publications catalog and on the agency's public web site. Opinions of the staff rule interpretation teams are indexed on the agency's public web site by subject matter. Orders and decisions are indexed by identifying number or entity name in a database.

The agency complies with the statutory requirement to cross-index the listed documents. Rules reference the statutory authority in the preamble to the rule proposal and adoption packages published in the *Texas Register*. Other documents specified in the statute cite either the statutory or regulatory authority for their issuance within each document, or they cite the statutory or regulatory authority being exercised or the authority being interpreted within each document.

The agency complies with the statutory requirement to make the listed documents available for public inspection. Agency rules and regulatory guidances are available through the agency's publication office. Rules, many regulatory guidances, and opinions of staff rule interpretation teams are also available on the agency's public web site. Orders and decisions are available through the Office of the Chief Clerk and through Central Records at the agency's Austin headquarters. Many of these documents are also available at the agency's regional offices.

The commission proposes new §20.4 to clarify the means by which this provision of the APA is implemented.

SECTION DISCUSSION

New §20.4 is proposed to clarify the practice of indexing and cross-indexing throughout the agency for all five types of documents specified in the statute. New subsection (a) is proposed to specify the five types of documents covered by the section, and to clarify that only final versions of those documents in effect are subject to the indexing and cross-indexing provisions of this section, not draft versions, proposed versions, outdated versions, or working copies kept for reference.

New subsection (b) is proposed to define indexing and cross-indexing. New paragraph (1) is proposed to define "index" as a means in assisting the public to access the five types of documents specified by statute. New subparagraphs (A) - (D) are proposed to provide flexibility to the offices responsible for indexing documents by allowing any of four methods of indexing: a table of contents; a list of titles, identifying names, or identifying numbers; or an orderly filing system by which those documents may be retrieved; or an electronic database accessed by title, name, or number to be developed in the future as time and money allow. New paragraph (2) is proposed to define the phrase "cross-index to statute" consistent with statutory requirements. New subparagraph (A) is proposed to specify that cross-indexing a rule to statute means to cross-reference or to cite statutory authority for proposing or adopting the rule according to APA provisions, *Texas Register* rules, and other applicable law. New subparagraph (B) is proposed to allow that all other documents to which the APA applies may be cross-indexed either to statutory or regulatory authority, recognizing that all the other documents may implement or interpret rules as well as statutes.

New subsection (c) is proposed to set forth the statutory requirement to index, cross-index to statute, and make available for public inspection all rules; written statements of policy or interpretations that are prepared, adopted, or used by the agency in discharging its functions; orders; decisions; and opinions.

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 impacts to units of state or local government as a result of administration of the proposed rule.

This rulemaking is proposed to define and clarify agency procedures for indexing and cross- indexing rules, orders, decisions, permits, and opinions. Additionally, the proposal will also set forth procedures to index and cross-index written statements of policy or interpretations that are prepared, adopted, or used by the agency in discharging its functions.

The proposed rulemaking only affects the agency. No other units of state and local government are affected by this proposal. The commission does not anticipate the proposed rulemaking will result in significant costs to the agency.

PUBLIC BENEFIT AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from administration of the proposed rule would be a better understanding of how the agency implements and complies with the APA.

This rulemaking is intended to define and clarify agency procedures for indexing and cross- referencing rules, orders, decisions, permits, and opinions. Additionally, the proposal will set forth procedures to index and cross-index written statements of policy or interpretations that are prepared, adopted, or used by the agency in discharging its functions.

The proposed rulemaking only affects the agency; therefore, there will be no costs to individuals and businesses to implement provisions of this proposal.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal impacts to small or micro-businesses as a result of the proposed new rule, which is intended to define and clarify agency procedures for indexing and cross-referencing rules, orders, decisions, permits, and opinions. Additionally, the proposal will also set forth procedures to index and cross-index written statements of policy or interpretations that are prepared, adopted, or used by the agency in discharging its functions.

The proposed rulemaking only affects the agency; therefore, there will be no costs to small or micro-businesses to implement provisions of this proposal.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed the 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 would be 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 is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the act. "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 commission proposes this revision to define and clarify procedures for indexing and cross-indexing rules; written statements of policy or interpretations that are prepared, adopted, or used by the agency in discharging its functions; orders; decisions or permits; and opinions. The purpose of new §20.4 is procedural and affects only agency staff. Therefore, the rulemaking does not meet the definition of "major environmental rule" because the rulemaking is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rule and performed a preliminary analysis of whether Texas Government Code, Chapter 2007 is applicable. The commission's preliminary analysis indicates that Texas Government Code, Chapter 2007 does not apply to the proposed rule because the rule is procedural in nature and does not provide the commission with any additional authority or jurisdictional responsibility. The rulemaking will affect only agency staff. No burdens are imposed on any private real property. Therefore, the rulemaking will not constitute a taking under the Fifth and Fourteenth Amendments to the United States Constitution; §17 or §19, Article 1, Texas Constitution; or Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the proposed rule is not subject to the Coastal Management Program.

SUBMITTAL OF COMMENTS

Comments may be submitted to Joyce Spencer, Office of Environmental Policy, Analysis, and Assessment, Texas Natural Resource Conservation Commission, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Log Number 2000-058-020-AD. Comments must be received by 5:00 p.m., December 10, 2001. For further information, please contact Debra Barber, Policy and Regulations Division, at (512) 239-0412.

STATUTORY AUTHORITY

The new section is proposed under Texas Government Code, §2001.004, which provides the commission authority to adopt rules of practice. The new section is authorized by Texas Water Code (TWC), §5.103, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under TWC; §5.013, which establishes the general jurisdiction of the commission; and §5.105, which provides the commission with authority to establish and approve all general policy of the commission.

The proposed new section implements Texas Government Code, §2001.004, relating to Requirement to Adopt Rules of Practice and Index Rules, Orders, and Decisions.

§20.4. Indexing, Cross-Indexing, and Availability of Certain Documents.

(a) This section applies only to final versions of the following documents that are in effect:

(1) rules;

(2) other written statements of policy or interpretations that are prepared, adopted, or used by the agency in discharging its functions;

(3) orders;

(4) decisions; and

(5) opinions.

(b) For the purposes of this section, the following words or phrases shall have the following meanings:

(1) Index - To produce or furnish, as an aid in making documents accessible to the public, one or more of the following:

(A) a table of contents;

(B) a current list of the titles, identifying names, or identifying numbers of the documents;

(C) an orderly filing system by which those documents may be retrieved; or

(D) an electronic database of documents by which at least the titles, identifying names, or identifying numbers of those documents can be searched.

(2) Cross-index to statute -

(A) For rules: to cross-reference or cite statutory authority, for proposing or adopting the rule, according to the requirements of the APA, *Texas Register* rules, and other applicable law.

(B) For written statements of policy or interpretations that are prepared, adopted, or used by the agency in discharging its functions, orders, decisions, and opinions: to cross-reference or cite statutory or regulatory authority within the document.

(c) The agency shall index, cross-index to statute, and make available for public inspection the following:

(1) rules;

(2) other written statements of policy or interpretations that are prepared, adopted, or used by the agency in discharging its functions;

(3) orders;

(4) decisions; and

(5) opinions.

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 October 26, 2001.

TRD-200106543
Stephanie Bergeron
Division Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 239-5017

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CHAPTER 334. UNDERGROUND AND ABOVEGROUND STORAGE TANKS

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes amendments to §334.2, Definitions; §334.3, Exemption for Underground Storage Tanks (USTs) and UST Systems; §334.5, General Prohibitions for Underground Storage Tanks (USTs) and UST Systems; §334.6, Construction Notification for Underground Storage Tanks (USTs) and UST Systems; §334.8, Certification for Underground Storage Tanks (USTs) and UST Systems; §334.12, Other General Provisions; §334.45 Technical Standards for New Underground Storage Tank Systems; §334.47, Technical Standards for Existing Underground Storage Tank Systems; §334.50, Release Detection; §334.54, Temporary Removal from Service; §334.71, Applicability; §334.82, Public Participation; §334.201, Purpose and Applicability; §334.301, Applicability of this Subchapter; §334.302, General Conditions and Limitations Regarding Reimbursement; §334.303, When to File Application; §334.310, Requirements for Eligibility; §334.313, Review of Application; and §334.322, Subchapter H Definitions.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The proposed rules implement the provisions of House Bill (HB) 2687 and duplicative provisions in TNRCC Sunset legislation in HB 2912, Article 14. These statutory provisions cover several areas that require rulemaking: the definition of a tank "owner" in the petroleum storage tank (PST) program was clarified; the scope of compliance self-certification (established by HB 2815 in the previous legislative session) was prospectively narrowed to exclude tanks containing regulated substances that are not motor fuels; specific deadlines were attached to the existing general obligations that tank owners and operators have to perform corrective action activities at leaking petroleum storage tank (LPST) sites, with loss of reimbursement eligibility stemming from missed deadlines that are the fault of the tank owner or operator (or their agents, etc.); the long-standing legal fact that a person's liability to perform corrective action at LPST sites is unrelated to any possible reimbursements that person may be eligible for was reiterated and emphasized in new statutory provisions; and the Petroleum Storage Tank Reimbursement (PSTR) Account was extended through September 1, 2006. Other elements of the new legislation (e.g., fee schedules) do not require rulemaking, and are not included in this proposal. A minor amount of regulatory reform is also contained in this package. For example, amendments are proposed to facilitate owner/operators of tanks temporarily out-of-service (under §334.54) who wish to bring those tanks back into service without violating compliance self-certification regulations in §334.8(c). Typographical errors in the rules are also proposed to be corrected.

SECTION BY SECTION DISCUSSION

Subchapter A--General Provisions

Several of the new legislative provisions (concerning the clarified tank owner definition, and the prospective narrowing of the scope of the compliance self-certification program require changes to the regulations in this subchapter. Also, regulatory reform changes are proposed here concerning how tanks that are temporarily out-of-service in §334.54 may be brought back into service without violating compliance self-certification requirements. Also, some typographical errors in the subchapter were corrected.

Section 334.2, Definitions, is proposed to be amended. Paragraph (27)(C) is proposed to be amended by correcting

the spelling of the word "tester." The definition of "owner" in §334.2(72) is proposed to be amended to match the clarified definition of the term contained in legislation being implemented by this proposed rulemaking.

Section 334.3, Exemptions from Underground Storage Tanks (USTs) and UST Systems, is proposed to be amended. Section 334.3(a)(10)(A) is proposed to be amended to correct the spelling of the word "pipeline."

Section 334.5, General Prohibitions for Underground Storage Tanks (USTs) and UST Systems, is proposed to be amended. The text of subsection (b)(1)(C) is proposed to be deleted, because the new legislation prospectively narrows the scope of the compliance self-certification program such that there will no longer be a phase-in concerning regulated substances that are not motor fuels, with the old subsection (b)(1)(D) language now becoming subsection (b)(1)(C) (and including a correction of the spelling of the phrase prima facie). Section 334.5(b)(2) is proposed to be amended by deletion of the parenthetical, because the new legislation narrows the scope of the compliance self-certification program such that there will no longer be a phase-in concerning regulated substances that are not motor fuels.

Section 334.6, Construction Notification for Underground Storage Tanks (USTs) and UST Systems, is proposed to be amended. Section 334.6(b)(1)(C) is proposed to be added to require that when a UST system has been taken temporarily out-of-service under §334.54 of this chapter, the owner or operator must first submit a construction notification form before returning the UST system to service. This change is being proposed because, under existing compliance self-certification rules in §334.8(c), owners/operators may experience difficulty in bringing these tanks back into service without violating those compliance self-certification requirements. Under the current self-certification regulatory scheme, new and replacement tanks may receive a "temporary delivery authorization" from the commission under §334.8(c)(5)(D) once a construction notification form is received under this section. This temporary authorization functions as the required delivery certificate while preliminary testing is done on the tank systems (which includes placing motor fuels into them). The proposed amendment would plug the temporarily out-of-service tanks into this system as well such that, once the construction notification form is received, the owner/operator may perform the testing, etc. necessary to bring such a tank back into service prior to getting his standard delivery certificate as discussed in this portion of the Section by Section Discussion of this preamble. Concurrent changes to §334.8(c) and §334.54 are being proposed to implement this change.

Section 334.8, Certification for Underground Storage Tanks (USTs) and UST Systems, is proposed to be amended. Section 334.8(c)(1)(A)(i) is proposed to be amended by deleting the word "and" at the end of the provision, and the period at the end of §334.8(c)(1)(A)(iii) is changed to a semi-colon, since new items are being added to the list. Section 334.8(c)(1)(A)(iv), reading "USTs used for storing regulated substances that are not motor fuels (as defined in this subchapter); and," is proposed to be added because new legislative provisions narrow the scope of the compliance self-certification program to exclude regulated substances that are not motor fuels. Section 334.8(c)(1)(A)(v), reading "USTs temporarily out-of-service under §334.54 of this title," is proposed to be added to clarify compliance self-certification requirements for this class of tanks. Section 334.8(c) is proposed to be reorganized so that existing §334.8(c)(1)(B) language becomes §334.8(c)(2) language (with necessary cross-reference changes), while current §334.8(c)(2)(B) language becomes new §334.8(c)(1)(B) language. Existing language in §334.8(c)(2) and (c)(2)(A) - (B) is proposed to be deleted. This reorganization of language is proposed because new legislative provisions narrow the scope of the compliance self-certification program to exclude regulated substances that are not motor fuels. For this reason, there will no longer be a phase-in of the program for those substances that occurs in November of 2002. Section 334.8(c)(3)(B) is proposed to be amended to correct the spelling of the phrase "self-certification." The phrase "To ensure timely initial issuance by the agency of the UST delivery certificate," is proposed to be deleted from §334.8(c)(4)(A)(vi) as superfluous language. Section 334.8(c)(5)(D) is proposed to be amended to facilitate tanks that are temporarily out-of-service under §334.54 being brought back into service without violating compliance self-certification requirements. These tanks are added to the list in §334.8(c)(5)(D)(i), and changes to clauses (ii) and (iii) are proposed to acknowledge this new item on the list (see full discussion in this preamble in the proposed amendments to §334.6).

Section 334.12, Other General Provision, is proposed to be amended. Section 334.12(a)(2) is proposed to be deleted, because the statutory language can stand alone on these points. Section 334.12(a)(1) has been renumbered to subsection (a) and a cross-reference in subsection (a)(1) was deleted.

Subchapter C--Technical Standards

There are three categories of amendments proposed for this subchapter: changes which serve to cross-reference new legislative special requirements for tank owners and operators with tanks located in areas containing certain aquifers, the specifics which will be contained in a separate rulemaking (Rule Log Number 2001-100-214-WS); changes to remove uncertainty in technical standards caused by HB 2912 language invalidating certain existing and prospective local ordinances; and changes to facilitate owner/operators of tanks temporarily out-of-service (under §334.54 of this subchapter) who wish to bring those tanks back into service without violating compliance self-certification regulations in §334.8(c).

Section 334.45, Technical Standards for New Underground Storage Tank Systems, is proposed to be amended. Section 334.45(d)(1)(C) is proposed to be amended by inserting the following new language: "An UST system, at a minimum, shall incorporate secondary containment as specified in Texas Water Code, §26.3476, if the UST system is located in an area described in that provision." The current language in subparagraph (C) would become a new subparagraph (D). These changes are to cross-reference new requirements for tanks located near certain aquifers that are contained in HB 2912, Article 13.

Section 334.47, Technical Standards for Existing Underground Storage Tank Systems, is proposed to be amended. Section 334.47(d) is proposed to be amended by inserting the following new language: "An UST system, at a minimum, shall incorporate secondary containment as specified in TWC, §26.3476, if the UST system is located in an area described in that chapter." The current language in subsection (d) would become a new subsection (e). These changes are to cross-reference new requirements for tanks located near certain aquifers that are contained in HB 2912, Article 13.

Section 334.50, Release Detection, is proposed to be amended. Section 334.50(d)(1)(B)(iii)(III) is proposed to be amended by deleting the phrase "the local standards for meter calibration or within" and inserting the phrase "or less" after the word "six" to remove uncertainty caused by the new HB 2912, Article 14.10 which invalidates certain local ordinances, replacing it with a technically appropriate standard not dependant on local laws.

Section 334.54, Temporary Removal From Service, is proposed to be amended. Section 334.54(c)(3)(B) is proposed to amend the period at the end of the sentence to "; and" to reflect a new item on the list. Section 334.54(c)(3)(C) is proposed as new language reading "Before any UST system is returned to service under this subsection, the owner or operator must first submit a construction notification form as specified under §334.6(b) of this chapter" to facilitate tanks that are temporarily out-of-service under this section being brought back into service without violating compliance self-certification regulations in §334.8(c) (see full discussion in §334.6 of this preamble).

Subchapter D--Release Reporting and Corrective Action

For many years, TWC, Chapter 26, generally, and Subchapter I specifically, have required tank owners and operators to perform corrective action activities concerning releases from their facilities. Assessment and necessary clean-up at the LPST site must be timely and properly performed until the commission is satisfied that the site can be closed. Current wording in this subchapter and Subchapter G reiterates this statutory obligation, and provides the details on how it is to be accomplished.

New legislative language assigns specific calendar deadlines to corrective action milestones, and provides that missing one of these deadlines removes eligibility for reimbursement for those and future corrective action activities at that LPST site from the PSTR Account. The new TWC provisions go on to say that eligibility is only lost if the missed deadline is the fault of the tank owner or operator, or his agent, or contractor. The amendments to this rule subchapter are primarily designed to reflect these new specific deadlines which have been overlaid on the existing assessment/cleanup obligations, as well as to reference the reimbursement consequences for missing a deadline. In addition, amendments are also proposed to memorialize commission practice of having the owner or operator provide the required notice to persons affected by a contamination release, as opposed to having a regulatory option that the commission may choose to make the notification itself.

Section 334.71, Applicability, is proposed to be amended. The title of this section is proposed to be amended to "Applicability and Deadlines," to reflect the insertion of the new legislative deadlines in this section. Language in §334.71 is proposed to be renamed as §334.71(a), since other subsections are proposed for this section. New §334.71(b) is proposed to be added to reflect the new corrective action milestone deadlines contained in HB 2687 and HB 2912, Article 14.03. New §334.71(c) is proposed to be added to reflect the new legislative requirements concerning PSTR Account reimbursement consequences of missing a deadline, and to provide a cross-reference to Subchapter H where rules containing more detail on the matter are proposed.

Section 334.82, Public Participation, is proposed to be amended. The existing rule language provides that either the owner or operator, or the agency (at its discretion), will provide the required notice to "those members of the public directly affected by the release and the planned corrective action." In practice, the agency, with its limited resources, has consistently directed the owner/operator to make these notifications. Because the commission wishes to continue this practice, amendments are proposed to §334.82(a) and (b) to state that it will be the owner or operator that will always have this burden (unless the LPST site is being handled by the commission's State-Lead Program). To this end, §334.82(a) is proposed to be amended by substituting the phrase "owner or operator must" for the phrase "agency shall" in the first sentence. In the same subsection in the last sentence, the word "certified" is proposed to be inserted to require that notification letters be sent certified mail, when that is the option of notification chosen by the owner or operator. Also, the phrase "or businesses" is proposed to be inserted after the word "households" in the last sentence of the subsection to acknowledge that affected persons may sometimes be in a business as opposed to a residence. In §334.82(b), the phrase "executive director may require" is proposed to be deleted to, as discussed in the rationale for amendments to subsection (a), reflect that it will always be the owner or operator who will make the required notification. The phrase "must submit proof of the notification required under subsection (a) of this section to the commission within 30 days of the confirmation of the release" is proposed to replace the phrase "to perform or implement the public notices in this section and to verify that such activity has been satisfactorily completed" as clarification to provide an actual deadline in every case by which the owner or operator must prove to agency staff that the required notification has been made. In §334.82(c), the phrase "executive director" is proposed to be replaced with the more general "agency," per definitions in Chapter 3 of this title. Also in this subsection, the phrase "When corrective action is performed by the commission, the commission will provide the notification referenced in subsection (a) of this section" is proposed to be added to reflect the fact that some LPST sites are handled in the commission's State-Lead program.

Subchapter G--Target Concentration Criteria

For many years, TWC, Chapter 26, generally, and Subchapter I specifically, have required tank owners and operators to perform corrective action activities concerning releases from their facilities. Assessment and necessary clean-up at the LPST site must be timely and properly performed until the commission is satisfied that the site can be closed. Current wording in this subchapter and Subchapter D reiterates this statutory obligation, and provides the details on how it is to be accomplished.

New legislative language assigns specific calendar deadlines to corrective action milestones, and provides that missing one of these deadlines removes eligibility for reimbursement for those and future corrective action activities at that LPST site from the PSTR Account. The new TWC provisions go on to say that eligibility is only lost if the missed deadline is the fault of the tank owner or operator, or his agent or contractor. The amendments to this rule subchapter are designed to reflect these new legislative requirements, and to provide a statement of applicability and a cross-reference to Subchapter D.

Section 334.201, Purpose and Applicability, is proposed to be amended. The title of this section is proposed to be amended to "Purpose, Applicability, and Deadlines" to reflect the addition of a new subsection concerning the new legislative deadlines for corrective action activities (see full discussion in this preamble in §334.71). New §334.201(c) is proposed to be added to reflect the applicability of the new deadlines, and provide a cross-reference to the Subchapter D where those deadlines are set out.

Subchapter H--Reimbursement Program

New legislation necessitates that three areas of amendments be proposed in this subchapter: HB 2687 and HB 2912, Article 14 extended the sunset date for the PSTR Account through September 1, 2006, and new deadlines were created concerning applications for reimbursement from that fund; the same legislation provided specific deadlines associated with existing corrective action duties for owners and operators, with missed deadlines affecting reimbursement eligibility; and the same legislation provided a clarified definition for "owner," which necessitates matching amendments to the "eligible owner" definition in this subchapter. Also, a small number of regulator reform amendments are proposed to clarify the subchapter.

Section 334.301, Applicability of this Subchapter, is proposed to be amended. Section 334.301(c) is proposed to be amended by adding the phrase "No expenses for corrective action performed after September 1, 2005 will be reimbursed. No reimbursements will be made for corrective action expenses sought in claims submitted to the agency after March 1, 2006. Under no circumstances will any reimbursements be made" (on or after September 1) "2006," with a deletion of "2003," to reflect the new dates and restrictions concerning the PSTR Account contained in HB 2687 and HB 2912, Article 14.

Section 334.302, General Conditions and Limitations Regarding Reimbursement, is proposed to be amended. Language in §334.302(c)(5) is proposed to be deleted and replaced with "any expenses related to corrective action performed after September 1, 2005"; to reflect the new dates and restrictions concerning the PSTR Account contained in HB 2687 and HB 2912, Article 14. A new §334.302(c)(6), reading "any expenses related to corrective action contained in a reimbursement claim filed with the agency after March 1, 2006; and/or," is proposed to be added to reflect the new dates and restrictions concerning the PSTR Account contained in HB 2687 and HB 2912, Article 14. A new §334.302(c)(7), reading "on or after September 1, 2006," is proposed to be added to reflect the new dates and restrictions concerning the PSTR Account contained in HB 2687 and HB 2912, Article 14.

Section 334.303, When to File Application, is proposed to be amended. Section 334.303(a) is proposed to be amended to insert the phrase "not after," delete the phrase "prior to," add the word "March," delete the word "June," add the year "2006," and delete the year "2003," such that the provision reads "An application for reimbursement under this subchapter must be filed on or after January 17, 1990, but not after March 1, 2006," to reflect the new dates and restrictions concerning the PSTR Account contained in HB 2687 and HB 2912, Article 14.

Section 334.310, Requirements for Eligibility, is proposed to be amended. Section 334.310(a)(1) is proposed to be amended to insert the parenthetical "(including, but not limited to, the restrictions under §334.302 of this title (relating to General Conditions and Limitations Regarding Reimbursement))" to provide a cross-reference to regulations where new language is proposed to reflect the new dates and restrictions concerning the PSTR Account contained in HB 2687 and HB 2912, Article 14 (see full discussion in this preamble in §334.302). Section 334.310(a)(1)(E) is proposed to be amended to insert the phrase "on or receives an assignment or deed in lieu of foreclosure" to more accurately reflect the requirements of TWC, §26.3571(b)(1)(C). Language in §334.310(b) is proposed to be deleted and replaced with "If an otherwise eligible owner or operator misses a deadline under §334.71(b) of this title (relating to Applicability), and that missed deadline is the fault of that person, his agent or contractor, then that person shall no longer be eligible for reimbursement for those and future corrective action expenses at that site" to reflect the additional PSTR Account reimbursement eligibility requirements imposed by HB 2687 and HB 2912, Article 14 and to provide a cross-reference to rules where proposed amendments give more details on the specific corrective action deadlines required under the new statutory provisions (see discussion in this preamble in §334.71).

Section 334.313, Review of Application, is proposed to be amended. Section 334.313(a)(1)(F) is proposed to be amended to add the parenthetical "(though no reimbursement applications may be filed after March 1, 2006)" to reflect the new dates and restrictions concerning the PSTR Account contained in HB 2687 and HB 2912, Article 14. Section 334.313(b) is proposed to be amended by changing the date "June 1, 2003" to read "March 1, 2006" to reflect the new dates and restrictions concerning the PSTR Account contained in HB 2687 and HB 2912, Article 14. Section 334.313(d) is proposed to be amended to insert the clarifying phrase "either, at the executive director's discretion" to reflect that the executive director must take one of the two actions listed, and to make the point that which of the two actions is taken on a particular application is at the discretion of the executive director.

Section 334.322, Subchapter H Definitions, is proposed to be amended. Section 334.322(9) is proposed to be amended so that the definition of "eligible owner" properly reflects the amendment to the tank "owner" definition contained in HB 2687 and HB 2912, Article 14.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeffrey Horvath, Strategic Planning and Appropriations, has determined that for the first five years the proposed rules are in effect, no fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. No fiscal implications are anticipated for those units of state and local government that do not own or operate LPSTs. However, those units of state and local government that do own or operate LPSTs will benefit from the extension of the sunset date for the PSTR Account for three additional years. Because of this extension, eligible owners and operators will be able to apply for reimbursements for much longer than they could have under the previous provisions resulting in significant cost savings.

The proposed rules implement provisions in HB 2687 (relating to the program for the regulation and remediation of underground and aboveground storage tanks) 77th Legislature, 2001, and certain provisions in HB 2912 (relating to the continuation and functions of the commission; providing penalties).

The proposed rules implement new legislative requirements which, for the most part, relate to the operation of the PSTR Account. This account was created in 1987 to provide eligible PST owners and operators reimbursement for certain expenses associated with corrective action they perform at LPST sites. Revenues to the account are derived from a fee assessed on the bulk delivery of motor fuel.

This account was to expire on September 1, 2003. In addition, the petroleum product delivery fee had been suspended according to statute, until the unobligated account balance reached $25 million.

To address concerns that remediation projects eligible for reimbursement for corrective action expenses may not be completed by the 2003 deadline, and that the unobligated account balance would reach $25 million by December of 2001, the legislature passed HB 2687 and HB 2912. These bills provide for the continuation of the PSTR Account until September 1, 2006, reduce the petroleum product delivery fees on a graduated scale, and a graduated increase in the percentage of fees that can be spent on the administrative costs of the program by the agency. The proposed rules do not address the revised fee schedules or administrative costs as they do not require rulemaking.

The proposed rules: clarify the definition of a tank owner; exclude tanks containing regulated substances that are not motor fuels from self certification requirements; attach specific calendar deadlines for tank owners and operators to perform corrective action activities at LPST sites and to bring those sites to closure, with loss of reimbursement eligibility stemming from missed deadlines that are the fault of the owner, operator or their agents; provide that a person's liability to perform corrective action at LPST sites is unrelated to any possible reimbursements that the person may be eligible for; and continue the PSTR Account through September 1, 2006 and create new deadlines for applications for reimbursement from the account.

The proposed rules provide that no reimbursement can be received for corrective action performed after September 1, 2005 and no claim received after March 1, 2006 may be reimbursed by the agency. Further, the proposed rules require sites where a confirmed release was initially discovered and reported to the agency on or before December 22, 1998 to complete site and risk assessments which must be received by the agency by September 1, 2002. Corrective action plans (or the alternative allowed demonstrations) for these sites must be received by September 1, 2003, action plans must be initiated by March 1, 2004 and all requests for closure of sites not requiring a corrective action plan must be received by September 1, 2005. The specific deadlines in these provisions reflect legislative requirements in HB 2912 and HB 2687 and would allow the PSTR Account to meet the new sunset date of September 1, 2006. The General Appropriations Act, 77th Legislature, 2001, appropriated the agency $110,581,103 in Fiscal Year (FY) 2002 and $93,308,741 in FY 2003 for the PST cleanup program and to provide reimbursement to contractors and owners for the cost of remediating sites contaminated by leaking storage tanks. Estimated funding for this portion of the PST program is estimated to remain at $93,308,741 for FY 2004, then drop to $67,173,831 in FY 2005 and $48,103,617 in FY 2006.

No fiscal implications are expected for units of state and local government that do not own or operate LPSTs. Units of state and local government that do own or operate LPSTs and fail to meet the new deadlines may lose reimbursement eligibility and encounter possible future enforcement action by the agency. Units of state and local governments that operate or own LPSTs will also benefit from the extension of the sunset date for the PSTR Account for three additional years. Because of this extension, eligible owners and operators will be able to continue to apply for reimbursements for much longer than they could have under the previous provisions. Out of the estimated 6,292 LPSTs sites currently eligible for reimbursement, there are an estimated 500 sites that are owned or operated by units of state and local government. Although costs for PST cleanups vary widely, based upon an estimated average cleanup cost of $50,000 to $60,000 per site, units of state and local government that meet the new deadlines will be able to apply for reimbursement for three years longer than they would have, resulting in potential savings of an estimated $25 to $30 million.

No fiscal implications are anticipated to the agency or other units of state and local government to implement the other provisions in the proposed rulemaking as these provisions do not add additional regulatory requirements, but clarify existing rules and practices.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the enforcement and compliance with these proposed rules will be the expedited completion of LPSTs cleanups and closures around the state thus protecting the state's groundwater resources, and the continuation of reimbursements to PST owners and operators for remediation costs until 2006.

There are no fiscal implications to businesses and individuals that do not own or operate LPSTs. However, those eligible businesses and individuals that do own LPSTs will benefit from the extension of the sunset date for the PSTR Account for three additional years. Because of this extension, eligible owners and operators will be able to continue to apply for reimbursements for much longer than they could have under the previous provisions, resulting in significant cost savings.

The proposed rules implement new legislative requirements which, for the most part, relate to the operation of the PSTR Account. This account was created in 1987 to provide eligible PST owners and operators reimbursement for certain expenses associated with corrective action they perform at LPST sites. Revenue to the account is derived from a fee assessed on the bulk delivery of motor fuel.

This account was to expire on September 1, 2003. In addition, the petroleum product delivery fee had been suspended according to statute, until the unobligated account balance reached $25 million.

To address concerns that remediation projects eligible for reimbursement for corrective action expenses may not be completed by the 2003 deadline, and that the unobligated account balance would reach $25 million by December of 2001, the legislature passed HB 2687 and HB 2912. These bills provide for the continuation of the PSTR Account until September 1, 2006, reduce the petroleum product delivery fees, and increase the amount of fees that can be spent on the administrative costs of the program by the agency. The proposed rules do not address the revised fee schedules or administrative costs as they do not require rulemaking.

The proposed rules: clarify the definition of a tank owner; exclude tanks containing regulated substances that are not motor fuels from self certification requirements; attach specific calendar deadlines for tank owners and operators to perform corrective action activities at LPST sites and to bring those sites to closure, with loss of reimbursement eligibility stemming from missed deadlines that are the fault of the owner, operator or their agents; provide that a person's liability to perform corrective action at LPST sites is unrelated to any possible reimbursements that the person may be eligible for; and continue the PSTR Account through September 1, 2006 and create new deadlines for applications for reimbursement from the account.

The proposed rules provide that no reimbursement can be received for corrective action performed after September 1, 2005 and no claim received after March 1, 2006 may be reimbursed

by the agency. Further, the proposed rules require sites where a confirmed release was initially discovered and reported to the agency on or before December 22, 1998 to complete site and risk assessments which must be received by the agency by September 1, 2002. Corrective action plans for these sites must be received by September 1, 2003, action plans must be initiated by March 1, 2004 and all requests for closure of sites not requiring a corrective action plan must be received by September 1, 2005. The specific deadlines in these provisions reflect legislative requirements in HB 2912 and HB 2687 and would allow the PSTR Account to meet the new sunset date of September 1, 2006. Senate Bill 1, 77th Legislature, 2001, appropriated the agency $110,581,103 in FY 2002 and $93,308,741 in FY 2003 for the PST cleanup program and to provide reimbursement to contractors and owners for the cost of remediating sites contaminated by leaking storage tanks. Estimated funding for this portion of the PST program is estimated to remain at $93,308,741 for FY 2004, then drop to $67,173,831 in FY 2005 and $48,103,617 in FY 2006.

No fiscal implications are anticipated to individuals and businesses that do not own or operate LPSTs. Businesses and individuals that do own or operate LPSTs and miss the new deadlines would lose reimbursement eligibility and encounter possible future enforcement action by the agency. Eligible businesses or individuals that operate or own LPSTs will also benefit from the extension of the sunset date for the PSTR Account for three additional years. Because of this extension, eligible owners and operators will be able to apply for reimbursements for much longer than they could have under the previous provisions. Out of the estimated 6,292 LPST sites currently eligible for reimbursement, there are an estimated 1,000 sites that have not reported any information to the agency regarding their remediation efforts. It could be assumed that these sites will miss the new deadlines for obtaining reimbursement. Although costs for PST cleanup costs vary widely, it is estimated that an average cleanup may cost between $50,000 and $60,000 per site. However, for those sites that meet the deadlines, they will be able to apply for reimbursement for three years longer than they would have, thus resulting in potential savings of between $264,600,000 and $317,520,000.

No fiscal implications are anticipated to individuals or businesses to implement the other provisions in the proposed rulemaking as these provisions do not add additional regulatory requirements, but clarify existing rules and practices.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for any small or micro-businesses as a result of implementing the proposed rules. Those eligible small or micro-businesses that own LPSTs will benefit from the extension of the sunset date for the PSTR Account for three additional years. Because of this extension, eligible owners and operators will be able to apply for reimbursements for much longer than they could have under the previous provisions. It is not known how many of the currently estimated 6,292 LPST sites currently eligible for reimbursement are small or micro-businesses. However, assuming that there are an estimated 1,000 sites that have not reported required information to the agency regarding their remediation efforts, it could be assumed that these sites will miss the new deadlines for obtaining reimbursement.

Although costs for PST cleanup costs vary widely, it is estimated that an average cleanup may cost between $50,000 and $60,000 per site. However, for those sites that meet the deadlines, they will be able to apply for reimbursement for three years longer than they would have, thus resulting in potential savings of between $264,600,000 and $317,520,000.

No fiscal implications are anticipated to small or micro-businesses to implement the other provisions in the proposed rulemaking as these provisions do not add additional regulatory requirements, but clarify existing rules and practices.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has review this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. Major environmental rule means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Further, it does not meet any of the four applicability requirements listed in §2001.0225(a).

The vast majority of these proposed rule amendments reflect the new dates and restrictions concerning the PSTR Fund contained in HB 2687 and HB 2912, Article 14, rather than being specifically intended to protect the environment or reduce risks to human health from environmental exposure. The PSTR Fund was created many years ago by TWC, Chapter 26, Subchapter I, to provide a fee-driven pool of monies from which eligible owners and operators may apply for reimbursement for certain expenses associated with corrective action they are required to perform at LPST sites (the agency is also authorized to use the fund for certain expenses associated with the PST program). The new legislation attaches specific calendar deadlines to existing general obligations that tank owners and operators have under TWC, Chapter 26, Subchapter I and Subchapters D and G of this rule chapter to perform corrective action activities at LPST sites and bring those sites to closure, with loss of reimbursement eligibility stemming from missed deadlines that are the fault of the tank owner or operator (or their agents, etc.). The specific deadlines in the new statutory provisions are part of a legislative effort to wind down the PSTR Fund by its new sunset date of September 1, 2006. As the new statutory language reiterates, "a person's liability to perform corrective action under this chapter is unrelated to any possible reimbursements the person may be eligible for under §26.3571" of the TWC. That general liability predates the new legislation.

In addition, the proposed regulatory "owner" definition revision, also required in the new statutory provisions, is intended as a clarification to better explain this important term and how the agency makes ownership determinations.

The exclusion of regulated substances that are not motor fuels from the compliance self-certification program was written into the new statutory provisions to narrow the prospective program scope. The self-certification program was created by HB 2815 in

1999, and following that session there was some question concerning legislative intent about the scope of the program. In implementing HB 2815, rules were promulgated in §334.8(c)(2) of this chapter that would not phase the substances in question into the self-certification scheme until 2002. This was specifically done to allow the legislature, if it chose to, to address the applicability issue concerning these substances in the following session, which was done in HB 2687 and HB 2912, Article 14. With the applicability change, the "phase in" period for these substances to enter the compliance self-certification program, scheduled for 2002, will not take place. It should be noted that only a very small number of facilities would have been included in that phase-in group.

Also, the regulatory reform amendments in this proposed rulemaking are intended to clarify rule requirements, rather than introduce new concepts. The amendments concerning the mechanics of how a tank that has been temporarily out-of-service under §334.54 can be brought back into service without violating the self-certification rules in §334.8(c) is essentially administrative in nature.

Any potential adverse economic affect caused by these proposed rules (specifically the specific calendar deadlines placed on corrective action milestones, and their resulting effect on reimbursement eligibility) should be offset by the extension in HB 2687 and HB 2912, Article 14 of the PSTR Fund sunset date for three additional years. Because of this extension, owners and operators will be able to apply for reimbursements for much longer that they could have under existing law and thus face fewer out-of-pocket expenses when assessing and remediating LPST sites.

In addition, even if a proposed rule was to be considered a "major environmental rule," a draft regulatory impact assessment is not required because the rules do not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or propose to adopt a rule solely under the general powers of the agency.

This proposal does not exceed a standard set by federal law. This proposal also does not exceed an express requirement of state law because almost all of the amendments proposed in this rulemaking are required by new legislation, and those amendments do not exceed the scope of those new statutory provisions. The regulatory reform amendments are either clarifications of existing rules or corrections of typographical errors. This proposed rulemaking is authorized as described in the "Statutory Authority" section of this preamble. This proposal does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of federal government to implement a state federal program. One of the central elements of federal approval of the Texas PST program is the existence in state law of requirements concerning timely and proper assessment and clean-up of contaminated LPST sites (see 40 Code of Federal Regulations §281.35). A substantial part of the proposed rulemaking reflects HB 2687/HB 2912, Article 14 requirements establishing specific calendar deadlines for assessment and clean-up of these sites. When the Texas program was approved, it already contained regulations concerning the duty for timely and proper LPST site corrective action. The new state legislation only places specific calendar deadlines on existing general obligations tank owners and operators have to perform corrective action activities at these sites. Also, the proposed rules are not proposed to be adopted solely under the general powers of the agency, but rather under specific state law.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this proposal under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of this proposed rulemaking is to implement HB 2687 and HB 2912, Article 14 (with a small number of clarifying regulatory reform amendments proposed). This action will not create a burden on private real property. Most of the legislatively-driven changes relate to the operation of the PSTR Account. This fund was created many years ago by TWC, Chapter 26, Subchapter I, to provide a pool of monies from which eligible owners and operators may apply for reimbursement for certain expenses associated with corrective action they perform at LPST sites (the commission is also authorized to use the fund for certain expenses associated with the PST program). The existence of this fund facilitates timely and proper assessment and remediation of LPST sites by tank owners and operators. The new legislation extends the sunset date of the fund for three additional years. Consequently, this may increase the pace of clean-ups and closures at contaminated sites around the state. The small number of rules proposed as part of the commission's regulatory reform effort also do not create a burden on private real property, since they are written to clarify existing rules. As a whole, this rulemaking will not be the cause of a reduction in market value of private real property, and does not create a burden on private real property and will not constitute a takings under the Texas Government Code, §2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has prepared a consistency determination for the proposed rules pursuant to 31 TAC §505.22, and has found that the proposed rulemaking is consistent with the applicable Texas Costal Management Program (CMP) goals and policies. The rulemaking is subject to the CMP and must be consistent with applicable goals and policies which 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 or Coastal Natural Resource Areas (CNRAs). This proposed rulemaking implements HB 2687 and HB 2912, Article 14, and also includes a small number of regulatory reform changes. Most of the legislatively-driven changes relate to the operation of the PSTR Account. This fund was created many years ago by TWC, Chapter 26, Subchapter I, to provide a pool of monies from which eligible owners and operators may apply for reimbursement for certain expenses associated with corrective action they perform at LPST sites (the commission is also authorized to use the fund for certain expenses associated with the PST program). The existence of this fund facilitates timely and proper assessment and remediation of LPST sites by tank owners and operators. The new legislation extends the sunset date of the fund for three additional years. Consequently, this may increase the pace of clean-ups and closures at contaminated sites around the state. The new legislation also adds specific deadlines for corrective action milestones that owners and operators must follow in cleaning up LPST sites on the way to site closure. A missed deadline, which is the fault of the owner or operator (or agent, etc.), leads to a loss of reimbursement eligibility from the PSTR Fund, thus acting as an inducement for the deadlines to be met, which in turns expedites timely and proper assessment and remediation of contaminated sites. The proposed regulatory reform amendments clarify existing rules, or correct typographical errors. No CMP policies are applicable to this proposed rulemaking.

For these reasons, the commission has determined that this proposed rulemaking is consistent with the applicable CMP goal and will not have an adverse effect on the CNRAs. Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

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 by fax at (512) 239-4808. All comments must be received on December 10, 2001, and should reference Rule Log Number 2001-039-334-WS. Comments received by 5:00 p.m. on that date will be considered by the commission before any final action on the proposal. For further information, please contact Michael Bame at (512) 239-5658.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §§334.2, 334.3, 334.5, 334.6, 334.8, 334.12

STATUTORY AUTHORITY

The amendments are proposed under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §26.011, which requires the commission to control the quality of water by rule. The amended sections are also proposed under TWC, §26.345, which provides the commission authority to develop a regulatory program and to adopt rules regarding USTs; and §26.351, which provides the commission authority to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or an aboveground storage tank.

The proposed amendments implement TWC, Chapter 26, Subchapter I, Underground Storage Tanks.

§334.2. Definitions.

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

(1) - (26) (No change.)

(27) Corrosion technician--A person who can demonstrate an understanding of the principals of soil resistivity, stray current, structure-to-soil potential, and component electrical isolation measurements as relate to corrosion protection and control on buried or submerged metal tanks and metal piping systems; who is qualified by appropriate training and experience to engage in the practice of inspection and testing for corrosion protection and control on such systems, including the inspection and testing of all common types of cathodic protection systems; and who either:

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

(C) has been officially qualified as a cathodic protection tester [~~testor~~], in strict accordance with the assessment and examination procedures prescribed by NACE International.

(28) - (71) (No change.)

(72) Owner--Any person who [~~currently~~] holds legal possession or ownership of an [~~a total or partial~~] interest in an UST system or an AST. For the purposes of this chapter, if [~~where~~] the actual ownership of an UST system or an AST is [~~either~~] uncertain, unknown, or in dispute, the fee simple owner of the surface estate of the tract on which [~~where~~] the UST system or the AST is located is [~~shall be~~] considered the UST system or AST owner[~~,~~] unless that person [~~the owner of the surface estate~~] can demonstrate by appropriate documentation, including a deed reservation, invoice, bill of sale, [~~(deed reservation, invoice, bill of sale, etc.)~~] or by other legally-acceptable means that the UST system or AST is owned by another person [~~others~~]. A person that has registered as an owner of an UST system or AST with the commission under §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems) (or a preceding rule section concerning tank registration) after September 1, 1987, shall be considered the UST system owner and/or AST owner until such time as documentation demonstrates to the executive director's satisfaction that the legal interest in the UST system or AST was transferred to a different person subsequent to the date of the tank registration. This definition is subject to the limitations found in Texas Water Code, §26.3514, Limits on Liability of Lender; §26.3515, Limits on Liability of Corporate Fiduciary; and §25.3516, Limits on Liability of Taxing Unit. [~~Except as otherwise provided by the Texas Water Code, §§26.3514 - 26.3516, owner does not include a person who holds an interest in an UST system or AST solely for financial security purposes unless, through foreclosure or other related actions, the holder of such security interest has taken legal possession of the UST system or AST.~~]

(73) - (120) (No change.)

§334.3. Exemptions for Underground Storage Tanks (USTs) and UST Systems.

(a) Complete exemption. The following underground tanks and containment devices (including any connected piping) are completely exempt from regulation under this chapter:

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

(10) pipeline facilities, including gathering lines, if such facilities are regulated under:

(A) the Natural Gas Pipeline [~~Pipeling~~] Safety Act of 1968 (49 United States Code, §§1671, et seq.); or

(B) (No change.)

(11) (No change.)

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

§334.5. General Prohibitions for Underground Storage Tanks (USTs) and UST Systems.

(a) (No change.)

(b) Delivery prohibitions.

(1) Concerning UST systems which the tank owner or operator must self-certify under §334.8(c) of this title (relating to Certification for Underground Storage Tanks (USTs) and UST Systems):

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

[~~(C) The requirement to observe a delivery certificate before delivering to an UST system regulated under §334.8(c)(2) of this title will phase-in according to the same schedule found in that section.~~]

(C) [~~(D)~~] If in the exercise of good faith, a common carrier who deposits a regulated substance into an UST system is first presented with an apparently valid, current TNRCC delivery certificate (or temporary delivery authorization, if applicable) represented by the UST system owner or operator to meet the requirements of subsection (a) of this section, this will be considered prima facie [~~facia~~] evidence of compliance by that common carrier with this subparagraph.

(2) Concerning UST systems which are not required to be self-certified compliant at a given time under §334.8(c) of this title, but

which are required to be registered under §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems) [(e.g. tanks which have not yet "phased-in" to the compliance self-certification program under the schedule in §334.8(c)(2) of this title)]:

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

(3) (No change.)

§334.6. Construction Notification for Underground Storage Tanks (USTs) and UST Systems.

(a) (No change.)

(b) Notification for major construction activities.

(1) Applicable activities.

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

(C) When an UST system has been taken temporarily out-of-service under §334.54 of this title (relating to Temporary Removal from Service), the owner or operator must first submit a construction notification form before returning the UST system to service.

(2) - (6) (No change.)

(c) (No change.)

§334.8. Certification for Underground Storage Tanks (USTs) and UST Systems.

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

(c) UST compliance self-certification requirements.

(1) Applicability. Except as provided in this paragraph, the requirements of this subsection are applicable to the owners and operators of USTs regulated under this chapter.

(A) The requirements of this subsection are not applicable to the following USTs:

(i) USTs which are completely exempt or partially exempt from regulation under §334.3 of this title (relating to Exemptions for Underground Storage Tanks (USTs) and UST Systems); [and]

(ii) (No change.)

(iii) USTs into which deliveries or deposits of regulated substances are exclusively made by persons other than a common carrier, as defined in §334.2 of this title (relating to Definitions); [.]

(iv) USTs used for storing regulated substances that are not motor fuels as defined in §334.2 of this title; and

(v) USTs temporarily out-of-service under §334.54 of this title (relating to Temporary Removal from Service).

(B) Nothing in this subsection affects the requirements under §334.7(d)(4) of this title.

(2) [(B)] The agency will not provide an UST delivery certificate for USTs covered by the exceptions in paragraph (1)(A) of this subsection [subparagraph (A) of this paragraph].

[(2) Phase-in schedule for all regulated substance UST systems except motor fuel (as defined in §334.2 of this title) UST systems.]

[(A) For these UST systems, the self-certification requirements of this subsection will become effective two years after the effective date of this subsection.]

[(B) Nothing in this subsection affects the requirements under §334.7(d)(4) of this title.]

(3) Conditions and limitations.

(A) (No change.)

(B) Completion of the UST registration and self-certification [self-certificaton] form in a manner that indicates compliance with applicable UST regulations (as specified in subparagraph (D) of this paragraph) will result in the agency's issuance of an UST delivery certificate for the tanks at the facility for which compliance is self-certified.

(C) - (D) (No change.)

(4) UST registration and self-certification form.

(A) Requirements for completion of the form.

(i) - (v) (No change.)

(vi) An [To ensure timely initial issuance by the agency of the UST delivery certificate, an] owner or operator must submit the required UST registration and self-certification form (including any additional or supplemental information required under clause (v) of this subparagraph) to the agency no later than the following dates:

(I) - (II) (No change.)

(vii) (No change.)

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

(5) UST delivery certificate.

(A) - (C) (No change.)

(D) Temporary delivery authorization.

(i) Upon receipt of a TNRCC construction notification form indicating the pending installation of a new or replacement UST system(s), or indicating that an UST system temporarily out-of-service under §334.54 of this title will be returned to service, the agency will issue a temporary delivery authorization for those tank systems.

(ii) The temporary delivery authorization is valid for no more than 90 days after the first delivery of regulated substance into the [new or replacement] UST system described in clause (i) of this subparagraph.

(iii) The UST owner and operator are responsible for maintaining complete and accurate records of the date of the first deposit of regulated substances into the UST system(s) [a new or replacement UST(s)], as well as the date that the initial 90 day period expires. The bill of lading for the first delivery of regulated substance into the [any new or replacement] UST system at the facility must be attached to the temporary delivery authorization for that facility.

(6) (No change.)

§334.12. Other General Provisions.

(a) Other regulations. Compliance

[(1) Except as provided in paragraph (2) of this subsection, compliance] with the provisions of this chapter by an owner or operator of an underground storage tank (UST) system or aboveground storage tank (AST) system does not relieve such owner or operator from the responsibility of compliance with any other regulations directly and/or indirectly affecting such tanks and the stored regulated substances, including, but not necessarily limited to, all applicable regulations legally promulgated by the United States Environmental Protection Agency, United States Occupational Safety and Health Administration, United States Department of Transportation, United States Nuclear Regulatory Commission, United States Department of Energy, Texas Department

of Health, State Board of Insurance, Texas Commission on Fire Protection, Railroad Commission of Texas, Texas Department of Agriculture, State Comptroller, Texas Department of Public Safety, Texas Natural Resource Conservation Commission, and any other federal, state, and local governmental agencies or entities having appropriate jurisdiction.

~~[(2) As provided in the Texas Water Code (TWC), §26.359, this chapter establishes a unified statewide program for underground and surface water protection, and any local regulation or ordinance is effective only to the extent the regulation or ordinance does not conflict with the standards adopted for the design, construction, installation, or operation of USTs under this chapter.]~~

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

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

Filed with the Office of the Secretary of State, on October 26, 2001.

TRD-200106513
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 239-4712

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SUBCHAPTER C. TECHNICAL STANDARDS

30 TAC §§334.45, 334.47, 334.50, 334.54

STATUTORY AUTHORITY

The amendments are proposed under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §26.011, which requires the commission to control the quality of water by rule. The amended sections are also proposed under TWC, §26.345, which provides the commission authority to develop a regulatory program and to adopt rules regarding USTs; and §26.351, which provides the commission authority to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or an aboveground storage tank.

The proposed amendments implement TWC, Chapter 26, Subchapter I, Underground Storage Tanks.

§334.45. Technical Standards for New Underground Storage Tank Systems.

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

(d) Secondary containment for UST systems.

(1) Applicability.

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

(C) An UST system, at a minimum, shall incorporate secondary containment as specified in Texas Water Code, §26.3476, if the UST system is located in an area described in that provision.

(D) [~~(C)~~] The agency may specifically require the installation of a secondary containment system meeting the requirements of this subsection at other times when necessary for the protection of human health or safety or the environment.

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

(e) - (f) (No change.)

§334.47. Technical Standards for Existing Underground Storage Tank Systems.

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

(d) An UST system, at a minimum, shall incorporate secondary containment as specified in Texas Water Code, §26.3476, if the UST system is located in an area described in that provision.

(e) [~~(d)~~] Records for upgrading of existing UST systems.

(1) Owners and operators shall maintain all records related to the upgrading of existing UST systems required in this subsection in accordance with the requirements in §334.10(b) of this title (relating to Reporting and Recordkeeping).

(2) Owners and operators shall maintain the following records for the operational life of the UST system:

(A) general information related to the tank integrity assessment and cathodic protection requirements in subsection (b) of this section, including:

(i) dates of the tank integrity assessment and cathodic protection installation activities;

(ii) names, addresses, and telephone numbers of the persons conducting the tank integrity assessment and cathodic protection installation activities; and

(iii) copies of all related notifications or reports filed with the agency or others, including:

(I) registration information, as required by §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems); and

(II) installation certification information, as required by §334.8(a) of this title (relating to Certification for Underground Storage Tanks (USTs) and UST Systems);

(B) as-built drawings (or plans), which have been drawn to scale and in sufficient detail so as to accurately depict and describe the sizes, dimensions, and locations of any UST system components or equipment added or installed on or after the effective date of this subchapter which are installed pursuant to one of the construction activities included in §334.6(b)(1)(A) of this title (relating to Construction Notification for Underground Storage Tanks (USTs) and UST Systems); and

(C) equipment information for any UST system components or equipment added or installed on or after the effective date of this subchapter for the purpose of compliance with the upgrading requirements of this section, including manufacturers specifications, installation instructions, operating instructions, warranty information, recommended test procedures, and inspection and maintenance schedules.

(3) Owners and operators shall maintain the results of all equipment tests and tank integrity tests required in this section including internal inspections, tank and piping tightness tests, and site assessments, for at least five years after the dates such tests are conducted.

§334.50. Release Detection.

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

(d) Allowable methods of release detection. Tanks in an UST system may be monitored for releases using one or more of the methods included in paragraphs (2) - (10) of this subsection. Piping in an UST system may be monitored for releases using one or more of the methods included in paragraphs (5) - (10) of this subsection. Any method of release detection for tanks and/or piping in this section shall be allowable only when installed (or applied), operated, calibrated, and maintained in accordance with the particular requirements specified for such method in this subsection.

(1) Tank tightness testing and inventory control. A combination of tank tightness testing and inventory control may be used as a tank release detection method only until December 22, 1998, subject to the following conditions and requirements.

(A) (No change.)

(B) Inventory control. All inventory control procedures shall be in conformance with the following requirements.

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

(iii) The operator shall assure that the following additional procedures and requirements are followed.

(I) - (II) (No change.)

(III) Substance dispensing shall be metered and recorded within [~~the local standards for meter calibration or within~~] an accuracy of six or less cubic inches for every five gallons of product withdrawn.

(IV) (No change.)

(2) - (10) (No change.)

(e) (No change.)

§334.54. Temporary Removal from Service.

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

(c) Protected and monitored systems. Any UST system may remain out of service indefinitely so long as the following requirements are met during the period that the UST system remains temporarily out of service.

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

(3) Returning UST system to service.

(A) When a protected and empty UST system that has been temporarily out of service for longer than six months is placed back into service, the owner or operator shall ensure the integrity of the system by the performance of tank tightness and piping tightness tests that meet the requirements of §334.50(d)(1)(A), and as applicable, (b)(2)(A)(ii)(I), or (B)(i)(I), of this title, prior to bringing the system back into operation; [~~and~~]

(B) When either a protected and monitored or a protected and empty UST system is placed back into service, the owner or operator shall also ensure that the UST system either is in compliance or is brought into compliance with all applicable release detection, and spill and overfill prevention requirements of §334.50 of this title and §334.51 of this title (relating to Spill and Overfill Prevention and Control); and [~~,~~]

(C) Before any UST system is returned to service under this subsection, the owner or operator must first submit a construction notification form as specified in §334.6(b) of this title (relating to Construction Notification for Underground Storage Tanks (USTs) and UST Systems).

(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.

Filed with the Office of the Secretary of State, on October 26, 2001.

TRD-200106514
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 239-4712

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SUBCHAPTER D. RELEASE REPORTING AND CORRECTIVE ACTION

30 TAC §334.71, §334.82

STATUTORY AUTHORITY

The amendments are proposed under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §26.011, which requires the commission to control the quality of water by rule. The amended sections are also proposed under TWC, §26.345, which provides the commission authority to develop a regulatory program and to adopt rules regarding USTs; and §26.351, which provides the commission authority to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or an aboveground storage tank.

The proposed amendments implement TWC, Chapter 26, Subchapter I, Underground Storage Tanks.

§334.71. Applicability and Deadlines.

(a) For releases discovered and reported to the executive director on or before August 31, 2003, the provisions of this subchapter are applicable to owners and operators of all underground storage tanks (USTs) and all petroleum product aboveground storage tanks (ASTs) unless otherwise specified in Subchapters A or F of this chapter (relating to General Provisions and Aboveground Storage Tanks, respectively). For releases reported to the agency on or after September 1, 2003, the provisions of this subchapter are applicable to owners and operators of all USTs and all petroleum product ASTs, except that Chapter 350 of this title (relating to Texas Risk Reduction Program) shall be used in lieu of §§334.78 - 334.81 of this title (relating to Site Assessment, Removal of Non-Aqueous Phase Liquids, Investigation for Soil and Groundwater Cleanup, and Corrective Action Plans, respectively).

(b) If the release was reported to the agency on or before December 22, 1998, the person performing the corrective action shall meet the following deadlines:

(1) a complete site assessment and risk assessment (including, but not limited to, risk-based criteria for establishing target concentrations), as determined by the executive director, must be received by the agency no later than September 1, 2002;

(2) a complete corrective action plan, as determined by the executive director and including, but not limited to, completion of pilot

studies and recommendation of a cost-effective and technically appropriate remediation methodology, must be received by the agency no later than September 1, 2003. The person may, in lieu of this requirement, submit by this same deadline a demonstration that a corrective action plan is not required for the site in question under commission rules. Such demonstration must be to the executive director's satisfaction;

(3) for those sites found under paragraph (2) of this subsection to require a corrective action plan, that plan must be initiated and proceeding according to the requirements and deadlines in the approved plan no later than March 1, 2004;

(4) for sites which require either a corrective action plan or groundwater monitoring, a comprehensive and accurate annual status report concerning those activities must be submitted to the agency;

(5) for sites which require either a corrective action plan or groundwater monitoring, all deadlines set by the executive director concerning the corrective action plan or approved groundwater monitoring plan shall be met; and

(6) site closure requests for all sites where the executive director agreed in writing that no corrective action plan was required must be received by the agency no later than September 1, 2005. The request must be complete, as judged by the executive director.

(c) Failure to meet the deadlines detailed in subsection (b) of this section will result in a loss of reimbursement eligibility as described in Subchapter H of this chapter (relating to Reimbursement Program).

§334.82. Public Participation.

(a) For each confirmed release that requires corrective action, the owner or operator must [~~agency shall~~] provide notice to the public by means designated to reach those members of the public directly affected by the release and the planned corrective action. This notice may include, but is not limited to, public notice in local newspapers, block advertisements, publication in a state register, certified letters to individual households or businesses, or personal contacts [~~by field staff~~].

(b) The [~~executive director may require the~~] owner or operator must submit proof of the notification required under subsection (a) of this section to the agency within 30 days of the confirmation of the release [~~to perform or implement the public notices in this section and to verify that such activity has been satisfactorily completed~~].

(c) The agency [~~executive director~~] shall give public notice to affected parties if implementation of an approved corrective action plan does not achieve the established cleanup levels in the plan and termination of that plan is under consideration by the executive director. When corrective action is performed by the agency, the agency will provide the notification referenced in subsection (a) 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 October 26, 2001.

TRD-200106515
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 239-4712

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SUBCHAPTER G. TARGET CONCENTRATION CRITERIA

30 TAC §334.201

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §26.011, which requires the commission to control the quality of water by rule. The amendment is also proposed under TWC, §26.345, which provides the commission authority to develop a regulatory program and to adopt rules regarding USTs; and §26.351, which provides the commission authority to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or an aboveground storage tank.

The proposed amendment implements TWC, Chapter 26, Subchapter I, Underground Storage Tanks.

§334.201. Purpose, Applicability, and Deadlines [~~Purpose and Applicability~~].

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

(c) Deadlines. For sites where the release was reported to the agency on or before December 22, 1998, the deadlines detailed in §334.71(b) of this title (relating to Applicability and Deadlines) apply.

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 October 26, 2001.

TRD-200106516
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 239-4712

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SUBCHAPTER H. REIMBURSEMENT PROGRAM

30 TAC §§334.301 - 334.303, 334.310, 334.313, 334.322

STATUTORY AUTHORITY

The amendments are proposed under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §26.011, which requires the commission to control the quality of water by rule. The amended sections are also proposed under TWC, §26.345, which provides the commission authority to develop a regulatory program and to adopt rules regarding USTs; and §26.351, which provides

the commission authority to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or an aboveground storage tank.

The proposed amendments implement TWC, Chapter 26, Subchapter I, Underground Storage Tanks.

§334.301. Applicability of this Subchapter.

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

(c) Expenses considered for payment - time frame in which corrective action performed. Subject to the other requirements of this subchapter, the expenses which may be considered for payment from the petroleum storage tank remediation fund (PSTR) are limited to expenses of corrective action which was performed for the owner or operator on or after September 1, 1987, and conducted in response to a confirmed release that was initially discovered and reported to the agency on or before December 22, 1998. Expenses for corrective action performed prior to September 1, 1987, are not subject to reimbursement or payment. No expenses for corrective action performed after September 1, 2005 will be reimbursed. No reimbursements will be made for corrective action expenses sought in claims submitted to the agency after March 1, 2006. Under no circumstances will any reimbursements be made [~~No expenses for corrective action will be reimbursed~~] on or after September 1, 2006 [~~2003~~].

(d) - (h) (No change.)

§334.302. General Conditions and Limitations Regarding Reimbursement.

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

(c) No payments shall be made by the agency under this subchapter for:

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

(4) any expenses for corrective action incurred for confirmed releases initially discovered and reported to the agency after December 22, 1998; [~~or~~]

(5) any expenses related to corrective action performed after September 1, 2005; [~~any corrective action expenses on or after September 1, 2003, regardless of when the expenses were incurred.~~]

(6) any expenses related to corrective action contained in a reimbursement claim filed with the agency after March 1, 2006; and/or

(7) on or after September 1, 2006.

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

§334.303. When to File Application.

(a) An application for reimbursement under this subchapter must be filed on or after January 17, 1990, but not after March 1, 2006 [~~prior to June 1, 2003~~].

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

§334.310. Requirements for Eligibility.

(a) For a person to be an eligible owner or operator under this subchapter, each of the following requirements must be met.

(1) The person must meet the other requirements of this chapter (including, but not limited to, the restrictions under §334.302 of this title (relating to General Conditions and Limitations Regarding Reimbursement)) and must be:

(A) (No change.)

(B) any past owner or operator of a tank described in subparagraph (A) of this paragraph who performed corrective action on or after September 1, 1987[~~, and on or before September 1, 2003,~~] in response to a release of petroleum products from such tank;

(C) - (D) (No change.)

(E) a lender who forecloses on or receives an assignment or deed in lieu of foreclosure and becomes the owner of property contaminated by a release of petroleum products from a tank described in subparagraph (A) of this paragraph, and who performed corrective action in response to a release of petroleum products from such tank; or [~~and~~]

(F) (No change.)

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

(b) If an otherwise eligible owner or operator misses a deadline under §334.71(b) of this title (relating to Applicability), and that missed deadline is the fault of that person, his agent or contractor, then that person shall no longer be eligible for reimbursement for those or future corrective action expenses at that site [~~Satisfaction of the eligibility criteria set forth in subsection (a) of this section shall constitute compliance for purposes of the Texas Water Code, §26.357(b)(2), for the purposes of this subchapter~~].

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

§334.313. Review of Application.

(a) An application for reimbursement or supplemented application filed under this subchapter shall be subject to review by the agency:

(1) to determine if the information which is required to be submitted under this subchapter has been filed with the agency, utilizing the following procedure:

(A) - (E) (No change.)

(F) if it has been determined that an otherwise complete application contains costs for a corrective action activity which has been performed improperly, or the information or report that documents the activity has been determined to be deficient or defective by the agency under Subchapter D of this chapter (relating to Release Reporting and Corrective Action), the applicant will be notified and the application will not be forwarded for further review. The applicant may resubmit the application after the defects or deficiencies have been resolved and the agency concurs that the corrective action activity or documentation is acceptable under Subchapter D of this chapter (though no reimbursement applications may be filed after March 1, 2006);

(G) (No change.)

(2) (No change.)

(b) An application which does not contain all the information required by this subchapter will not be considered a complete claim and will not be processed. This does not prevent the applicant from filing another application for the same occurrence at any time prior to March 1, 2006 [~~June 1, 2003~~].

(c) (No change.)

(d) If, during the course of the substantive (technical and financial) review, the agency finds that additional information of the type required by this subchapter is needed to evaluate the application, it may either, at the executive director's discretion:

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

(e) - (f) (No change.)

§334.322. Subchapter H Definitions.

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

(1) - (8) (No change.)

(9) Eligible owner--Any person who meets the eligibility requirements prescribed in §334.310 of this title and who held or currently holds legal possession or ownership of an [~~a total or partial~~] interest in a petroleum storage tank. For the purposes of this subchapter, if [~~where~~] the actual ownership of the petroleum storage tank is [~~either~~] uncertain, unknown, or in dispute, the fee simple owner of the surface estate of the tract on which [~~where~~] the petroleum storage tank is located is [~~shall be~~] considered the petroleum storage tank owner [~~,~~] unless that person [~~it~~] can demonstrate [~~be shown~~] by appropriate documentation, including a deed reservation, invoice, bill of sale, [~~(deed reservation, invoice, bill of sale, etc.)~~] or by other legally acceptable means that the petroleum storage tank is owned by another person. A person that has registered as an owner of a petroleum storage tank with the commission under §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems) (or a preceding rule section concerning tank registration) after September 1, 1987, shall be considered the petroleum storage tank owner until such time as documentation demonstrates to the executive director's satisfaction that the legal interest in the petroleum storage tank was transferred to a different person subsequent to the date of the tank registration. This definition is subject to the limitations found in Texas Water Code, §26.3514, Limits on Liability of Lender; §26.3515, Limits on Liability of Corporate Fiduciary; and §25.3516, Limits on Liability of Taxing Unit. [~~"Owner" does not include a person who holds an interest in a petroleum storage tank solely for financial security purposes unless, through foreclosure or other related actions, the holder of such security interest has taken legal possession of the petroleum storage tank.~~]

(10) - (20) (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 October 26, 2001.

TRD-200106517
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 239-4712

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TITLE 34. PUBLIC FINANCE

PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

CHAPTER 25. MEMBERSHIP CREDIT

SUBCHAPTER O. ROLLOVER DISTRIBUTIONS AND TRANSFERS TO TRS

34 TAC §25.201

The Teacher Retirement System of Texas (TRS) proposes new §25.201 concerning acceptance of eligible rollover distributions or trustee-to-trustee transfers from other retirement plans in payment of deposits a member is permitted to make for TRS credit. The new section would broaden the types of plans from which TRS may accept funds as payment when a member is eligible to establish credit in TRS. The purpose of the new section is to enable TRS to accept a rollover or transfer of funds from any type of plan permitted under the federal tax law as payment for TRS credit a member is eligible to establish. The Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"), Public Law 107-16 (June 7, 2001), expanded the ability to rollover or transfer funds from one type of retirement plan to another, effective January 1, 2002.

Ronnie Jung, Deputy Director, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications to state or local governments as a result of enforcing or administering the rule.

Mr. Jung has also determined that for each year of the first five years the rule is in effect the public benefit anticipated will be that members will have more avenues available for payment for TRS credit that they are eligible to establish. Additionally, the availability of rollovers or transfers as payment may minimize Internal Revenue Code limitations on payments a member may make in order to establish TRS credit. There will be no effect on small businesses. There are no anticipated economic costs to the persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Charles L. Dunlap, Executive Director, Teacher Retirement System of Texas, 1000 Red River, Austin, Texas 78701. Comments must be received no later than 30 days after the date the proposal is published in the *Texas Register*.

The new section is proposed under Government Code, Chapter 821, §821.004, which gives TRS the powers, privileges, and immunities of a corporation and the powers, privileges, and immunities conferred by Subtitle C; Chapter 823, §823.005, which authorizes the TRS to accept certain rollovers and fund transfers subject to rules adopted by the TRS Board of Trustees; Chapter 825, §825.101, which gives the TRS Board of Trustees responsibility for the general administration and operation of the system; Chapter 825, §825.102, which authorizes the TRS Board of Trustees to adopt rules for eligibility for membership, the administration of the funds of the system, and the transaction of business of the Board; and Chapter 825, §825.506, authorizing the TRS Board of Trustees to administer the provisions of Subtitle C in a manner that the retirement system's benefit plan will be considered a qualified plan under Internal Revenue Code provisions and to adopt rules necessary for the plan to be a qualified plan.

No other codes are affected by the proposal.

§25.201. Acceptance of Funds for Purchase of TRS Credit.

(a) In addition to funds required to be accepted under Government Code §823.005, the Teacher Retirement System of Texas (TRS) may accept the funds described in subsections (b) and (c) of this section, subject to the restrictions of this section.

(b) If permitted under and subject to the provisions of federal law, TRS may accept an eligible rollover distribution from another eligible retirement plan in payment of all or a portion of any deposit a member is permitted under applicable law to make with the system for TRS credit.

(1) An "eligible rollover distribution" is any distribution of all or any portion of the balance to the credit of the member from an

eligible retirement plan. An eligible rollover distribution does not include the following:

(A) any distribution that is one of a series of substantially equal periodic payments (not less frequently than annually) made for the life (or life expectancy) of the member or the joint lives (or joint life expectancies) of the member and the member's designated beneficiary, or for a specified period of ten (10) years or more;

(B) any distribution to the extent such distribution is required under Internal Revenue Code §401(a)(9);

(C) any distribution which is made upon hardship of the member; or

(D) the portion of any distribution that is not includible in gross income.

(2) An "eligible retirement plan" is any program defined in Internal Revenue Code §§401(a)(31) and 402(c)(8)(B), from which the member has a right to an eligible rollover distribution, as follows:

(A) an individual retirement account under Internal Revenue Code §408(a);

(B) an individual retirement annuity under Internal Revenue Code §408(b) (other than an endowment contract);

(C) a qualified trust;

(D) an annuity plan under Internal Revenue Code §403(a);

(E) an eligible deferred compensation plan under Internal Revenue Code §457(b) which is maintained by an eligible employer under Internal Revenue Code §457(e)(1)(A); and

(F) an annuity contract under Internal Revenue Code §403(b).

(c) If permitted under and subject to the provisions of federal law, TRS may accept a direct trustee-to-trustee transfer of funds from a plan described under §403(b) or 457(b) of the Internal Revenue Code in payment of all or a portion of any deposit a member is permitted to make with TRS for permissive service credit in TRS.

(d) In order to authorize the rollover or transfer of funds described in this section, a member shall provide or cause to be provided to TRS information sufficient for TRS to reasonably conclude that the contribution is a valid rollover or direct trustee-to-trustee transfer as permitted under federal tax law. If TRS later determines that a contribution was an invalid rollover or direct trustee-to-trustee transfer or otherwise not permitted under federal tax law, TRS may take any action appropriate or required by the Internal Revenue Code or regulations issued thereunder, including return of the invalid contribution and, if applicable, any earnings attributed thereto to the member within a reasonable time after the determination and cancellation of any credit purchased with the returned amounts.

(e) TRS shall construe and administer this section in a manner such that the TRS plan will be considered a qualified plan under §401(a) of the Internal Revenue Code of 1986, (United States Code, Title 26, §401).

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 October 29, 2001.

TRD-200106622

Charles L. Dunlap
Executive Director
Teacher Retirement System of Texas
Proposed date of adoption: December 13, 2001
For further information, please call: (512) 542-6115

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CHAPTER 29. BENEFITS
SUBCHAPTER G. PROPORTIONATE RETIREMENT

34 TAC §29.80

The Teacher Retirement System of Texas (TRS) proposes new §29.80, concerning proportionate retirement. The new section would address eligibility for a normal age retirement annuity from TRS based on combined service credit. The purpose of the new section is to allow a person whose combined service credit under the proportionate retirement program is sufficient to establish eligibility for normal age retirement under Government Code §824.202(a) to receive a normal age retirement annuity from TRS, though the years of service credit used to compute the TRS benefit will include only TRS service credit.

Ronnie Jung, Deputy Executive Director, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications to state or local governments as a result of enforcing or administering the rule.

Mr. Jung has also determined that for each year of the first five years the rule is in effect the public benefit anticipated will be that a person with combined service credit under the proportionate retirement program may use all the combined service credit to establish eligibility for a normal age service retirement annuity from TRS. There will be no effect on small businesses. There are no anticipated economic costs to the persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Charles L. Dunlap, Executive Director, Teacher Retirement System of Texas, 1000 Red River, Austin, Texas 78701. Comments must be received no later than 30 days after the date the proposal is published in the *Texas Register*.

The new section is proposed under Government Code, Chapter 803, §803.401, which authorizes the TRS Board of Trustees to adopt rules it finds necessary to implement the proportionate retirement program. The new section is also proposed under Government Code, Chapter 825, §825.102, which authorizes the TRS Board of Trustees to adopt rules for eligibility for membership, the administration of the funds of the retirement system, and the transaction of business of the Board.

No other codes are affected by the proposal.

§29.80. Eligibility for Normal Age Retirement.

Retirees with an effective date of retirement on or after January 31, 2002, and who retire under Chapter 803, Proportionate Retirement Program, Government Code, and whose combined service credit under this program establishes eligibility for retirement under Government Code, Chapter 824, §824.202(a), shall receive a normal retirement annuity based only on the actual TRS service credit.

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 October 29, 2001.

TRD-200106623
Charles L. Dunlap
Executive Director
Teacher Retirement System of Texas
Proposed date of adoption: December 13, 2001
For further information, please call: (512) 542-6115

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PART 4. EMPLOYEES RETIREMENT SYSTEM OF TEXAS

CHAPTER 71. CREDITABLE SERVICE

34 TAC §71.29

The Employees Retirement System of Texas (ERS) proposes a new 34 Texas Administrative Code §71.29 concerning purchase of additional service credit. This new section is added to reflect changes made pursuant to the provisions of §6 of Senate Bill 292, 77th Legislative Session.

Paula A. Jones, General Counsel, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Jones also determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be the opportunity for eligible members to establish additional service. There will be no affect on small businesses. There are no known anticipated economic costs to persons who are required to comply with the rule as proposed, other than to purchase the additional service credit that eligible persons seek.

Comments on the proposed new rule may be submitted to Paula A. Jones, General Counsel, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207, or e-mail Ms. Jones at pjones@ers.state.tx.us

The new rule is proposed under Texas Government Code Annotated §815.102, which provides that the Board of Trustees may adopt rules for the transaction of any business of the Board.

No other statutes are affected by the proposed new section.

§71.29. Purchase of Additional Service Credit.

(a) An eligible member may establish equivalent membership service credit authorized by §813.513, Texas Government Code, as provided in this section. The provisions of §71.14 of this title do not apply to credit established under this section.

(b) A member is eligible to establish credit under this section in the membership class in which the member holds a position if the member:

(1) has 120 months of service credit for one or more periods of time during which the member held a position in a membership class and the required contributions were made;

(2) is actively contributing to the system at the time credit is established; and

(3) is not eligible to establish other credit or service.

(c) An eligible member shall deposit with the system in a lump sum a contribution in the amount determined by the system to be the actuarial present value of the benefit attributable to the credit established under this section. The tables recommended by the actuaries and adopted by the board shall be used by the system to determine the actuarial present value. Such tables are incorporated herein by reference and shall be available from the system. The actuarial present value shall be based on:

(1) the member's age on the date of the deposit required by this subsection;

(2) the earliest date on which the member will become eligible to retire and receive a service retirement annuity after establishing credit under this section; and

(3) the future employment, compensation, investment and retirement benefit assumptions recommended by the actuaries and adopted by the board.

(d) Credit shall be established in increments of 12 months of credit, except that a member who may become eligible to retire by establishing fewer than 12 months of credit may establish the minimum number of months of credit necessary for the member to become eligible to retire.

(e) A member who establishes credit under this section shall certify that the member is not eligible to establish other credit or service and shall waive any and all right to establish such credit or service that the member had on the date of the deposit required by subsection (c) of this section. This subsection does not apply to service credit transferred as authorized by Chapter 805, Texas Government Code.

(f) Credit established under this section may not be used to compute the amount of a disability retirement annuity, or to determine average monthly compensation for the purpose of computing a service retirement annuity.

(g) A member who withdraws contributions and cancels credit established under this section may not reestablish such credit under §813.102, Texas Government Code, but may again establish credit as provided in this section.

(h) The provisions of §813.503, Texas Government Code, do not apply to credit established under 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 October 25, 2001.

TRD-200106480
Sheila W. Beckett
Executive Director
Employees Retirement System of Texas
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 867-7125

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CHAPTER 73. BENEFITS

34 TAC §73.31

The Employees Retirement System of Texas (ERS) proposes amendments to 34 Texas Administrative Code §73.31 concerning adjustments to annuities. This section is amended to reflect

changes made pursuant to the provisions of §45 of the Senate Bill 292, 77th Legislative Session.

Paula A. Jones, General Counsel, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Jones also determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be updated information in connection with annuity adjustments provided by Senate Bill 292. There will be no affect on small businesses. There are no known anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed rule amendments may be submitted to Paula A. Jones, General Counsel, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207, or e-mail Ms. Jones at pjones@ers.state.tx.us

The amendments are proposed under Texas Government Code Annotated §814.602, which provides that the Board of Trustees may adopt rules that adjust or modify annuities as necessary to be consistent with changes in plan design, as well as under Texas Government Code Annotated §815.102, which provides that the Board of Trustees may adopt rules for the transaction of any business of the Board.

No other statutes are affected by these proposed amendments.

§73.31. Adjustment to Annuities.

(a) Annuities with an effective date before September 1, 2001 [~~1995~~], that are based on service retirements, disability retirements, or deaths pursuant to the Government Code, Title 8, §§814.104, 814.1041, 814.107, 814.206, 814.207, 814.301, 814.302, or 814.305, shall be adjusted pursuant to the provisions of §45 of Senate Bill 292, 77th Legislature, 2001 [~~following plan design changes:~~]

[~~(1) current percentage value for each year of service credited at time of retirement;~~]

[~~(2) current applicable reduction factors;~~]

[~~(3) current minimum standard annuity;~~]

[~~(4) current maximum service percentage value.~~]

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

(e) Annuities [~~with an effective date of September 30, 1997, and later that are based on disability pursuant to the Government Code, Title 8, §814.206, and annuities~~] based on service credited under Government Code, Title 8, §813.401, shall be adjusted to [~~remove any actuarial reduction and to~~] reflect the plan design changes provided by §814.105 that are effective September 1, 2001 [~~1997~~].

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 October 25, 2001.

TRD-200106481
Sheila W. Beckett
Executive Director
Employees Retirement System of Texas
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 867-7125

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CHAPTER 81. INSURANCE

34 TAC §81.7

The Employees Retirement System of Texas (ERS) proposes amendments to 34 Texas Administrative Code §81.7 concerning Enrollment and Participation in the Texas Employees Uniform Group Insurance Program (UGIP). This section is amended in order to update and clarify the rules pertaining to additional or alternative coverages as they relate to members of the Texas National Guard or any of the reserve components of the United States armed forces who are assigned to active military duty.

Paula A. Jones, General Counsel, has determined that for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Jones also determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be simplified administration of the UGIP. There will be no affect on small businesses. There are no known anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed rule amendments may be submitted to Paula A. Jones, General Counsel, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207, or e-mail Ms. Jones at pjones@ers.state.tx.us.

The amendments are proposed under Texas Insurance Code, article 3.50-2, §4A, which provides authorization for the Board of Trustees to adopt rules necessary to carry out its statutory duty and responsibilities.

No other statutes are affected by these proposed amendments.

§81.7. Enrollment and Participation.

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

(g) Special rules for additional or alternative coverages.

(1) Only an employee or retiree or a former officer or employee specifically authorized to join the program may apply for optional coverages. An employee/retiree must be enrolled in health coverage provided by the program to apply for any optional coverages, but a member of the Texas National Guard or any of the reserve components of the United States armed forces who is assigned to active military duty and who is enrolled in optional term life insurance coverage may cancel health coverage and retain life insurance coverage during the period of such assignment. [~~Only an employee or retiree or a former officer or employee specifically authorized to join the program may apply for optional coverages.~~]

(2) - (6) (No change.)

(h) - (l) (No change.)

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

Filed with the Office of the Secretary of State, on October 25, 2001.

TRD-200106482

Sheila W. Beckett
Executive Director
Employees Retirement System of Texas
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 867-7125

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CHAPTER 87. DEFERRED COMPENSATION

34 TAC §87.31

The Employees Retirement System of Texas (ERS) proposes amendments to 34 Tex. Admin. Code §87.31, concerning the Texa$aver 457 Revised Plan. Section 87.31 is being amended to reference beneficiary designations filed with the administrator of the revised plan in the deferred compensation program.

Paula A. Jones, General Counsel, 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. Jones 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 an enhancement of state employees' benefit programs. There will be no affect on small businesses. There are no known anticipated economic costs to persons who are required to comply with the rules as proposed.

Comments on the proposed rule amendments may be submitted to Paula A. Jones, General Counsel, Employees Retirement System of Texas, P. O. Box 13207, Austin, Texas 78711-3207, or email Ms. Jones at pjones@ers.state.tx.us.

The amendments are proposed under Tex. Gov't Code, §609.508 which provides the ERS Board of Trustees the authority to adopt rules necessary to carry out the purposes of the subchapter related to the deferred compensation plan.

No other statutes are affected by this amendment.

§87.31. Revised Plan.

(a) Applicability.

(1) This section applies to the State of Texas Deferred Compensation Plan as revised and adopted by the Employees Retirement System of Texas effective September 1, 2000, and filed with the Secretary of State. The plan as revised and adopted is incorporated in this section by reference and is referred to in this section as "the revised plan." Copies of the revised plan may be obtained upon request.

(2) This section also applies to the State of Texas Deferred Compensation Plan as adopted by the Employees Retirement System of Texas effective January 1, 1991, and as amended prior to adoption of the revised plan. The 1991 plan is referred to in this section as "the previous plan." Except as otherwise provided in this section, the provisions of §§87.1 through 87.29 of this title continue to apply to participation agreements, distribution agreements, and vendor contracts entered into pursuant to provisions of the previous plan.

(3) This section takes effect September 1, 2000 and shall apply to deferrals and transfers which take place on or after September 1, 2000.

(b) Administration of the revised plan.

(1) The plan administrator shall administer the revised plan in the manner provided in the plan and §87.3 of this title (relating to Administrative and Miscellaneous Provisions).

(2) The provisions of §87.15 of this title (relating to Transfers) shall apply to the authority of the plan administrator to make transfers under the revised plan. Limitations on the plan administrator imposed in §87.7(b)(1) (relating to Vendor Participation) and §87.9(b)(1) (relating to Investment Products) of this title shall not apply to administration of the revised plan.

(3) A participant shall select a single manner of distribution and a single date of distribution of all of the participant's investments in the revised plan.

(4) The plan administrator may assess a fee if necessary to cover the costs of administering the revised plan.

(5) If a participant has not selected an investment product to receive deferrals, the deferrals shall be invested in a money market account or such other product selected by the plan administrator in its sole discretion. Balances in the revised plan may not be transferred to the previous plan.

(6) Deferrals and transfers to the revised plan shall be accepted by the revised plan beginning on the effective date of this section.

(c) Transition from the previous plan.

(1) On the effective date of this section, the plan administrator shall cease to accept deferrals to investment products approved under the previous plan, with the exception of life insurance products, to which deferrals may be continued as necessary to maintain the life insurance.

(2) A participant with an account balance in investment products approved under the previous plan may elect to maintain the balance in those products or to transfer the balance to one or more products approved under the revised plan. Any transfer of funds to the revised plan must include the participant's total balance in all products in the previous plan, except for life insurance products. Annuitized products may not be transferred to the revised plan. Balances transferred to a product approved under the revised plan may not be transferred to a product approved under the previous plan. Transfer of funds to the revised plan that are in distribution must be paid out over a uniform term. A participant may transfer funds from one qualified vendor in the previous plan to another qualified vendor in the previous plan only if the participant had an account with the recipient vendor on the effective date of this section.

(3) Notwithstanding the provisions of paragraph (2) of this subsection, the plan administrator may require that an account balance in an investment product be transferred from such product approved under the previous plan to a product approved under the revised plan if the plan administrator determines it is in the best interests of the plan.

(4) On the effective date of this section, vendors and vendor representatives of qualified investment products under the previous plan shall cease solicitation of business for such products from participants and employees.

(5) Distribution agreements for investment products in the previous plan filed on or after the effective date of this section shall use the same beginning date, duration and frequency for all vendors and investment products.

(6) A beneficiary designation filed with the administrator of the revised plan applies only to those funds that have been transferred to the revised plan.

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 October 25, 2001.

TRD-200106483
Sheila W. Beckett
Executive Director
Employees Retirement System of Texas
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 867-7125

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34 TAC §87.33

The Employees Retirement System of Texas (ERS) proposes new section 34 Tex. Admin. Code §87.33, concerning the Economic Growth and Tax Relief and Reconciliation Act revisions to the Plan. Section 87.33 is being added to allow the Plan Administrator to amend the Plan to provide valuable additional benefits to participants in the deferred compensation program.

Paula A. Jones, General Counsel, has determined that for the first five-year period the new rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Jones also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be an enhancement of state employees' benefit programs. There will be no affect on small businesses. There are no known anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed new rule may be submitted to Paula A. Jones, General Counsel, Employees Retirement System of Texas, P. O. Box 13207, Austin, Texas 78711-3207, or e-mail Ms. Jones at pjones@ers.state.tx.us.

This new rule is proposed under Tex. Gov't Code, §609.508 which provides the ERS Board of Trustees the authority to adopt rules necessary to carry out the purposes of the subchapter related to the deferred compensation plan.

No other statutes are affected by this amendment.

§87.33. The Economic Growth and Tax Relief and Reconciliation Act.

(a) The Economic Growth and Tax Relief and Reconciliation Act of 2001 (referred to as "EGTRRA" and/or "Act") allows a plan administrator to amend eligible 457 deferred compensation plans to provide additional benefits to participants. The following resolutions set forth the decisions and provisions effective January 1, 2002.

(b) Applicability.

(1) This section applies to the State of Texas Deferred Compensation 457 Plan as revised and adopted by the Employees Retirement System of Texas effective January 1, 2002, and filed with the Secretary of State. The plan as revised and adopted is incorporated into this section. Copies may be obtained upon request.

(2) This section also applies to the State of Texas Deferred Compensation 457 plan adopted by the Employees Retirement System of Texas effective January 1, 1991, and as amended prior to adoption of the revised plan. The 1991 plan is referred to in this section as the "previous plan." Except as otherwise provided in this section, the provisions of §§87.1 through 87.31 of this title continue to apply to participation agreements, distribution agreements, and vendor contracts entered into pursuant to applicable provisions of the previous plan.

(3) This section takes effect January 1, 2002 and shall apply to deferrals, transfers/rollovers and distributions that take place on or after January 1, 2002.

(c) Administration of the revised plan. The plan administrator shall administer the revised plan in the manner provided in the plan and §87.3 of this title (relating to Administrative and Miscellaneous Provisions).

(d) Catch-up contributions during the three years prior to normal retirement age are increased to twice the applicable deferral limit.

(e) A participant age 50 or older during any calendar year shall be eligible to make additional pre-tax contributions in accordance with Internal Revenue Code §414(v) applicable to 457 plans, in excess of normal deferral amounts. A participant who elects to defer contributions under the normal catch-up provisions may not also defer under the special catch-up and Internal Revenue Code §414(v).

(f) Plan Loans - The plan administrator is authorized to implement procedures to establish a loan program for the revised plan. Plan loans shall be permitted only from assets deposited in the revised plan. Participants with account balances in the previous plan must transfer those balances to the revised plan in order to qualify for a plan loan.

(g) Distributions.

(1) Change or Cancellation of Irrevocable Distribution Elections - A participant or beneficiary of a participant who previously filed an irrevocable distribution election under the previous plan or under the revised plan may change that distribution election or cancel that distribution election by notifying the plan administrator. Such notification must be in writing and received by the plan administrator at least 30 days prior to the scheduled distribution date.

(2) Purchase of Service - A participant may request a trustee-to-trustee transfer of assets from the previous plan or the revised plan to a governmental defined benefit plan for the purchase of permissible service credit (as defined in Internal Revenue Code §415(n)(3)(A)) under such plan or a repayment to which Internal Revenue Code §415 does not apply by reason of subsection (k)(3) thereof.

(3) Vendors who maintain participant account balances in the previous plan shall provide the required Internal Revenue Code §402(f) safe harbor notice to all 457 plan participants prior to the payment of an eligible rollover distribution.

(h) Cessation of Deferrals upon Emergency Withdrawal - If the plan administrator approves a participant's request for an emergency withdrawal, the participant must agree to cease all deferrals, except deferrals to life insurance products, to both this plan and the Texa$aver 401(k) plan for six months following the approval. Participants who were required to suspend deferrals as a result of an emergency withdrawal and whose suspension has equaled or exceeded 6 months as of January 1, 2002 may elect to resume contributions by completing a participation agreement.

(i) Qualified Domestic Relations Orders - Upon receipt of a qualified domestic relations order, the plan administrator may distribute to an alternate payee in a lump sum immediate distribution, the proceeds as directed by the order. The plan administrator shall develop procedures for the implementation of this section.

(j) The normal maximum amount of deferrals is increased to the lesser of $11,000 (as periodically adjusted in accordance with Internal Revenue Code §457(e)(15)) or 100% of a participant's includible compensation.

(k) At a participant's request, the plan sponsor shall process a trustee-to-trustee transfer of an eligible rollover distribution upon receipt of appropriate instructions from the receiving plan.

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 October 25, 2001.

TRD-200106484
Sheila W. Beckett
Executive Director
Employees Retirement System of Texas
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 867-7125

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 19. TEXAS DEPARTMENT OF PROTECTIVE AND REGULATORY SERVICES

CHAPTER 705. ADULT PROTECTIVE SERVICES

SUBCHAPTER J. RELEASE HEARINGS

40 TAC §705.4101

The Texas Department of Protective and Regulatory Services (PRS) proposes an amendment to §705.4101, concerning adult protective services release hearings, in its Adult Protective Services chapter. The purpose of the amendment is to add a reference to the Employee Misconduct Registry (EMR). With the passage of Senate Bill 1245, PRS is required to place findings from investigations of alleged misconduct in home and community support services agencies (HCSSAs) into the EMR following due process proceedings. The investigations affected in Chapter 705 are those conducted in home health agencies by Adult Protective Services in-home staff. PRS is proposing new rules concerning the EMR in Chapter 711, Investigations in TDMHMR Facilities and Related Programs, in this issue of the *Texas Register*.

Mary Fields, Budget and Federal Funds Director, has determined that for the first five-year period the proposed section will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Ms. Fields also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be that confirmed perpetrators will be reported to the EMR. There will be no effect on large, small, or micro- businesses because the section does not impose any new requirements on businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Questions about the content of the proposal may be directed to Marc Mullins at (512) 438- 5505 in PRS's Adult Protective Services Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-192, Texas Department of Protective and Regulatory Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

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

The amendment is proposed under the Human Resources Code, §40.029, which authorizes the department to propose and adopt rules to facilitate implementation of department programs; and under Human Resources Code, Chapter 48, Subchapter I, which specifically directs the department to adopt rules to implement its role in relation to the employee misconduct registry.

The amendment implements the Human Resources Code, §40.029 and Human Resources Code, Chapter 48, Subchapter I.

§705.4101. Adult Protective Services Release Hearings.

(a) (No change.)

(b) Right to appeal.

(1) When the Texas Department of Protective and Regulatory Services (PRS) Adult Protective Services (APS) staff validates an allegation of abuse, neglect, or exploitation of an aged or disabled adult and an entity such as a provider agency, home health agency, senior center or other employer allows the perpetrator to have access to aged or disabled adults, the APS caseworker may notify the entity of the findings. If the findings are to be released to the entity, the perpetrator must be given prior written notification, except in emergencies, and an opportunity to appeal.

(2) If the perpetrator is an employee of a home health agency and subject to placement on the Employee Misconduct Registry established under Health and Safety Code, Chapter 253, he may request a hearing as described in Chapter 711 of this title (relating to Investigations in TDMHMR Facilities and Related Programs), Subchapter O (relating to Employee Misconduct Registry).

(3) A perpetrator who is offered a due process hearing under paragraph (2) of this subsection may not also request a release hearing, as described in this chapter, relating to the same allegations of abuse, neglect, or exploitation.

(c) - (e) (No change.)

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

Filed with the Office of the Secretary of State, on October 26, 2001.

TRD-200106582
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: January 25, 2002
For further information, please call: (512) 438-3437

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CHAPTER 711. INVESTIGATIONS IN TDMHMR FACILITIES AND RELATED PROGRAMS

The Texas Department of Protective and Regulatory Services (PRS) proposes amendments to §711.1 and §711.1001; and proposes new §§711.1401, 711.1403, 711.1405, 711.1407, 711.1409, 711.1411, 711.1413, 711.1415, 711.1417, 711.1419, 711.1421, 711.1423, 711.1425, 711.1427, 711.1429, 711.1431, 711.1433, and 711.1435, concerning employee misconduct registry, in its Investigations in TDMHMR Facilities and Related Programs chapter. The purpose of the amendments and new sections is to implement Senate Bill 1245, which requires PRS to place findings from investigations of alleged misconduct in home and community support services agencies (HCSSAs) into the Employee Misconduct Registry following due process proceedings. The investigations affected are those conducted in home health agencies by Adult Protective Services in-home staff, as well as those conducted by Adult Protective Services facility investigations staff in TDMHMR Home and Community-Based Services Waiver programs.

Mary Fields, Budget and Federal Funds Director, has determined that for the first five-year period the proposed sections will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Fields also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be that confirmed perpetrators will be reported to the Employee Misconduct Registry. There will be no effect on large, small, or micro-businesses because the sections do not impose any new requirements on businesses. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Questions about the content of the proposal may be directed to Marc Mullins at (512) 438- 5505 in PRS's Adult Protective Services Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-192, Texas Department of Protective and Regulatory Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

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

SUBCHAPTER A. INTRODUCTION

40 TAC §711.1

The amendment is proposed under the Human Resources Code, §40.029, which authorizes the department to propose and adopt rules to facilitate implementation of department programs; and under Human Resources Code, Chapter 48, Subchapter I, which specifically directs the department to adopt rules to implement its role in relation to the employee misconduct registry.

The amendment implements the Human Resources Code, §40.029 and Human Resources Code, Chapter 48, Subchapter I.

§711.1. What is the purpose of this chapter?

The purpose of this chapter is to:

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

(3) define abuse, neglect, and exploitation of a person served by the programs listed in paragraph (2) of this section; [~~and~~]

(4) describe procedures for reporting and investigating allegations ; and [.]

(5) implement Human Resources Code, Chapter 48, Subchapter I, relating to the Employee Misconduct Registry maintained by the Texas Department of Human Services, as described in Subchapter O of this chapter (relating to Employee Misconduct Registry).

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 October 26, 2001.

TRD-200106583
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: January 25, 2002
For further information, please call: (512) 438-3437

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SUBCHAPTER K. REQUESTING A REVIEW OF FINDING IF YOU ARE THE ADMINISTRATOR OR CONTRACTOR CEO

40 TAC §711.1001

The amendment is proposed under the Human Resources Code, §40.029, which authorizes the department to propose and adopt rules to facilitate implementation of department programs; and under Human Resources Code, Chapter 48, Subchapter I, which specifically directs the department to adopt rules to implement its role in relation to the employee misconduct registry.

The amendment implements the Human Resources Code, §40.029 and Human Resources Code, Chapter 48, Subchapter I.

§711.1001. What if the administrator or contractor CEO wants to challenge the finding or the methodology used to conduct the investigation?

(a) The administrator or contractor CEO may request a review of the finding or methodology used to conduct the investigation if he or she is not the perpetrator or alleged perpetrator.

(1) If the administrator is the perpetrator or alleged perpetrator then only TDMHMR may request a review.

(2) If the contractor CEO is the perpetrator or alleged perpetrator then only the administrator may request a review.

(b) The administrator or contractor CEO of an HCSW may not request a review of the finding or methodology if the alleged perpetrator requests a hearing in accordance with Subchapter O of this chapter (relating to the Employee Misconduct Registry).

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 October 26, 2001.

TRD-200106584
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: January 25, 2002
For further information, please call: (512) 438-3437

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SUBCHAPTER O. EMPLOYEE MISCONDUCT REGISTRY

40 TAC §§711.1401, 711.1403, 711.1405, 711.1407, 711.1409, 711.1411, 711.1413, 711.1415, 711.1417, 711.1419, 711.1421, 711.1423, 711.1425, 711.1427, 711.1429, 711.1431, 711.1433, 711.1435

The new sections are proposed under the Human Resources Code, §40.029, which authorizes the department to propose and adopt rules to facilitate implementation of department programs; and under Human Resources Code, Chapter 48, Subchapter I, which specifically directs the department to adopt rules to implement its role in relation to the employee misconduct registry.

The new sections implement the Human Resources Code, §40.029 and Human Resources Code, Chapter 48, Subchapter I.

§711.1401. What is the purpose of this subchapter?

The purpose of this subchapter is to implement Human Resources Code, Chapter 48, Subchapter I, relating to the Employee Misconduct Registry maintained by the Texas Department of Human Services.

§711.1403. To which investigations does this subchapter apply?

This subchapter applies to APS investigations involving a person who works for a Home and Community Support Services Agency (HCSSA) licensed under Health and Safety Code, Chapter 142. This subchapter applies to community center investigations only when the employee involved performed services for an HCSW.

§711.1405. How are some of the terms in this subchapter defined?

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

(1) Employee -- A person who:

(A) works as an employee, agent, or contractor for a home and community support services agency (HCSSA);

(B) provides personal care services, active treatment, or any other personal services to an individual receiving services from a HCSSA; and

(C) is not licensed by the state to perform the services the person performs for the HCSSA.

(2) Employee Misconduct Registry -- The registry established under Health and Safety Code, Chapter 253.

(3) Executive director -- The executive director of the Texas Department of Protective and Regulatory Services (PRS), or the executive director's designee.

(4) Hearings examiner -- A PRS attorney designated to conduct an appeal of a finding of reportable conduct.

(5) HCSSA -- A home and community support services agency licensed under Health and Safety Code, Chapter 142, which includes HCSW programs and home health agencies.

(6) Home health agency -- A home and community support services agency (HCSSA) that provides services in the home, but is not an HCSW provider.

(7) Reportable conduct -- Certain types of abuse, neglect, or exploitation of a person, as further defined in §711.1409 of this title (relating to What is reportable conduct?).

§711.1407. What is the Employee Misconduct Registry?

The Employee Misconduct Registry is a database maintained by the Texas Department of Human Services that contains the names of persons who have committed reportable conduct. A person whose name is recorded in the registry is prohibited by law from working for certain facilities or agencies, as provided under Health and Safety Code, Chapter 253.

§711.1409. What is reportable conduct?

(a) The definition of reportable conduct depends on whether the investigation was investigated under this chapter or under Chapter 705 of this title (relating to Adult Protective Services).

(b) If the employee worked for an HCSW program and the investigation was conducted under this chapter, reportable conduct is abuse, neglect, or exploitation that meets the following criteria:

(1) physical abuse, as defined in this chapter, that caused or may have caused serious physical injury or death;

(2) neglect, as defined in this chapter, that caused or may have caused serious physical injury or death;

(3) sexual abuse, as defined in this chapter;

(4) exploitation, as defined in this chapter, that involves an aggregate amount of $25 or more; and

(5) emotional or verbal abuse, as defined in this chapter, that caused substantial harm.

(c) If the employee worked for a home health agency and the investigation was conducted under Chapter 705 of this title (relating to Adult Protective Services), reportable conduct is abuse, neglect, or exploitation that meets the following criteria:

(1) abuse, as defined in Chapter 705 of this title, that caused or may have caused serious physical injury, as defined in this chapter, or death;

(2) neglect, as defined in Chapter 705 of this title, that caused or may have caused serious physical injury, as defined in this chapter, or death;

(3) sexual abuse, as defined in Chapter 705 of this title;

(4) exploitation, as defined in Chapter 705 of this title, that involves an aggregate amount of $25 or more; and

(5) emotional or verbal abuse, as defined in Chapter 705 of this title, that caused substantial harm.

§711.1411. Under what circumstances does PRS submit an employee's name to the Employee Misconduct Registry?

When PRS determines that an employee has committed reportable conduct, and that determination becomes final, PRS must submit the employee's name and other relevant information to the Texas Department of Human Services for recording in the Employee Misconduct Registry.

§711.1413. Is PRS required to give notice before an employee's name is submitted to the Employee Misconduct Registry?

Yes. When APS determines that an employee committed reportable conduct, APS must mail a written "Notice of Finding" to the employee's last known address. The notice must include:

(1) a brief summary of the finding of reportable conduct;

(2) a statement of the employee's right to appeal the finding by filing a "Request for Hearing";

(3) a statement that PRS will submit the employee's name for inclusion in the Employee Misconduct Registry if the employee accepts the finding of reportable conduct or fails to file a timely Request for Hearing;

(4) a statement of the employee's right to obtain a copy of the investigation records; and

(5) a statement that a person whose name is recorded in the registry is prohibited by law from working for certain facilities or agencies, as provided under Health and Safety Code, Chapter 253.

§711.1415. How does an employee file a Request for Hearing?

(a) The Notice of Finding will contain instructions for filing the Request for Hearing, including the following:

(1) a description of the information that must be included in the request;

(2) the address to which the request must be mailed; and

(3) the deadline for filing the request.

(b) If the employee fails to follow the filing instructions and, as a result, PRS does not receive the Request for Hearing in a timely manner or cannot determine the matter being appealed, the employee will be deemed to have accepted the finding of reportable conduct and PRS will submit the employee's name for inclusion in the Employee Misconduct Registry.

§711.1417. What is the deadline for filing the Request for Hearing?

(a) The employee must file the Request for Hearing no later than 30 calendar days from the date the employee receives the Notice of Finding.

(b) If the Request for Hearing is submitted by mail, the envelope must be postmarked no later than 30 days after the date the employee received the Notice of Finding. If the Request for Hearing is hand-delivered or submitted by fax, the request must be received in the appropriate PRS office by 5:00 p.m., no later than 30 days from the date the employee received the Notice of Finding.

(c) If an employee files the Request for Hearing after the deadline, PRS will notify the employee that the request was not filed by the deadline and that the employee's name will be submitted for inclusion in the Employee Misconduct Registry.

(d) If an employee disputes the fact that the Request for Hearing was filed late, the employee may request, and PRS will grant, a hearing that is limited solely to the issue of whether the Request for Hearing was filed on time. If, as a result of that hearing, the employee can prove that the original Request for Hearing was filed on or before the deadline, a separate hearing will be scheduled as soon as possible on the issue of whether the employee committed reportable conduct.

§711.1419. Is a finding of reportable conduct ever reversed without conducting a hearing?

Prior to a hearing, APS, in its sole discretion, may designate a person to conduct a review of the investigation records. If a review of the records results in a reversal of the finding of reportable conduct, APS will send the employee a new Notice of Finding, which will indicate that the employee's name will not be submitted to the Employee Misconduct Registry. If the review does not result in a reversal of the finding PRS will designate a hearings examiner to schedule and conduct a hearing, as described in this subchapter.

§711.1421. When and where will the hearing take place?

(a) PRS will schedule a hearing as soon as possible and will send a "Notice of Hearing" to the employee and to APS within 45 days of when PRS receives a timely Request for Hearing.

(b) The Notice of Hearing will provide the date, time, and location for the hearing, as well as the name of the hearings examiner.

(c) The hearing will usually be held in the same PRS region where the alleged reportable conduct took place. The hearings examiner reserves the right to take all or some of the testimony at the hearing by telephone- or video-conference and may consider a request by any party to have the hearing conducted in a different location for good cause.

§711.1423. May an employee request that the hearing be rescheduled?

Yes. Both the employee and APS may request that the hearings examiner reschedule the hearing for good cause. Except in cases of emergency, the request to reschedule the hearing must be made no later than three working days prior to the hearing date. The hearings examiner must grant the request if good cause is shown.

§711.1425. May an employee withdraw a Request for Hearing after it is filed.

Yes. An employee may withdraw a Request for Hearing any time before the hearing is conducted. An employee who withdraws a Request for Hearing will be deemed to have accepted the finding of reportable conduct and PRS will submit the employee's name for inclusion in the Employee Misconduct Registry.

§711.1427. How is the hearing conducted?

(a) The hearing is similar to a civil court trial, but is less formal. The parties to the hearing are the employee and APS.

(b) The hearing is conducted by a hearings examiner who has the duty to provide a fair and impartial hearing and to ensure that the available and relevant testimony and evidence is presented in an orderly manner.

(c) Prior to the hearing the employee may request a copy of the investigation record, edited to remove the identity of the reporter, in order to prepare for the hearing. Neither party may request additional discovery unless the hearings examiner finds that there is good cause for additional discovery.

(d) Both the employee and APS will be given the opportunity to present their own testimony and evidence, as well as the testimony and evidence of witnesses. Any person who provides testimony at the hearing will be sworn under oath.

(e) Both the employee and APS will be given the opportunity to examine the evidence presented by the other party, to cross-examine any witnesses presented by the other party, and to rebut or respond to the evidence presented by the other party.

(f) Testimony of a witness may be presented by written affidavit, but will be given less weight than the testimony of a witness who testifies in person, under oath, subject to cross- examination.

(g) Presentation of evidence at the hearing is not restricted under the rules of evidence used in civil cases. The hearings examiner will admit evidence if it is of a type on which a reasonably prudent person commonly relies in the conduct of the person's affairs. Evidence

will not be admitted if it is irrelevant, immaterial, unduly repetitious, or precluded by statutory law.

(h) Both parties have the right to be represented at the hearing by a person of their choosing who may be, but is not required to be, an attorney.

(i) The hearings examiner will assist either party in presenting their evidence and testimony, as needed, to ensure that a complete and proper record is developed at the hearing.

(j) The hearings examiner will arrange to have an interpreter available for the hearing if a party or witness requires an interpreter in order to effectively participate in the hearing.

(k) The hearing will be recorded by audio or video tape in order to preserve a record of the hearing. PRS will not prepare a transcription of the hearing tape unless an employee seeks judicial review, as provided in this subchapter.

(l) If the employee fails to appear for the hearing to offer testimony and evidence, the employee will be deemed to have accepted the finding of reportable misconduct.

§711.1429. How and when is the decision made after the appeal hearing?

(a) The hearing examiner will prepare a proposed decision which includes findings of fact and conclusions of law based on a preponderance of the evidence presented at the hearing. The proposed decision will be forwarded to the executive director for review.

(b) The executive director may accept or reject the proposed decision, in whole or in part, or may direct the hearings examiner to take such additional testimony and evidence as the executive director deems necessary.

(c) After review of the record and the proposed decision, the executive director must issue a written "Hearing Order" which will be mailed to the employee at the employee's last known mailing address. The Hearing Order must contain the following:

(1) separate statements of the findings of fact and conclusions of law;

(2) a statement of the right of the employee to seek judicial review of the order; and

(3) a statement that the finding of reportable conduct will be forwarded to the Texas Department of Human Services to be recorded in the Employee Misconduct Registry unless the employee makes a timely request for judicial review and the court reverses the finding of reportable conduct.

(d) The executive director may designate a Hearing Order to be published in an Index of Hearing Orders that are deemed to have precedential authority for guiding future decisions and PRS policy. A Hearing Order must be edited to remove all personal identifying information before publication in the Index of Hearing Orders.

§711.1431. How is judicial review requested and what is the deadline?

(a) To request judicial review of a Hearing Order, the employee must file a petition for judicial review in a Travis County district court, as provided by Government Code, Chapter 2001, Subchapter G.

(b) The petition must be filed with the court no later than the 30th day after the date the Hearing Order becomes final, which is the date that the Hearing Order is received by the employee.

(c) Judicial review by the court is under the substantial evidence rule, as provided by Government Code, Chapter 2001, Subchapter G.

(d) Unless notice of petition for judicial review is served on PRS within 45 days after the date on which the Hearing Order is mailed to the employee, PRS will submit the employee's name for inclusion in the Employee Misconduct Registry. If valid service is received after the employee's name has been recorded in the registry, PRS will immediately request that the employee's name be removed from the registry pending the outcome of the judicial review.

§711.1433. Must PRS provide notice to anyone else if a finding is modified or reversed as the result of a review, a hearing, or judicial review?

Yes. If at any stage the finding or reportable conduct is modified or reversed, PRS must provide notice of the new finding to all entities that PRS notified of the original finding.

§711.1435. If an employee accepts a finding of reportable misconduct or the finding is upheld on appeal, what information is forwarded to the Texas Department of Human Services for recording in the Employee Misconduct Registry?

By law, PRS must forward the following information to be recorded in the registry:

(1) the employee's name, address, and social security number, if available;

(2) the name and address of the HCSSA where the employee worked when the reportable conduct occurred; and

(3) a summary of the reportable conduct and the approximate date on which it occurred.

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 October 26, 2001.

TRD-200106585
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: January 25, 2002
For further information, please call: (512) 438-3437

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CHAPTER 720. 24-HOUR CARE LICENSING

The Texas Department of Protective and Regulatory Services (PRS) proposes the repeal of §§720.37, 720.47, and 720.55, concerning other child-placing staff, foster care study, and required information; and proposes an amendment to §720.602, concerning administration of assessment services, in its 24-Hour Care Licensing chapter. Part of Licensing's business plan is to review, analyze, and modernize Licensing rules to strengthen the protection of children in out- of-home care and improve an operator's understanding of the rules. The repealed rules have been rewritten, and are proposed in Chapter 745, Licensing, in this issue of the *Texas Register*. Section 720.602 is revised to update a cross reference and to be consistent with the new terminology used in §745.4027, which is proposed in this issue of the *Texas Register*.

Mary Fields, Budget and Federal Funds Director, has determined that for the first five-year period the proposed sections will be in effect there will be no fiscal implications for state or

local government as a result of enforcing or administering the sections.

Ms. Fields also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be that the rules will be easier to understand, which should help improve compliance and reduce mistakes. There will be no effect on large, small, or micro-businesses because the rules do not require the purchase of any new equipment, and should not require any increased staff time in order to comply. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Questions about the content of the proposal may be directed to Lizet Alaniz at (512) 438- 4538 in PRS's Licensing Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-191, Texas Department of Protective and Regulatory Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

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

SUBCHAPTER A. STANDARDS FOR CHILD-PLACING AGENCIES

40 TAC §§720.37, 720.47, 720.55

(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 Protective and Regulatory Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Human Resources Code (HRC), §40.029, which authorizes the department to propose and adopt rules to facilitate implementation of department programs; and HRC §42.042, which gives the department the authority to promulgate rules to carry out the statute and to regulate child-care facilities and homes.

The repeals implement the Human Resources Code, §40.029 and §42.042.

§720.37. Other Child-Placing Staff.
§720.47. Foster Care Study.
§720.55. Required Information.

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 October 26, 2001.

TRD-200106573
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: January 25, 2002
For further information, please call: (512) 438-3437

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SUBCHAPTER I. STANDARDS FOR ASSESSMENT SERVICES

40 TAC §720.602

The amendment is proposed under the Human Resources Code (HRC), §40.029, which authorizes the department to propose and adopt rules to facilitate implementation of department programs; and HRC §42.042, which gives the department the authority to promulgate rules to carry out the statute and to regulate child-care facilities and homes.

The amendment implements the Human Resources Code, §40.029 and §42.042.

§720.602. Administration of Assessment Services.

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

(c) If the assessment services program is provided by a child-placing agency, a Level I child- placing staff, as defined in §745.4027 of this title (relating to What qualifications must I meet to conduct a foster home screening, a pre-adoptive home screening, or a post-placement adoptive report?) [~~§720.36 of this title (relating to Personnel Qualifications and Responsibilities for Level I Child-Placing Staff)~~] may be responsible for both child-placing decisions and administration of the assessment services program.

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 October 26, 2001.

TRD-200106574
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: January 25, 2002
For further information, please call: (512) 438-3437

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CHAPTER 725. GENERAL LICENSING PROCEDURES

The Texas Department of Protective and Regulatory Services (PRS) proposes the repeal of Subchapter JJJ, Court-ordered Social Studies, consisting of §§725.6050-725.6052; and Subchapter KKK, Adoptive Home Screening, consisting of §§725.6070-725.6072, in its General Licensing Procedures chapter. Part of Licensing's business plan is to review, analyze, and modernize Licensing rules to strengthen the protection of children in out-of-home care and improve an operator's understanding of the rules. The rules in this chapter are difficult to comprehend, disorganized, and repetitive. As a result, Chapter 725 is repealed, and the rewritten rules are proposed in Chapter 745, Licensing, in this issue of the *Texas Register*.

Mary Fields, Budget and Federal Funds Director, has determined that for the first five-year period the proposed sections will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Fields also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be that the rewritten rules will be easier to understand, which should help improve compliance and reduce mistakes. There will be no effect on large, small, or micro-businesses because the rules do not require the purchase

of any new equipment, and should not require any increased staff time in order to comply. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Questions about the content of the proposal may be directed to Lizet Alaniz at (512) 438- 4538 in PRS's Licensing Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-191, Texas Department of Protective and Regulatory Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

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

SUBCHAPTER JJJ. COURT-ORDERED SOCIAL STUDIES

40 TAC §§725.6050 - 725.6052

(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 Protective and Regulatory Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Human Resources Code (HRC), §40.029, which authorizes the department to propose and adopt rules to facilitate implementation of department programs; and HRC §42.042, which gives the department the authority to promulgate rules to carry out the statute and to regulate child-care facilities and homes.

The repeals implement the Human Resources Code, §40.029 and §42.042.

§725.6050. Definitions.

§725.6051. Minimum Qualifications.

§725.6052. Conducting the Social Study and Writing the Report.

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 October 26, 2001.

TRD-200106575
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: January 25, 2002
For further information, please call: (512) 438-3437

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SUBCHAPTER KKK. ADOPTIVE HOME SCREENING

40 TAC §§725.6070 - 725.6072

(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 Protective and Regulatory Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Human Resources Code (HRC), §40.029, which authorizes the department to propose and adopt rules to facilitate implementation of department programs; and HRC §42.042, which gives the department the authority to promulgate rules to carry out the statute and to regulate child-care facilities and homes.

The repeals implement the Human Resources Code, §40.029 and §42.042.

§725.6070. Adoptive Home Screening Requirements.

§725.6071. Adoptive Home Screening Update.

§725.6072. Qualifications to Perform an Adoptive Home Screening.

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 October 26, 2001.

TRD-200106576
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: November 9, 2001
For further information, please call: (512) 438-3437

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CHAPTER 745. LICENSING SUBCHAPTER H. RESIDENTIAL CHILD-CARE MINIMUM STANDARDS

The Texas Department of Protective and Regulatory Services (PRS) proposes new rules in Chapter 745, Licensing, consisting of Subchapter H, Residential Child-Care Minimum Standards, Division 2, Child-Placing Agency Standards for Conducting a Foster Home Screening, Pre-Adoptive Home Screening, and Post-Placement Adoptive Report, §§745.4021, 745.4023, 745.4025, 745.4027, 745.4029, 745.4031, 745.4033, 745.4035, 745.4037, 745.4039, 745.4041, and 745.4043; Subchapter H, Residential Child-Care Minimum Standards, Division 3, Additional Child-Placing Agency Standards for Conducting a Pre- Adoptive Home Screening, §§745.4061, 745.4063, 745.4065, 745.4067, 745.4069, 745.4071, 745.4073, 745.4075, 745.4077, and 745.4079; Subchapter H, Residential Child-Care Minimum Standards, Division 4, Additional Child-Placing Agency Standards for Foster Homes and for Conducting Foster Home Screenings, §§745.4091, 745.4093, 745.4095, 745.4097, 745.4099, 745.4101, and 745.4103; Subchapter H, Residential Child-Care Minimum Standards, Division 5, Additional Child-Placing Agency Standards for Conducting a Post-Placement Adoptive Report, §§745.4121, 745.4123, 745.4125, and 745.4127; and Subchapter O, Independent Pre-Adoptive Home Screening and Independent Post-Placement Adoptive Report, §§745.9061, 745.9063, 745.9065, 745.9067, 745.9069, and 745.9071. Part of Licensing's business plan is to review, analyze, and update Licensing rules to strengthen the protection of children in out-of-home care and improve an operator's understanding of the rules. The proposed rules incorporate enough information to more fully explain this program to the public. In addition to the consolidation effort, the 77th Texas Legislature passed House Bill 1632, which changed requirements for pre-adoptive screenings and post-placement

adoptive reports (formerly known as adoptive home screenings and court-ordered social studies). The legislation, together with the revisions effort, has resulted in proposed changes to Licensing standards regulating adoptive and foster placement activities. This affects our regulation of child-placing agencies and individuals who conduct independent pre-adoptive home screenings and post- placement adoptive reports. Proposed changes are in the areas of required qualifications to conduct pre-adoptive home screenings and post-placement adoptive reports, as well as interview and documentation requirements for those screenings and reports.

Mary Fields, Budget and Federal Funds Director, has determined that for the first five-year period the proposed sections will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Fields also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be that the rules will be easier to understand, which should help improve compliance and reduce mistakes. There will be no effect on large, small, or micro-businesses because the rules do not require the purchase of any new equipment, and should not require any increased staff time in order to comply. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Questions about the content of the proposal may be directed to Lizet Alaniz at (512) 438- 4538 in PRS's Licensing Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-191, Texas Department of Protective and Regulatory Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

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

DIVISION 2. CHILD-PLACING AGENCY STANDARDS FOR CONDUCTING A FOSTER HOME SCREENING, PRE-ADOPITVE HOME SCREENING, AND POST-PLACEMENT ADOPTIVE REPORT

40 TAC §§745.4021, 745.4023, 745.4025, 745.4027, 745.4029, 745.4031, 745.4033, 745.4035, 745.4037, 745.4039, 745.4041, 745.4043

The new sections are proposed under the Human Resources Code, §40.029, which authorizes the department to propose and adopt rules to facilitate implementation of department programs; the Human Resources Code, §42.042, which gives the department the authority to promulgate rules to carry out the statute and to regulate child-care facilities and homes; and the Texas Family Code, §107.0511 and §107.052, which requires the department to adopt minimum standards relating to the preparation of pre-adoptive screenings and post-placement adoptive reports.

The new sections implement the Human Resources Code, §40.029 and §42.042, and the Texas Family Code, §107.0511 and §107.052.

§745.4021. What is a foster home screening?

A foster home screening is a written evaluation, prior to the placement of a child in a foster home, of:

(1) The prospective foster parent(s);

(2) Their family; and

(3) Their environment in relation to its ability to meet the child's needs.

§745.4023. What is a pre-adoptive home screening?

A pre-adoptive home screening is a written evaluation, prior to the placement of a child in an adoptive home, of:

(1) The prospective adoptive parent(s);

(2) Their family; and

(3) Their environment in relation to its ability to meet the child's needs.

§745.4025. What is a post-placement adoptive report?

A post-placement adoptive report is a written evaluation of the assessments and interviews, after the placement of the child, regarding the:

(1) Child;

(2) Prospective adoptive parent(s) or conservator(s);

(3) Family of the prospective adoptive parent(s) or conservator(s);

(4) Environment of the prospective adoptive parent(s), or conservator(s), and their family; and

(5) Adjustment of all individuals to the placement.

§745.4027. What qualifications must I meet to conduct a foster home screening, a pre-adoptive home screening, or a post-placement adoptive report?

You must qualify as a level 1 child-placing staff by meeting one of the following options:
Figure: 40 TAC §745.4027

§745.4029. When I conduct a foster home screening, a pre-adoptive home screening, or a post-placement adoptive report, may someone who does not meet minimum qualifications help me gather information?

If you are conducting a foster home screening, a pre-adoptive home screening, or a post- placement adoptive report, someone may help you gather information if they meet the following qualifications:
Figure: 40 TAC §745.4029

§745.4031. What must occur if another person conducts a portion of the foster home screening, pre-adoptive home screening, or post-placement adoptive report?

All people involved in studying the case must have all relevant information and specific directions regarding the case. Each person conducting any portion of a home screening or post- placement adoptive report (e.g. conducting an interview due to geographical distance, etc.) must qualify as a level 1 child-placing staff (See §745.4027 of this title (relating to What qualifications must I meet to conduct a foster home screening, a pre-adoptive home screening, or a post-placement adoptive report?)).

§745.4033. Whom must I interview when conducting a foster home screening, a pre-adoptive home screening, or a post-placement adoptive report?

Interviews for a home screening or post-placement adoptive report for family applicants may be conducted in one visit and must include:

(1) Individual interviews with each prospective foster or adoptive parent;

(2) Individual interviews with each child three years or older living in the home and any other person living full or part time with the family;

(3) Joint interviews with the prospective foster or adoptive parents;

(4) A family group interview; and

(5) Contact by telephone, in person, or by letter with each adult child of the prospective foster or adoptive parents no longer living in the home.

§745.4035. Must I document the interviews for a foster home screening, a pre-adoptive home screening, and a post-placement adoptive report?

Yes. You must document in the record all interviews and attempts to interview persons listed in §745.4033 of this title (relating to Whom must I interview when conducting a foster home screening, a pre-adoptive home screening, or a post-placement adoptive report?). The documentation must include the dates and methods taken to contact the required persons, the date of the interviews, who was present at the interviews, their relationship to the prospective foster or adoptive parents, and a summary of the interviews.

§745.4037. Is a visit to the home required when conducting a foster home screening, a pre-adoptive home screening, or a post-placement adoptive report?

Yes. You must visit the home when all members of the household are present. You must document in the record the date, persons present, their relationship to the prospective foster or adoptive parents, and observations made during the visit.

§745.4039. Do the interviews in §745.4033 of this title (relating to Whom must I interview when conducting a foster home screening, a pre-adoptive home screening, or a post- placement adoptive report?) apply to foster homes that are staffed with employees?

You do not have to conduct this interview when studying a foster home that is fully staffed with employees and does not have foster parents. However, you must still visit the home. You must document into the record the date, persons with whom you interface, their position in the home (including "resident"), and your observations.

§745.4041. What ethical requirements must I follow when conducting a foster home screening, a pre-adoptive home screening, or a post-placement adoptive report?

(a) You must not have a conflict of interest with any party in a disputed suit. You must not allow any previous knowledge of any party that was not exclusively obtained through a home screening or adoptive report to bias you. You must disqualify yourself if a conflict or bias exists. You must present any issues or concerns relating to such a conflict or bias to the court before you accept an appointment. However, unless the court finds you biased, you may conduct subsequent reports in a case you have previously screened.

(b) You must report to us any foster or adoptive placement that appears to have been made by someone other than the child's parents or a child-placing agency.

(c) If you have investigated only one side of a disputed case, you may state whether the party you investigated appears to be suitable for custody. You must refrain from making a custody recommendation, unless otherwise directed by the court.

§745.4043. Whom must I contact with a complaint about how a pre-adoptive home screening or post-placement adoptive report was conducted?

If a child-placing agency conducted the pre-adoptive home screening or post-placement adoptive report, then contact the agency directly. You may also contact the board that licenses the person who conducted the pre-adoptive home screening or post-placement adoptive report, and/or us. Before conducting the pre-adoptive home screening or post-placement adoptive report, the agency must give you telephone numbers for other entities where it is appropriate to file complaints, which must also be included in the pre-adoptive home screening and post- placement adoptive report.

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 October 26, 2001.

TRD-200106577
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: January 25, 2002
For further information, please call: (512) 438-3437

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DIVISION 3. ADDITIONAL CHILD-PLACING AGENCY STANDARDS FOR CONDUCTING A PRE-ADOPTIVE HOME SCREENING

40 TAC §§745.4061, 745.4063, 745.4065, 745.4067, 745.4069, 745.4071, 745.4073, 745.4075, 745.4077, 745.4079

The new sections are proposed under the Human Resources Code, §40.029, which authorizes the department to propose and adopt rules to facilitate implementation of department programs; the Human Resources Code, §42.042, which gives the department the authority to promulgate rules to carry out the statute and to regulate child-care facilities and homes; and the Texas Family Code, §107.0511, which requires the department to adopt minimum standards relating to pre-adoptive screenings.

The new sections implement the Human Resources Code, §40.029 and §42.042, and the Texas Family Code, §107.0511.

§745.4061. What information must the pre-adoptive home screening include?

It must include the following documented information for family applicants:

Figure: 40 TAC §745.4061

§745.4063. Must the pre-adoptive home screening include information about birth parents?

A child-placing agency or person conducting a pre-adoptive home screening must obtain the following information about the birth parents:

(1) Their expectations for adoptive placement, if they chose placement; and

(2) The degree and type of involvement they desire with the adoptive family.

§745.4065. How do I obtain information about the birth parents?

If you are conducting the pre-adoptive home screening for a child-placing agency, obtain the information about the birth parents from the agency records. If the information is not available in the records, then you must make every effort to obtain the information from the birth

parents unless their parental rights have been terminated. Document in the pre-adoptive home screening all your efforts to obtain the information. If appropriate, include reasons why you could not obtain the information.

§745.4067. May I place a child in a home of a prospective adoptive parent before I complete the pre-adoptive home screening?

This may be done in two situations. If the prospective adoptive parent is a:

(1) Member of the child's family related by the second degree of consanguinity or affinity; or

(2) Foster family with whom the child has been living immediately prior to the request for a pre- adoptive home screening.

§745.4069. What if a child is not placed with the prospective adoptive parents within six months of the completion of the pre-adoptive home screening?

The pre-adoptive home screening must be updated within the 30-day period before a child is placed in the home.

§745.4071. What information must the pre-adoptive home screening update include?

It must include:

(1) A review and any required updating of each category of information in the adoptive home screening (See §745.4061 of this title (relating to What information must the pre-adoptive home screening include?)); and

(2) Documentation of at least one visit to the adoptive home made within the six months prior to placement.

§745.4073. Must I complete a pre-adoptive home screening update if the prospective adoptive parents plan to adopt another child?

Yes. If prospective adoptive parents plan to adopt another child, either in addition to or instead of the child for whom the screening was done, you must complete a written pre-adoptive home screening update.

§745.4075. Must I complete a pre-adoptive home screening if the prospective adoptive family is a licensed or verified foster home?

(a) For a foster home that is licensed or verified as only a foster home, a pre-adoptive home screening is necessary to discuss the issues with the prospective adoptive parents in the context of adoptive placement rather than foster family placement.

(b) For an agency home that is dually verified as a foster and adoptive home, then the foster home screening will suffice for the pre-adoptive home screening.

§745.4077. Must an agency that previously verified a foster home or approved an adoptive home release background information to an agency currently conducting a pre- adoptive home screening?

Yes. The agency must release background information to an agency currently conducting and requesting a pre-adoptive home screening on the same home. This background information must be released to the agency within ten days after receiving the written request. If there are any unresolved investigations or deficiencies of the home, the agency must release the information to the requesting agency within ten days after the resolution of investigations and deficiencies.

§745.4079. What must I do with the background information that I receive from the agency that previously verified the foster home or approved the adoptive home?

You must evaluate the information as part of your screening and placement decisions regarding the home. You must use the information to evaluate the family's ability to work with specific kinds of behaviors and backgrounds. You must document any changes that have occurred since the previous agency documented the information.

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 October 26, 2001.

TRD-200106578
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: January 25, 2002
For further information, please call: (512) 438-3437

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DIVISION 4. ADDITIONAL CHILD-PLACING AGENCY STANDARDS FOR FOSTER HOMES AND FOR CONDUCTING FOSTER HOME SCREENINGS

40 TAC §§745.4091, 745.4093, 745.4095, 745.4097, 745.4099, 745.4101, 745.4103

The new sections are proposed under the Human Resources Code, §40.029, which authorizes the department to propose and adopt rules to facilitate implementation of department programs; the Human Resources Code, §42.042, which gives the department the authority to promulgate rules to carry out the statute and to regulate child-care facilities and homes; and the Texas Family Code, §107.0511, which requires the department to adopt minimum standards relating to the preparation of pre-adoptive screenings.

The new sections implement the Human Resources Code, §40.029 and §42.042, and the Texas Family Code, §107.0511.

§745.4091. Must an agency that previously verified a foster home or approved an adoptive home release background information to an agency currently conducting a foster home screening?

Yes. The agency must release background information to an agency currently conducting and requesting a foster home screening on the same home. This background information must be released to the agency within ten days after receiving the written request. If there are any unresolved investigations or deficiencies of the home, the agency must release the information to the requesting agency within ten days after the resolution of investigations and deficiencies.

§745.4093. What must I do to verify a foster home?

In addition to the verification requirements listed in §720.48 of this title (relating to Foster Home Verification), you must:

(1) Ensure that the previous agency completed all investigations and resolved all deficiencies;

(2) Complete the foster home screening as required in §745.4061 of this title (relating to What information must the pre-adoptive home screening include?). The information gathered should be in the context of a foster home instead of an adoptive home. Items 19, regarding fertility, and 22.C, regarding birth parent information, are not required for the foster home screening;

(3) Complete intake studies for children being transferred with the home;

(4) Complete and document all interviews and visits required in §745.4033 of this title (relating to Whom must I interview when conducting a foster home screening, a pre-adoptive home screening, or a post-placement adoptive report?);

(5) Ensure the completion of new fire and health inspections;

(6) Evaluate all areas required for the foster home screening and make recommendations regarding the home's ability and approval to work with children with respect to their age, gender, special needs, and the number of children; and

(7) Document in the child's record your evaluation on all available information and your determination that the home can meet the child's needs.

§745.4095. What must I do to verify a foster home that another child-placing agency has previously verified?

The foster home screening conducted by the previous child-placing agency may be used as a basis for the evaluation with appropriate updates, or the receiving agency may develop an entirely new foster home screening. In either case, prior to verifying each home, the current agency must meet all the requirements of §745.4093 of this title (relating to What must I do to verify a foster home?).

§745.4097. Must I conduct a foster home screening on an agency foster home that does not have foster parents but is otherwise fully staffed?

No. Section 745.4061 of this title (relating to What information must the pre-adoptive home screening include?) does not apply to foster homes that are fully staffed. However, you and the home must each maintain the following documentation:

(1) A current and approved fire-inspection report;

(2) A current and approved health-inspection report;

(3) Personnel records regarding the qualifications, education, and training of all volunteers, household and/or staff members of the foster home;

(4) Current background checks (See Subchapter F of this chapter (relating to Background Checks));

(5) A health card or physician's statement verifying that persons having contact with children are free of active tuberculosis as recommended by the local and regional TDH TB program. Persons whose behavior or health presents a danger to children are not allowed at the foster home;

(6) The agency verification certificate identifying any restrictions concerning the age range, gender, type, and number of children in care;

(7) Staffing schedule, if applicable; and

(8) Floor plan of the home that includes room dimensions and the purposes of the rooms.

§745.4099. What can I do if no local fire authority will inspect the agency foster home?

You must request the State Fire Marshal's Office to inspect the home if no local authority can conduct the inspection. If you have a foster family home and the State Fire Marshal's Office also cannot conduct the inspection, you:

(1) May use PRS's Fire Safety Evaluation Checklist form. Use of this checklist does not exempt the home from compliance with all fire laws, ordinances, and regulations;

(2) Must maintain the original checklist at the foster family home; and

(3) Must maintain documentation with the checklist that includes the date, name of person contacted at the local and State Fire Marshal's offices, and the person's response to the request for an inspection.

§745.4101. What can I do if no local health authority will inspect the agency foster home?

You must request the regional office of the Texas Department of Health (TDH) to inspect the home if no local authority can conduct the inspection. If you have a foster family home and the regional office of TDH also cannot conduct the inspection, you:

(1) May use PRS's Health Inspection Checklist form. Use of this checklist does not exempt the home from compliance with all health and safety laws, ordinances, and regulations;

(2) Must maintain the original checklist at the foster family home; and

(3) Must maintain documentation with the checklist that includes the date, name of person contacted at the local and regional TDH offices, and the person's response to the request for an inspection.

§745.4103. How long are health and fire inspection reports valid?

(a) Any health or fire report obtained from a local fire or health authority is valid for one year, unless otherwise stated in the report.

(b) If the agency used a PRS checklist, the checklist is valid for one year.

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 October 26, 2001.

TRD-200106579
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: January 25, 2002
For further information, please call: (512) 438-3437

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DIVISION 5. ADDITIONAL CHILD-PLACING AGENCY STANDARDS FOR CONDUCTING A POST-PLACEMENT ADOPTIVE REPORT

40 TAC §§745.4121, 745.4123, 745.4125, 745.4127

The new sections are proposed under the Human Resources Code (HRC), §40.029, which authorizes the department to propose and adopt rules to facilitate implementation of department programs; the Human Resources Code, §42.042, which gives the department the authority to promulgate rules to carry out the statute and to regulate child-care facilities and homes; and the Texas Family Code, §107.052, which requires the department to adopt minimum standards relating to the preparation of post-placement adoptive reports.

The new sections implement the Human Resources Code, §40.029 and §42.042, and the Texas Family Code, §107.052.

§745.4121. Are there requirements in addition to meeting the qualifications listed in §745.4027 of this title (relating to What qualifications must I meet to conduct a foster home screening, a pre-adoptive home screening, or a post-placement adoptive report)?

Unless PRS is a party to the case, you must complete and notarize a PRS Post-Placement Adoptive Report Registration form, and file this form with the appropriate court(s).

§745.4123. When must I conduct a post-placement adoptive report?

You must conduct the interviews for a post-placement adoptive report after the child has resided with the prospective adoptive parent or conservator for at least five months, unless otherwise directed by the court. However, you may start the post-placement adoptive report (e.g. the gathering of written information) after the placement of the child.

§745.4125. What issues should an interview for a post-placement adoptive report address?

Each interview should focus on the adjustment of the family and the child following the placement of the child. You must also address any items required by §745.4061 of this title (relating to What information must the pre-adoptive home screening include?) that have not been adequately addressed.

§745.4127. What information must the post-placement adoptive report include?

(a) It must include the following documented information:

(1) A summary of all assessments and available information about the child who is the subject of a petition for adoption, including:

(A) Health history, social history, educational history, genetic and family history, and other information required by the Texas Family Code, §162.005 and §162.007;

(B) History of physical, sexual, or emotional abuse experienced by the child;

(C) History of any previous placements, including the date and reasons for placement;

(D) The child's understanding of adoptive placement or conservatorship; and

(E) The child's legal status.

(2) A summary of all assessments, interviews, and available information about the prospective adoptive parents including:

(A) The pre-adoptive home screening (See §745.4061 of this title (relating to What information must the pre-adoptive home screening include?)), including the results of the criminal history and central registry background checks;

(B) The birth parents' expectations for adoptive placement and further involvement (See §745.4063 of this title (relating to Must the pre-adoptive home screening include information about the birth parents?));

(C) Individual strengths and weaknesses of the adoptive parents;

(D) Observations made relative to the family's interactions with each other;

(E) Additional interviews of persons specified in §745.4033 of this title (relating to Whom must I interview when conducting a foster home screening, a pre-adoptive home screening, or a post- placement adoptive report?); and

(F) A visit to the home (See §745.4037 of this title (relating to Is a visit to the home required when conducting a foster home screening, a pre-adoptive home screening, or a post-placement adoptive report?).

(3) An evaluation of the child's present or prospective physical, intellectual, social, and psychological functioning and needs, and whether the environment will meet those needs.

(4) A summary of the adjustment of the family and child in the home during the six-month placement period, if appropriate.

(5) Sources of information and verification, to the extent possible, of all statements of fact pertinent to the report.

(6) The basis for your conclusions or recommendations.

(7) The names and the qualifications of all persons involved in the preparation and evaluation of the report.

(8) Telephone numbers for entities where it is appropriate for the subject of the report to file complaints about how the post-adoptive placement report was conducted (See §745.4043 of this title (relating to Whom must I contact with a complaint about how a pre-adoptive home screening or post-placement adoptive report was conducted?)).

(b) All persons involved in the preparation and evaluation of the study must sign the report.

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 October 26, 2001.

TRD-200106580
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: January 25, 2002
For further information, please call: (512) 438-3437

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SUBCHAPTER O. INDEPENDENT PRE-ADOPTIVE HOME SCREENING AND INDEPENDENT POST-PLACEMENT ADOPTIVE REPORT

40 TAC §§745.9061, 745.9063, 745.9065, 745.9067, 745.9069, 745.9071

The new sections are proposed under the Human Resources Code, §40.029, which authorizes the department to propose and adopt rules to facilitate implementation of department programs; the Human Resources Code, §42.042, which gives the department the authority to promulgate rules to carry out the statute and to regulate child-care facilities and homes; and the Texas Family Code, §107.0511 and §107.052, which requires the department to adopt minimum standards relating to the preparation of pre-adoptive screenings and post-placement adoptive reports.

The new sections implement the Human Resources Code, §40.029 and §42.042, and the Texas Family Code, §107.0511 and §107.052.

§745.9061. What qualifications must I meet to conduct an independent pre-adoptive home screening or an independent post-placement adoptive report?

You must meet the qualifications to be a level 1 child-placing staff member as specified in §745.4027 of this title (relating to What qualifications must I meet to conduct a foster home screening, a pre-adoptive home screenings, or a post-placement adoptive report?).

§745.9063. Are there requirements in addition to meeting the qualifications listed in §745.4027 of this title (relating to What qualifications must I meet to conduct a foster home screening, a pre-adoptive home screenings or a post-placement adoptive report?)?

Unless PRS is a party to the case, you must complete and notarize a PRS Post-Placement Adoptive Report Registration form, and file this form with the appropriate court(s).

§745.9065. When I conduct an independent pre-adoptive home screening or an independent post-placement adoptive report, may someone who does not meet minimum qualifications help me gather information?

If you are conducting an independent pre-adoptive home screening, or an independent post- placement adoptive report, a person with a bachelor's degree from an accredited college or university may help gather the information required in §745.4061 of this title (relating to What information must the pre-adoptive home screening include?). A person meeting the minimum qualifications to conduct the pre-adoptive home screening or post-placement adoptive report must complete the evaluation, sign it, and be responsible for the finalized home screening or adoptive report.

§745.9067. How do I obtain information about the birth parents?

If you are conducting an independent pre-adoptive home screening, you must make every effort to obtain the information from the birth parents unless their parental rights have been terminated. Document in the pre-adoptive home screening all your efforts to obtain the information, including, if appropriate why you could not obtain the information.

§745.9069. How do I obtain a criminal history or central registry background check for an independent pre-adoptive home screening or independent post-placement adoptive report?

(a) You obtain a criminal history check from the Texas Department of Public Safety and, if appropriate, the Federal Bureau of Investigation (FBI).

(b) You obtain a central registry background check from us; contact our local branch office.

§745.9071. Whom must I contact with a complaint about how an independent pre-adoptive home screening or independent post-placement adoptive report was conducted?

You must contact the court that ordered the pre-adoptive home screening or post-placement adoptive report. You may also contact the board that licenses the person who conducted the home screening or report, and/or you may contact us. Before conducting the pre-adoptive home screening or post-placement adoptive report, the person must give you telephone numbers for other entities where it is appropriate to file complaints, which must also be included in the pre- adoptive home screening and post-placement adoptive report.

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 October 26, 2001.

TRD-200106581

C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: January 25, 2002
For further information, please call: (512) 438-3437

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 2. ENVIRONMENTAL POLICY SUBCHAPTER B. MEMORANDA OF UNDERSTANDING WITH NATURAL RESOURCE AGENCIES

The Texas Department of Transportation proposes the repeal of §2.23, Memorandum of Understanding with the Texas Water Commission, the repeal of §2.25, Memorandum of Understanding with the Texas Natural Resource Conservation Commission, and simultaneously proposes new §2.23, Memorandum of Understanding with the Texas Natural Resource Conservation Commission.

EXPLANATION OF PROPOSED REPEALS AND NEW SECTION

Transportation Code §201.607, requires the Texas Department of Transportation (TxDOT) to adopt a Memorandum of Understanding (MOU) with each state agency that has responsibilities for the protection of the natural environment, the preservation of the natural environment, or for the preservation of historic or archeological resources. Section 201.607 also requires TxDOT to adopt the memoranda and all revisions by rule and to periodically evaluate and revise the memoranda. In order to meet the legislative intent and to ensure that natural environmental resources are given full consideration in accomplishing TxDOT's activities, TxDOT has evaluated the memoranda of understanding adopted in 1992 and 1994. After this evaluation, TxDOT finds it necessary to propose the repeal of §2.23 (MOU with the Texas Water Commission) and §2.25 (MOU with the Texas Natural Resource Conservation Commission), and to simultaneously propose the adoption of new §2.23 in a revised form. New §2.23 describes procedures providing for Texas Natural Resource Conservation Commission (TNRCC) review of TxDOT projects that have the potential to affect natural resources within the jurisdiction of TNRCC.

New §2.23 describes the purpose of the section, including implementing provisions of Texas Transportation Code, §201.607, and the rules for coordination of state-assisted transportation projects, codified under Title 43, Texas Administrative Code, §§2.40-2.51 (and any subsequent amendments), which underline the need for and importance of comprehensive environmental coordination for all transportation projects. Section 2.23 also provides definitions for words and terms used in the MOU.

Subsection (a) explains the purpose of the MOU, including a statement of TxDOT policy regarding the identification of environmental impacts of TxDOT projects; the basis for project decisions; public input; and the use of a systematic interdisciplinary approach in project development. The MOU provides a formal

mechanism by which TNRCC may review TxDOT projects. This review will promote the mutually beneficial sharing of information between TxDOT and TNRCC, which will assist TxDOT in making environmentally sound decisions.

Subsection (b) sets out the authority by which each agency may adopt memoranda of understanding.

Subsection (c) provides definitions for this section.

Subsection (d) outlines the responsibilities of the department and TNRCC. The department's responsibilities include planning and designing safe, efficient, effective and environmentally sound transportation facilities, while avoiding, minimizing, or compensating, where practicable, for anticipated environmental impacts; the timely and efficient construction of transportation facilities; and the ongoing maintenance of transportation facilities. As a state natural resource protection agency, TNRCC's responsibilities include protecting the state's air quality; the protection of water, water quality, and water rights; and the administration of other state environmental programs.

Subsection (e) contains a new provision for early project development that provides a process for early contact with TNRCC to identify potential impacts to air and water resources caused by proposed transportation projects. Subsection (e) also contains a set of criteria under which transportation projects will be coordinated on air quality and/or water quality with TNRCC, with a TNRCC review time of environmental documentation of 30 days. The subsection also provides TxDOT with the authority to determine final disposition of transportation projects; provides for continuing coordination between TxDOT and TNRCC through the construction period of a transportation project if needed; and provides recommendations for the protection of natural resources under the jurisdiction of TNRCC.

Subsection (f) contains provisions concerning additional provisions regarding the exchange of information on air quality between TxDOT and TNRCC.

Subsection (g) contains provisions concerning additional provisions regarding the exchange of information on water quality between TxDOT and TNRCC.

Subsection (h) includes a mechanism for the resolution of disputes between TxDOT and TNRCC.

Subsection (i) provides for the review and revision of the MOU, no later than January 1, 2007, and provides that TxDOT and TNRCC by rule will adopt the MOU and all revisions to the MOU.

FISCAL NOTE

James Bass, Director, Finance Division, has determined that for the first five-year period the new section is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the new section. There are no anticipated economic costs for persons required to comply with the section as proposed.

Dianna F. Noble, P.E., Director, Environmental Affairs Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeals and new section.

PUBLIC BENEFIT

Ms. Noble has also determined that for each year of the first five years the new section is in effect the MOU will provide for timely and effective reviews, as a result of increased coordination and communication between the department and TNRCC. The MOU will assist TxDOT in meeting the mission of providing needed transportation projects and will assist TNRCC in meeting their mission of ensuring that the state's natural resources are preserved. The MOU will ensure comprehensive environmental coordination for all transportation projects in a manner consistent with federal and state laws, regulations, and guidelines. There will be no adverse economic effect on small businesses.

PUBLIC HEARING

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, TxDOT and TNRCC will conduct a joint public hearing to receive comments concerning the proposed new chapter. The public hearing will be held at 10:00 a.m., November 27, 2001, in the first floor hearing room of the Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 9:30 a.m. Any interested persons may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member when possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc., for proper reference. Any suggestions or requests for alternative language or other revisions to the proposed text should be submitted in written form. Presentations must remain pertinent to the issues being discussed. A person may not assign a portion of his or her time to another speaker. 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 Randall Dillard, Director, Public Information Office, 125 East 11th Street, Austin, Texas 78701-2483, 512/463-8588 at least two working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeals and new section may be submitted to Dianna F. Noble, P.E., Director of Environmental Affairs, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on December 10, 2001.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

This rulemaking action has been determined to be subject to the 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 rules of the Coastal Coordination Council (31 TAC Chapters 501-506). As required by 31 TAC §505.22(a), this rulemaking action must be consistent with all applicable CMP policies.

This action has been reviewed for consistency, and it has been determined that this rulemaking is consistent with the applicable CMP goals and policies. The primary CMP policy applicable to this rulemaking action is the policy that transportation projects be located at sites that, to the greatest extent practicable, avoid and

otherwise minimize the potential for adverse effects to coastal natural resource areas from construction and maintenance of roads, bridges, causeways, and other development associated with the project. This rulemaking action provides a means for identifying the environmental impacts of department transportation projects on natural resources, including air and water resources, for coordination of these projects with the relevant state resource agency, and for inclusion of these investigations and coordination in the environmental documentation for each project. All of these purposes will provide a mechanism for avoiding, minimizing, or compensating, where practicable, for the adverse effects of department projects on coastal natural resource areas that serve as habitat, on coastal preserves, and on threatened and endangered species. For these same reasons, the rulemaking action is consistent with the CMP goal of protecting, preserving, restoring, and enhancing the diversity, quality, quantity, functions, and values of coastal natural resource areas. Interested persons are requested to submit comments on the consistency of the proposed rules with the CMP.

43 TAC §2.23, §2.25

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

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Transportation Code, §201.607, which requires that the department adopt memoranda of understanding with each agency that has responsibility for the protection of the natural environment, the preservation of the natural environment, or for the preservation of historic or archeological resources, and that these memoranda and all revisions be adopted as rules.

No statutes, articles, or codes are affected by the proposed repeals.

§2.23. Memorandum of Understanding with the Texas Water Commission.

§2.25. Memorandum of Understanding with the Texas Natural Resource Conservation 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 October 25, 2001.

TRD-200106475
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 463-8630

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43 TAC §2.23

STATUTORY AUTHORITY

The new section is proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Transportation Code, §201.607, which requires that the department adopt memoranda of understanding with each agency that has responsibility for the protection of the natural environment, the preservation of the natural environment, or for the preservation of historic or archeological resources, and that these memoranda and all revisions be adopted as rules.

No statutes, articles, or codes are affected by the proposed new section.

§2.23. Memorandum of Understanding with the Texas Natural Resource Conservation Commission.

(a) Purpose. This section contains the Memorandum of Understanding (MOU) between the Texas Department of Transportation (TxDOT) and the Texas Natural Resource Conservation Commission (TNRCC) concerning the coordination of environmental reviews associated with transportation projects. The MOU addresses only those reviews required by Transportation Code, §201.607, and does not affect coordination or permits required by other state or federal regulations.

(1) It is the policy of TxDOT to:

(A) investigate fully the environmental impacts of departmental transportation projects, coordinate these projects with applicable state and federal agencies, and reflect these investigations and coordination in the environmental documentation for each project;

(B) base project decisions on a balanced consideration of the need for a safe, efficient, economical, and environmentally sound transportation system;

(C) receive input from the public through the public involvement process;

(D) utilize a systematic interdisciplinary approach as essential parts of the development process for transportation projects; and

(E) strive for environmental soundness of transportation activities through appropriate mitigation, where feasible and prudent, in coordination with appropriate resource agencies.

(2) It is the policy of TNRCC to:

(A) promote and foster voluntary compliance with environmental laws;

(B) ensure that the regulations promote flexibility in achieving environmental goals and are applied clearly and consistently;

(C) base decisions on the law, common sense, good science, and fiscal responsibility;

(D) ensure that regulations are necessary, effective, and current;

(E) ensure meaningful public participation in the decision making process; and

(F) ensure consistent, just, and timely enforcement when environmental laws are violated.

(3) The rules for coordination of state-assisted transportation projects developed by TxDOT, codified as 43 TAC §§2.40-2.51, underline the need for and importance of comprehensive environmental coordination for all transportation projects.

(4) The intent of this MOU is to provide a formal mechanism by which TNRCC may review TxDOT projects that have the potential to affect resources within TNRCC's jurisdiction. This review will promote the mutually beneficial sharing of information between TxDOT and TNRCC, which will assist TxDOT in making environmentally sound decisions.

(b) Authority.

(1) Transportation Code, Section 201.607, directs TxDOT to adopt memoranda of understanding with each agency that has responsibilities for protection of the natural environment.

(2) By statute, TNRCC may enter into a memorandum of understanding with any other state agency and shall adopt by rule any memorandum of understanding between TNRCC and any other state agency (Water Code, Section 5.104, and Health and Safety Code, Section 382.035).

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

(1) Construction--Activities that involve the building of transportation projects on new location, the expansion, rehabilitation, or reconstruction, of an existing facility.

(2) Districts--One of the 25 geographical districts into which TxDOT is divided.

(3) Environmental documents--Decision-making documents prepared pursuant to 23 CFR §771 (or any subsequent amendments or regulations) for federal-aid projects or §§2.40 et seq. of this chapter for non federal-aid projects that incorporate the results of environmental studies, coordination and consultation efforts, and engineering elements. These documents include categorical exclusions, environmental assessments, and environmental impact statements.

(4) The United States Environmental Protection Agency (EPA)--The federal agency which is generally charged with administering federal authority over the quality of air and water resources.

(5) Federal Clean Air Act (FCAA)--(42 USC §7401) The federal act, including all amendments, that establishes national ambient air quality standards and mandates procedures for reaching and maintaining these standards.

(6) Inspection and Maintenance Program--A vehicle emissions inspection program as defined by the EPA that includes, but is not limited to, the use of computerized analyzers, on-road testing, and/or inspection of vehicle emission devices.

(7) Maintenance--Activities which involve the repair or preservation of an existing facility to prevent that facility's degradation to an unsafe or irreparable state, or which involve the treatment of an existing facility or its environs to meet acceptable standards of operation or aesthetic quality. The activities generally do not require the acquisition of additional right of way or result in increased roadway capacity.

(8) Memorandum of Understanding--A formal document that outlines the relationship between agencies or parties, including the responsibilities and jurisdiction of each party, and which sets forth within its provisions agreements between the parties and a means of dispute resolution.

(9) Metropolitan Planning Organization (MPO)--An organization designated in certain urbanized areas to carry out the transportation planning process as required by 23 USC §134.

(10) Mitigation--A means of addressing impacts to the natural environment including in general order of preference, avoidance, minimization, and compensation.

(11) National Environmental Policy Act of 1969 (NEPA)--(42 USC §4332) The basic national charter for protection of the environment. It establishes policy, sets goals, and provides means for carrying out the policy. NEPA is binding on federal agencies, including the Federal Highway Administration (FHWA), and is usually followed as an environmental guideline by state and local agencies. For the purpose of this MOU, NEPA includes the Act itself, its subsequent amendments, and implementing regulations.

(12) Non-attainment counties--Counties in an air quality control region for which any pollutant exceeds the National Ambient Air Quality Standards (NAAQS) for the pollutant as designated pursuant to 42 USC §7407 (Section 107 of the FCAA).

(13) Project development--The planning process of a transportation project that includes environmental studies and drafting the appropriate environmental documentation, the public involvement process, engineering design, and right of way acquisition.

(14) Right of way--The land provided for a transportation facility. Right of way includes the roadway itself (including shoulders) and the areas between the roadway and adjacent properties.

(15) Single occupancy vehicle--A motor vehicle operated by a driver and carrying no passengers.

(16) State Implementation Plan (SIP)--The plan prepared by TNRCC as required by 42 USC §7410 (Section 110 of the FCAA) to attain and maintain air quality standards. An approved SIP is the implementation plan, or most recent revision of this plan, that has been approved by EPA under Section 110.

(17) Statewide Transportation Improvement Plan (STIP)--The statewide multi-year transportation improvement program made up of Transportation Improvement Plans (TIPs) from all metropolitan planning areas, as well as the rural TIPs for areas outside the metropolitan planning areas, and some statewide programs.

(18) TNRCC--For the purposes of this MOU, TNRCC refers to the commissioners, executive director, and their respective staffs, of the Texas Natural Resource Conservation Commission.

(19) Transportation Improvement Program (TIP)--A staged, multi-year (normally three years), intermodal program of transportation projects which are consistent with the metropolitan transportation plan (MTP) as defined in 23 CFR 450.322 and which covers a metropolitan planning area.

(20) Transportation projects--All surface transportation projects designed, constructed, and maintained by TxDOT.

(21) TxDOT--For the purposes of this MOU, TxDOT refers to the commissioners, executive director, and staff of the Texas Department of Transportation.

(22) TxDOT environmental rules--The rules relating to the environmental review and public involvement process for transportation projects (§§2.40-2.51 of this chapter).

(d) Responsibilities.

(1) The responsibilities of TxDOT pertain primarily to its functions as a transportation agency and include:

(A) planning and designing safe, efficient, cost effective and environmentally sound transportation projects, while avoiding, minimizing, or compensating for anticipated environmental impacts to the fullest extent practicable;

(B) timely and efficient construction of transportation projects consistent with transportation control measures in the SIP and with approved plans and agreements which have been executed by TxDOT regarding the protection of the environment;

(C) ongoing maintenance to protect transportation investments and to provide safe and efficient transportation facilities for the traveling public;

(D) preservation of the environment when possible and enhancement of the environment when practicable;

(E) maintaining vehicle registration data which will facilitate mobile source air quality planning and implementation as directed by the SIP and as agreed to by TxDOT;

(F) developing a STIP, which includes each MPO's TIP and specific projects in the TIP; and

(G) implementing an enforceable and verifiable registration denial mechanism which requires emissions testing as a prerequisite to vehicle registration in appropriate areas.

(2) The responsibilities of TNRCC pertain to air and water quality as described in this paragraph.

(A) Air quality.

(i) TNRCC is the state air pollution control agency and is the principal authority in Texas on matters relating to the quality of the state's air resources.

(ii) TNRCC's primary responsibility, as designated by Health and Safety Code, Section 382.002, includes, but is not limited to, setting standards, criteria, levels, and emission limits for air quality and air pollution control.

(iii) General powers and duties of TNRCC regarding air quality are:

(I) regulation of air quality through the development, implementation, and enforcement of strategies, and control programs as necessary to satisfy all federal and state requirements, including SIP requirements mandated by the FCAA;

(II) participation in the preparation and review of SIP conformity evaluations and other SIP documents for determination purposes of transportation programs, plans, and projects as required by the FCAA;

(III) participation, through coordination with TxDOT, in the development and implementation of transportation control measures, which may require action by TxDOT; and

(IV) implementation of an effective vehicle inspection and maintenance program incorporating an enforceable and verifiable registration denial mechanism.

(iv) TNRCC has the authority to develop the following items.

(I) State Air Control Plan. TNRCC shall prepare and develop a general, comprehensive plan for the proper control of the state's air quality.

(II) Air quality control regions. TNRCC may designate air quality control regions based on jurisdictional boundaries, urban/industrial concentrations, and other factors, including atmospheric conditions, necessary to provide adequate implementation of air quality standards.

(III) Emission inventory. TNRCC may require any entity whose activities cause emissions of air contaminants to submit information to enable TNRCC to develop an inventory of air contaminants.

(B) Water quality

(i) TNRCC is charged with the protection of the quality of water and water rights in the state.

(ii) TNRCC's jurisdiction, as outlined in Water Code, §5.013, includes:

(I) water and water rights, including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights;

(II) the state's water quality program, including issuance of permits, enforcement of water quality rules, standards, orders, and permits, certification of federal permits and water quality planning;

(III) the determination of the feasibility of certain federal projects;

(IV) the administration of the state's programs relating to inactive hazardous substance, pollutant, and contaminant disposal facilities;

(V) the administration of the state's programs involving underground water; and

(VI) any other areas assigned to TNRCC by the Water Code and other state law.

(e) Provisions regarding coordination and document review.

(1) Coordination.

(A) TxDOT is committed to performing early identification efforts to assess potential environmental concerns related to proposed transportation projects, and initiating coordination with TNRCC during the early planning stages of these projects. Early identification of environmental concerns and coordination with TNRCC is essential to TxDOT's efforts to:

(i) consider environmental issues early in the project development process;

(ii) design and develop transportation projects in a timely manner; and

(iii) avoid and minimize impacts to environmental resources to the maximum extent practicable.

(B) TxDOT's districts are encouraged to coordinate projects early in development by working with TNRCC's Austin Headquarters and regional offices. Any information received, and the results of coordination will be summarized in the environmental document prepared for the project.

(C) Through notices, public meetings, and public hearings, TxDOT and TNRCC are committed to encouraging public input as specified by statute and TNRCC and TxDOT rules concerning plans and actions that may affect environmental quality.

(2) Environmental document review.

(A) TxDOT will furnish environmental documentation to TNRCC for types of projects listed in this paragraph, pertaining to air quality and water quality.

(i) Air quality. TxDOT shall furnish to TNRCC environmental documentation for all projects that:

(I) involve the construction of highway projects on new location in non-attainment areas;

(II) involve additional single occupancy vehicle capacity in non-attainment areas;

(III) are in non-attainment areas and which may affect air quality; and

(IV) involve construction of single occupancy vehicle projects on new location and increased single occupancy vehicle highway capacity in metropolitan areas with a total metropolitan area threshold of at least 100,000.

(ii) Water quality. TxDOT project types to be coordinated with TNRCC include:

(I) projects which may encroach upon threatened or impaired stream segments designated under §303(d) of the Clean Water Act and/or are 5 miles upstream from the designated stream segment;

(II) projects in the recharge or contributing zone of the Edwards Aquifer, pursuant to 30 TAC §213.3, §213.10 and §§213.20-213.28; and

(III) projects that will require individual Clean Water Act Section 401 certification under procedures defined in a Memorandum of Agreement between the U.S. Army Corps of Engineers and the TNRCC.

(B) Environmental documentation prepared and provided to TNRCC by TxDOT will be in compliance with NEPA, USDOT regulations (23 CFR 771), TxDOT environmental rules, and other applicable laws, rules, and regulations.

(C) The environmental document shall be forwarded to the designated points of contact at TNRCC following TxDOT review. TNRCC shall have a period of 30 days, from date of receipt, to review the environmental document and provide written comments. TNRCC may, if necessary, submit a written request to extend the review period for a maximum of 30 days. The reason for requesting a review extension must be included in any such request.

(D) For projects requiring the preparation of an environmental impact statement, TxDOT shall furnish the preliminary environmental/scoping document to TNRCC upon approval of the document by the FHWA for federal projects or TxDOT for state projects. TxDOT will also provide the draft and final environmental impact statements to TNRCC for review and comment.

(f) Additional provisions regarding air quality.

(1) TNRCC shall furnish TxDOT information detailing the location and severity of non-attainment counties and information affecting transportation-related activity and mobile sources to be included in the SIP. The information is helpful in the planning and location of future TxDOT projects, and in the coordination of the projects with TNRCC.

(2) TxDOT and TNRCC shall exchange, on a statewide basis, accurate and timely information to facilitate the coordination of environmental reviews. In addition, data for developing mobile source budgets and data on transportation conformity determinations will also be provided, particularly for any new areas designated by EPA as non-attainment.

(g) Additional provisions regarding water quality. TxDOT will coordinate with TNRCC in complying with 30 TAC Chapter 213 (Edwards Aquifer Protection Program) in accordance with the Interagency Cooperation Contract relating to such coordination.

(h) Dispute resolution. When TxDOT and TNRCC are unable to reach a mutually agreeable plan of action regarding impacts of transportation projects to natural resources within the jurisdiction of TNRCC, each agency shall make a good faith effort to address the major concerns of the other party. TxDOT will evaluate comments received from TNRCC in conjunction with all other applicable factors (i.e., other agency comments, project alternatives, cost, mitigation requirements, and safety considerations) in an attempt to arrive at a plan of action acceptable to the affected parties. A period of 45 days shall be provided for the resolution of such disputes, after which the department is charged with determining the disposition of transportation projects within its jurisdiction. If TxDOT proceeds with a proposed transportation project in conflict with TNRCC comments, TxDOT will submit to TNRCC a complete and detailed justification demonstrating full compliance with all federal and state rules, regulations, and laws. TNRCC reserves the right to bring enforcement action against TxDOT for violation of laws or rules that TNRCC is charged with enforcing and that may be applicable to TxDOT operations. Both parties agree that this MOU does not preclude either party from making any legal argument.

(i) Review of MOU. This MOU shall be reviewed and updated no later than January 1, 2007. TxDOT and TNRCC by rule shall adopt the MOU and all revisions to the MOU. If a change in state or federal law or a change in the Texas SIP necessitates a change in this MOU, then representatives from both TxDOT and TNRCC will meet to work out a mutually agreeable amendment to the MOU. If such an amendment is not possible, either party may require dispute resolution under subsection (h) 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 October 25, 2001.

TRD-200106474
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 463-8630

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SUBCHAPTER D. PUBLIC PARTICIPATION PROGRAMS

43 TAC §2.67

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

The Texas Department of Transportation proposes the repeal of §2.67, concerning adopt-an-area.

EXPLANATION OF PROPOSED REPEAL

Government Code, §2001.039, requires state agencies to readopt their rules every four years and, prior to readopting, to consider whether the reason for each rule continues to exist. In accordance with Texas Department of Transportation's rule review plan, Chapter 2, Environmental Policy, was reviewed during January 2001. The department's internal review revealed that §2.67, regarding adopt-an-area, should be repealed since the

program has not attracted any donors and its continuance would be impractical. The department readopted Chapter 2, with the exception of §2.67 in the April 13, 2001, edition of the *Texas Register* (26 TexReg 2860).

FISCAL NOTE

James Bass, Director, Finance Division, has determined that for the first five-year period the repeal is in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeal. There are no anticipated economic costs for persons required to comply with the repeal as proposed.

Zane L. Webb, Director, Maintenance Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeal.

PUBLIC BENEFIT

Mr. Webb has also determined that for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of enforcing or administering the repeal will be a more accurate organization of the rules. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeal may be submitted to Zane Webb, Director, Maintenance Division, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on December 10, 2001.

STATUTORY AUTHORITY

The repeal is proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation.

No statutes, articles, or codes are affected by the proposed repeal.

§2.67. Adopt-an-Area Program.

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 October 25, 2001.

TRD-200106476
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 463-8630

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CHAPTER 15. TRANSPORTATION PLANNING AND PROGRAMMING

SUBCHAPTER K. ROAD UTILITY DISTRICTS

43 TAC §§15.130 - 15.136

The Texas Department of Transportation proposes new §§15.130-15.136, concerning road utility districts.

EXPLANATION OF PROPOSED NEW SECTIONS

The Texas Transportation Commission (commission) last adopted rules relating to road utility districts in 1985. Since that time, there have been numerous changes in the organization of the Texas Department of Transportation and in the titles of its employees. These obsolete terms might confuse the public, and it is therefore desirable to update the terminology of the rules. The existing rules relating to road utility districts are codified in Chapter 21. Existing §§21.171-21.312 are proposed for repeal and simultaneously proposed as new §§15.130-15.136 because road utility districts relate more closely to transportation planning than to right of way issues. In addition, the rules have been shortened by about one-third by eliminating unnecessary and duplicative provisions. Throughout, terms and cross-references have been updated, language has been clarified, and the structure of the rules has been simplified.

In general, the rules are now organized in a manner that is more closely aligned with the subchapters in Transportation Code, Chapter 441. If a road utility district is exempted from some subchapters, this will make it easier to determine which rules still apply.

Section 15.130 is based on former §21.181. The language has been shortened and clarified to eliminate unnecessary verbiage.

Section 15.131 is based on former §21.171. The definitions of act, approval statement, bridge layouts, and district have been eliminated as unnecessary. The definitions of commission and executive director have been updated to reflect current terminology. The definitions of drainage works, final plans, hydraulic design data, preliminary plans, and roads have been incorporated into the other definitions or substantive sections in which these terms were used. New definitions of plans and specifications have been added for ease of reference. Registered professional engineer is changed to licensed professional engineer to conform to current terminology.

Section 15.132 has been drawn from several former sections to consolidate provisions relating to the filing of documents. Section 15.132(a) is based on former §21.212. Section 15.132(b) is based on former §21.211. Section 15.132(c) is based on former §21.191.

Section 15.133 has been drawn from several former sections to consolidate provisions relating to the creation of a road utility district. Its provisions correspond to Transportation Code, Chapter 441, Subchapter B. It also applies to a grant of road utility district powers to a conservation and reclamation district under Transportation Code, Chapter 441, Subchapter C.

Section 15.133(a) is based on former §21.201. Section 15.133(b) is based on former §§21.221, 21.222, and 21.224. The hearing required by Transportation Code, 441.022 is no longer conducted as a contested case hearing, which is adversarial in nature and thus inappropriate in this context. Instead, the hearing will be conducted in the same manner as a public hearing on the adoption of proposed rules. Provisions relating to a formal hearing officer's report are omitted; matters presented during a hearing will instead be considered along with all other factors by the department in making a recommendation to the commission.

Section 15.133(c)(1) is based on the last sentence in former §21.221. Section 15.133(c)(2) is based on former §21.182. The former rule stated that the commission shall consider all the listed criteria; the proposed rule states only that the commission may consider the listed criteria. This provides the commission with more flexibility to focus on the particular considerations

that are most relevant in any application. Section 15.133(c)(3) is based on former §21.231. Section 15.133(c)(4) is based on former §21.241.

Section 15.134 has been drawn from several former sections to consolidate provisions relating to the operation of a road utility district. Its provisions correspond to Transportation Code, Chapter 441, Subchapters D, E, and F.

Section 15.134(a) is based on former §21.271. Section 15.134(b)(1) is based on former §21.251. Former §21.251(a)(7)(E) is omitted because it appears to contemplate an unauthorized dissolution in violation of §15.136 and Transportation Code, Chapter 441, Subchapter L. Section 15.134(b)(2) is based on former §21.261. Section 15.134(b)(3) is based on the last sentence of former §21.181. Section 15.134(c)(1) is based on former §21.284. Section 15.134(c)(2) is based on former §21.282 and §21.283. Section 15.134(c)(3) is based on former §21.285. Section 15.134(c)(4) is based on former §21.281.

Section 15.135 is based on former §21.301 and corresponds to Transportation Code, Chapter 441, Subchapter G.

Section 15.136 is based on former §21.311 and §21.312 and corresponds to Transportation Code, Chapter 441, Subchapter L. Subsection 15.136(d) has been added to provide further detail on relevant considerations in dissolving a road utility district.

In addition to the specific omissions noted above, the following items are omitted from the proposed rules. The former rules contained several references to the department's ability to seek assistance from the attorney general if needed. This language was omitted as unnecessary because the department always has the option of seeking assistance from the attorney general in any legal dispute. These references were contained in former §§21.251(a)(7)(D), 21.262, 21.282, 21.284, and 21.286.

The former rules contained several references to the responsibility of a road utility district to abide by the statute and the commission's rules. This language was omitted as unnecessary because any entity must always act in conformity with law. These references were contained in former §§21.171(2), 21.191, 21.201, 21.222, 21.224, 21.285, 21.301, and 21.312.

Former §21.223 provided that the executive director of the department shall review submissions and make recommendations to the commission. This provision was omitted as unnecessary because the executive director's authority is fully established by §1.2(a), relating to department organization and responsibilities, and Transportation Code, §201.301.

FISCAL NOTE

James Bass, Director, Finance Division, has determined that for each year of the first five years the new sections are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections. There are no anticipated economic costs for persons required to comply with the sections as proposed.

James L. Randall, P.E. has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the new sections.

PUBLIC BENEFIT

Mr. Randall has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the new sections will be to clarify and streamline the process for creating and administering road utility districts and to enhance public understanding of the application process for road utility districts. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the new sections may be submitted to James L. Randall, P.E., Director, Transportation Planning and Programming Division, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on December 10, 2001.

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation. In addition, the new sections are proposed under Transportation Code, §441.002, which provides the Texas Transportation Commission with the authority to establish rules relating to road utility districts.

No statutes, articles, or codes are affected by the proposed new sections.

§15.130. Purpose.

Under Transportation Code, Chapter 441, the Texas Transportation Commission must promulgate rules and supervise the creation and operation of a road utility district (RUD). These rules establish the standards under which the commission will discharge this responsibility.

§15.131. Definitions.

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

(1) Applicant--A person who files a petition for creation of a RUD.

(2) Bonds--Bonds, notes, warrants, and other evidence of indebtedness issued by a RUD.

(3) Commission--The Texas Transportation Commission or if permitted by law, its designee.

(4) Construction plans--Detailed plans and accompanying specifications and construction cost estimates that are prepared for the purpose of awarding a construction contract.

(5) Department--The Texas Department of Transportation.

(6) Engineering report--A written report prepared by a licensed professional engineer authorized to practice in Texas. The report shall describe the proposed facility and the existing and proposed conditions pertinent to the planning, design, construction, and maintenance of the proposed facility. To the extent possible, an engineering report must be bound, must be typewritten on 8 1/2-inch by 11-inch paper, and must include drawings that may, if appropriate, be foldouts.

(7) Executive director--The chief executive officer of the department or a designee.

(8) Facility--A gravel or paved road that is intended to serve as an arterial or main feeder road and is constructed, acquired, improved, or proposed by the RUD. A facility includes any drainage work for the improvement of a river, creek, or stream to prevent overflows. It also includes the construction and maintenance of pools, lakes, reservoirs, dams, canals, and waterways for the purpose of drainage if in furtherance of the construction, acquisition, or improvement of a road.

(9) Governmental entity--The public entity to which the facility is to be conveyed. A governmental entity may be a municipality, a county, or the department.

(10) Person--An individual, firm, corporation, company, partnership, or other legal entity.

(11) Plans--Drawings that show the location, character, and dimensions of the prescribed work, including layouts, profiles, cross sections, other miscellaneous details, and quantity summaries. Final plans include field changes made during construction and therefore reflect the final form of the facility.

(12) Specifications--The compilation of provisions and requirements for the performance of prescribed work.

(13) Typical section--Drawings that show usual roadway or bridge cross-sectional features, including lane and shoulder widths; limits of surfacing; pavement structure data, including subgrade treatment type and depth, base course thickness and gradation, the plasticity index and density requirements for embankment materials, and type of surfacing material; travel lane and shoulder cross slopes; side slope rates for cut and fill sections; ditch or storm sewer location and depth; typical right of way limits; profile grade line location; typical traffic barrier location; median width and slopes; and curb location and geometry.

§15.132. General Filing Requirements.

(a) Place of filing. Documents to be filed with the commission or the department must be filed with the director of the department's Transportation Planning and Programming Division. Applicants must submit all required data at one time in one package. An application will be returned if it does not satisfy all legal requirements.

(b) Licensed professional engineer. All plans shall be prepared, dated, signed, and sealed by a licensed professional engineer authorized to practice in Texas.

(c) Preliminary plans. Preliminary plans to be submitted and filed with the governmental entity and the commission shall contain at least the following items.

(1) The applicant must submit an engineering report that includes:

(A) average daily traffic volumes on existing roads and streets located within the RUD;

(B) five-year and twenty-year forecasts of average daily traffic volumes on existing and proposed roads and streets within or affected by the facility;

(C) an assessment of the facility's effect on the safety and quality of flow on state highways, municipal streets, and county roads that are intersected, interchanged, relocated, or widened as a result of construction;

(D) a description of the proposed facility, including typical sections of the proposed road and a typical section of the existing road;

(E) scale maps showing the boundaries of the RUD, its topography, the location of the facility, and anticipated land use and population density;

(F) scale maps of existing drainage areas that are partially or wholly within the RUD;

(G) hydraulic design frequencies for drainage structures, including specifications for the basis of design and the design coefficients, rainfall intensities, drainage area sizes, and calculated flow quantities for each drainage structure and, when applicable, for each inlet and storm sewer;

(H) an explanation of the anticipated handling of existing traffic during construction;

(I) an assessment of environmental impacts, including an in-depth analysis when environmentally sensitive areas are adversely affected;

(J) when bridges of 20 feet or more are proposed, an indication of structural capacity in terms of design loading;

(K) a preliminary estimate of construction costs subdivided into drainage structures and storm sewers, bridges, roadway, and miscellaneous features;

(L) a tabulation of basic geometric design values including design speed, maximum horizontal curvature, maximum gradient, minimum stopping sight distance, maximum superelevation rates, and other pertinent geometric design data;

(M) proposed landscaping and scenic easements;

(N) proposed temporary and permanent measures for controlling erosion; and

(O) identification of the sources or reference publications, such as a municipality or county, the department or the American Association of State Highway and Transportation Officials, that serve as a basis for the selected design values and standards or will serve as the standards, guidelines, criteria, or specifications in the subsequent development of other design documents, including construction plans.

(2) The applicant must also submit:

(A) a schematic of the facility consisting of a continuous roll of to-scale engineering drawings depicting plan views on the upper portion and proposed profile grade line and natural ground profile superimposed on a grid on the lower portion and showing percent grades, vertical curve data, horizontal alignment and superelevation data for each roadway, number of lanes on each roadway, right-of-way limits, location and configuration of interchanges, grade separations and ramps, control of access lines, intersection design, location of median openings, location and length of speed-change lanes, a typical section, and the design speed; or

(B) at the request of the department or governmental entity, or at the option of the applicant, construction plans.

(3) The applicant shall submit a description of the title, guarantees, and form of conveyance to be used in conveying the land and facility to the governmental entity.

§15.133. Creation.

(a) Petition. A petition to form a RUD, or for a conservation and reclamation district to acquire RUD powers, must include the following documents:

(1) all information required by Transportation Code, §441.019;

(2) the names, addresses, and signatures of holders of title to all the land within the proposed RUD, as shown by the county tax rolls;

(3) a $5,000 nonrefundable filing fee made payable to the department;

(4) a scale map showing the boundaries of the RUD and drawn on plan sheets not larger than 22 inches by 36 inches, a metes and bounds description, and a computation sheet for survey closure;

(5) a plan sheet that is not larger than 22 inches by 36 inches showing the boundaries of the RUD, existing topography including streams, highways, roads, and other improvements;

(6) preliminary plans;

(7) an approval statement from the governmental entity;

(8) an engineering report including:

(A) a vicinity map;

(B) the cost of right of way acquisition, including justification that the cost represents an equitable and fair market value or a statement that the right of way and easements will be acquired at no cost;

(C) the projected useful life of the facility and the expected costs of maintenance;

(D) a comprehensive study showing the justification for creation of the RUD supported by evidence that the proposed facility is feasible and necessary and that the proposed RUD and facility will be a benefit to land included in the RUD;

(9) a financial study of the proposed RUD and surrounding area, prepared by an independent consultant, that includes:

(A) projected bond requirements, including;

(i) the estimated cost of the facility;

(ii) all other estimated costs of the RUD;

(iii) a finding that the RUD will be financially able to issue and pay bonds of the RUD and all other costs with projected revenues;

(B) economic feasibility, including:

(i) a table showing the projected tax rates and fees over the life of the bond period;

(ii) total tax assessments;

(iii) a table showing the total debt encumbering the land within the RUD, including any debt payable from taxes levied by an entity under the provisions of the Texas Constitution, Article III, §52;

(iv) a projection of the assessed valuation of the real property on a yearly basis from the date of filing to the projected date on which the facility will be completed;

(10) a certificate from the central appraisal district or the tax assessor of each county in which the proposed RUD is located indicating the owners and tax valuation of the real property within the proposed RUD as reflected on the county or counties tax rolls, or if the tax rolls do not show that each applicant is an owner of land within the proposed RUD, a certified copy of deeds tracing title from the person listed on the county tax rolls as owner to the applicant;

(11) a certificate from the municipal clerk or secretary and the county clerk that a copy of the preliminary plans for creation of the proposed RUD was received by each municipality in whose extraterritorial jurisdiction the proposed RUD is located and by the commissioners court of each county in which the proposed RUD is located;

(12) a specific chronological history showing compliance with all the requirements of Transportation Code, Chapter 441;

(13) a proposed order of the commission providing for the public hearing and giving notice of the hearing;

(14) a list of at least five potential temporary directors who are eligible under subsection (c)(3) of this section, with their resumes; and

(15) other information that the commission may require.

(b) Hearing. On receipt of a completed petition, the department will conduct a hearing.

(1) Appointment of hearing officer. The executive director will appoint a hearing officer. The hearing officer will set the time and place of the hearing and conduct the hearing. At least 30 days before the hearing, the hearing officer will send notice of the hearing by first class mail to each person specified by Transportation Code, §441.023.

(2) Published notice of hearing. The applicant shall publish notice of the hearing in a newspaper of general circulation in each county in which the proposed RUD is to be located. The notice shall be published once per week for two consecutive weeks, with the first publication occurring at least 30 days before the date set for the hearing. The notice shall include:

(A) a vicinity map showing the location of the proposed RUD in relation to roads and other major landmarks;

(B) the exact location of the facility as nearly as it can be described;

(C) the applicant's anticipated construction and completion schedule, and an estimate of the facility's cost;

(D) the applicant's name and mailing address;

(E) a description of the nature and purpose of the petition to enable any interested party to be reasonably apprised of the benefits and necessity of the RUD;

(F) a statement that any interested party is entitled to appear at a hearing; and

(G) the date, time, and place of hearing.

(3) Proof of notice. The applicant shall provide proof of proper notice of the hearing. This proof shall consist of the publisher's affidavit, including the name of the newspaper, the title of the affidavit, the dates of publication, and the counties in which the newspaper is of general circulation. A newspaper tearsheet of the published notice shall be attached to the affidavit. Proof of notice will be accepted as an exhibit at the hearing.

(c) Approval.

(1) Order. After the conclusion of the hearing, the commission will issue an order either granting the creation of the RUD and approving the plans or denying the petition and disapproving the plans.

(2) Criteria. The commission may consider the following criteria in deciding whether to approve a petition.

(A) Structural integrity. The construction plans shall be based on sound established engineering principles and be compatible with the requirements of the county and municipality in whose jurisdiction the RUD is located and with the design criteria of the department. Consideration will be given to any possible effects on existing roads and drainage works.

(B) Safety. A facility shall be designed so it will not significantly increase flooding and endanger any person's life or property. The commission will not approve a facility that will significantly increase flooding on any person's land without that person's written consent.

(C) Rights of third parties. The commission may consider the rights of other third parties.

(D) Coordination. A facility shall be designed so that each phase, if it is designed in phases, shall itself be a complete facility forming a coordinate part of the finished facility. The successful operation of each phase shall coordinate with the successful operation of other phases within the same facility.

(E) Environmental effects. The commission may consider all environmental effects of the facility in its evaluation, including specifically scenic and landscaping matters.

(3) Temporary directors. The commission will appoint not more than five temporary directors from the list in the petition. These temporary directors will serve until their successors are elected and qualified for office. A temporary director must be at least 18 years old and a resident citizen of Texas and must either own land subject to taxation in a county in which the proposed RUD is located or be a registered voter within the proposed RUD.

(4) Debt limitations. The commission may limit a RUD's ability to incur debt to any amount up to 20% of the assessed value of the real property within the RUD. If the county commissioners court of each county in which the RUD is located consents to a greater debt limitation, the commission may limit the RUD's ability to incur debt to any amount up to 25% of the assessed value of the real property within the RUD.

§15.134. Operation.

(a) Required signs. Within 30 days after the creation of a RUD, the RUD shall post signs indicating the existence of the RUD at two or more principal entrances to the RUD. Detailed sign specifications can be obtained from the executive director on request.

(b) Filings with the commission.

(1) Post-election report.

(A) Post-election filings. Within 30 days after the election to confirm the creation of the RUD, the RUD shall file reports with the commission and with the county clerks of each county in which the RUD is located. These reports shall include:

(i) the name of the RUD;

(ii) a complete and accurate legal description of the boundaries of the RUD;

(iii) the most recent rate of RUD taxes on property located in the RUD;

(iv) the total amount of bonds that have been approved by the voters and will be issued by the RUD;

(v) the date on which the election to confirm the creation of the RUD was held;

(vi) a statement of the functions performed or to be performed by the RUD; and

(vii) a complete scale map or plat showing the boundaries of the RUD.

(B) If there is any change in information contained in a report, the RUD shall amend the report within seven days after the change in information.

(C) The report and each amendment to a report shall be signed by a majority of the members of the governing board of the RUD and by each officer.

(2) Bond issuance. Before submitting bonds to the attorney general under Transportation Code, §441.174, the RUD shall file with the commission a complete record showing the amount of bonds authorized to be issued for the purpose of constructing the facility and the engineer's estimates and reports.

(3) Audits and additional information. At the request of the commission, the RUD shall submit to an audit, shall provide additional information and reports, and shall permit on-site inspections. At any time the commission may institute an investigation or hold hearings concerning the RUD.

(c) Supervision of construction.

(1) Supervisory responsibility. The governmental entity and executive director may exercise supervisory authority and control over the preparation of all construction plans for construction of the facility and over related engineering work. During construction, on-site inspections may be made at the governmental entity's or executive director's discretion.

(2) Approval of construction plans. If construction plans were not submitted initially as a part of the preliminary plans, the applicant shall submit construction plans to the governmental entity and executive director before beginning construction. A RUD shall not construct any facility without first obtaining approval of the construction plans by the executive director and the governmental entity. A RUD shall not construct any facility that differs from the approved construction plans.

(3) Changes and additions. Changes and additions to a facility shall be filed with the commission for approval. The filing shall fully explain the reason for the change and the estimated cost and shall be accompanied by an engineering report with amended drawings and documents. Additional information shall be furnished as deemed necessary by the executive director. Except to the extent that the decision is delegated to the executive director, the commission will issue an order approving or disapproving the changes and additions. Field changes made during construction shall be submitted to the governmental entity and the executive director if they total less than $25,000 and do not alter the approved plans or affect the scope of the work. In that case the executive director will approve or disapprove the changes and additions.

(4) Failure to comply.

(A) If work has not been done in compliance with these provisions, the executive director will serve notice on the RUD. If compliance is not achieved within the time specified, approval of the construction plans may be suspended.

(B) If an applicant has constructed a facility or has begun work on a facility before filing for approval of preliminary plans, the commission will refuse to accept an application for the approval of those preliminary plans until the executive director has approved the pre-existing work. The applicant shall submit information requested by the executive director for the purpose of making this determination.

§15.135. Conveyance of Roads.

In a request for the commission to authorize conveyance of a facility, the RUD shall submit a certified copy of the governmental entity's approval of the conveyance and a certification by a licensed professional engineer authorized to practice in Texas. The certification shall state that the facility has been completed in accordance with all requirements and in accordance with the approved plans.

§15.136. Dissolution.

(a) A RUD may file a petition with the commission setting forth grounds for its dissolution.

(b) A request for dissolution shall include a certified financial statement and an auditor's opinion that all bonds have been paid in full.

(c) The RUD shall file any additional information requested by the commission.

(d) In considering the dissolution of a RUD, the commission will consider all relevant factors. At a minimum, the commission will consider the needs of the traveling public, the rights of third parties, and the interests of local political subdivisions, including those who do not fall under the definition of governmental entity in this subchapter.

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

Filed with the Office of the Secretary of State, on October 25, 2001.

TRD-200106477
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 463-8630

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CHAPTER 21. RIGHT OF WAY
SUBCHAPTER J. ROAD UTILITY DISTRICTS

43 TAC §§21.171, 21.181, 21.182, 21.191, 21.201, 21.211, 21.212, 21.221 - 21.224, 21.231, 21.241, 21.251, 21.261, 21.262, 21.271, 21.281 - 21.286, 21.301, 21.311, 21.312

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

The Texas Department of Transportation proposes the repeal of §§21.171, 21.181, 21.182, 21.191, 21.201, 21.211, 21.212, 21.221 - 21.224, 21.231, 21.241, 21.251, 21.261, 21.262, 21.271, 21.281 - 21.286, 21.301, 21.311, and 21.312, concerning road utility districts.

EXPLANATION OF PROPOSED REPEALS

The Texas Transportation Commission last adopted rules relating to road utility districts in 1985. Since that time, there have been numerous changes in the organization of the Texas Department of Transportation and in the titles of its employees. These obsolete terms might confuse the public, and it is therefore desirable to update the terminology of the rules. Moreover, the rules are being repealed from Chapter 21 and simultaneously proposed as new §§15.130-15.136 because road utility districts relate more closely to transportation planning than to right of way issues.

FISCAL NOTE

James Bass, Director, Finance Division, has determined that for the first five-year period the repeals are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeals. There are no anticipated economic costs for persons required to comply with the repeals as proposed.

James L. Randall, P.E. has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeals.

PUBLIC BENEFIT

Mr. Randall has also determined that for each year of the first five years the repeals are in effect, the public benefit anticipated as a result of enforcing or administering the repeals will be to clarify and streamline the process for creating and administering road utility districts and to enhance public understanding of the application process for road utility districts. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeals may be submitted to James L. Randall, P.E., Director, Transportation Planning and Programming Division, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on December 10, 2001.

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation. In addition, the repeals are proposed under Transportation Code, §441.002, which provides the Texas Transportation Commission with the authority to establish rules relating to road utility districts.

No statutes, articles, or codes are affected by the proposed repeals.

§21.171. Definitions.
§21.181. The Commission's Interpretation of Legislative Authority.
§21.182. Policy and Administrative Construction.
§21.191. Approval of Governmental Entity.
§21.201. Petition.
§21.211. Registered Engineer.
§21.212. Filing.
§21.221. Hearing Officer.
§21.222. Hearing.
§21.223. Engineer-Director Review of Application and Plans.
§21.224. Publication of Notice of Hearing.
§21.231. Appointment of Temporary Directors.
§21.241. Debt Limitations.
§21.251. Additional Reports and Information Required of Districts.
§21.261. Districts to File Information with Commission.
§21.262. Failure to File Reports.
§21.271. Posting Notice in the District.
§21.281. Unauthorized Construction of Facilities.
§21.282. Construction of Facilities Without Approval of Construction Plans.
§21.283. Submission of Construction Plans.
§21.284. Supervisory Authority.
§21.285. Changes and Additions to Facilities.
§21.286. Failure To Report Changes
§21.301. Authorization of Conveyance.
§21.311. Petition for Dissolution.
§21.312. Order of Dissolution.

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 October 25, 2001.

TRD-200106478
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 463-8630

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CHAPTER 22. USE OF STATE PROPERTY
SUBCHAPTER C. USE OF STATE INTELLECTUAL PROPERTY

43 TAC §§22.20 - 22.22

The Texas Department of Transportation proposes amendments to §§22.20-22.22, concerning the use of state intellectual property.

EXPLANATION OF PROPOSED AMENDMENTS

Transportation Code, §201.205 authorizes the department to apply for, register, secure, hold, and protect copyrights, trademarks, patents, or other evidence of protection or exclusivity. The department may enter into a license agreement with a third party for the receipt of license fees, royalties, or other consideration, including nonmonetary compensation, for the use of its intellectual property. The department is authorized to adopt and enforce rules necessary to implement that section. Government Code, §2054.115 requires the department to obtain appropriate compensation for the use of software developed by the department. Sections 22.20-22.22 prescribe the policies and procedures governing the protection of department intellectual property, and the use of department intellectual property by third parties through the licensure of the intellectual property.

The amendments to §22.20 reflect the codification in Transportation Code, §201.205, of the department's authority to protect and license its intellectual property and the authority granted by that section to obtain nonmonetary compensation in a license of intellectual property. Changes are also made to improve clarity and grammar.

The amendments to §22.21 reflect changes to the department's organizational structure. A reorganization of the department eliminated a level of management between the department's administration and its district engineers and division and office directors. This senior management team was responsible for approving the licensure of department intellectual property. Amendments to §22.22 give that authority to the district engineer, division director, or office director with jurisdiction over the intellectual property. Amendments to §22.21 define those persons and delete definitions for senior management team member and Intellectual Property Committee. The department created an Intellectual Property Committee to make recommendations to the department's executive director or designee concerning intellectual property to be protected, appropriate license fees, and circumstances in which license fees should be waived. This committee was recently disbanded. Amendments to §22.22 give the authority previously held by this committee to the executive director or designee.

Amendments have been made to §22.22 to improve clarity and grammar. The amendments provide that a person must, rather than may, submit a written request for a license. In order to expeditiously process requests, the amendments require a request to be sent to the person authorized to approve it, namely the district engineer, division director, or office director with jurisdiction over the intellectual property, rather than the department's General Services Division. Additionally, the requirement that a request for a license include the number of copies or licenses requested has been deleted, since the description of the intellectual property requested and the purpose for which it will be used will include that information.

In order to provide the department with the ability to determine an appropriate license fee for various types of intellectual property and categories of licensees, the amendments to §22.22 provide that fee determinations in licenses of intellectual property will be made on a case by case basis by the district engineer, division director, or office director with jurisdiction over the intellectual property, rather than with a fee schedule. In order to prescribe the circumstances in which a waiver or reduction of license fees furthers the goals and missions of the department and results in a net benefit to the state, as required by Transportation Code, §201.205, the amendments to §22.22 prescribe criteria the department will consider in determining whether a waiver or reduction should be made. Those criteria include whether the licensee is a governmental entity, whether the intellectual property will be used for a commercial purpose, whether the department is the primary beneficiary of the licensee's use of the intellectual property, and whether the department has an interest in maximizing the distribution and use of the intellectual property. If the department is the primary beneficiary and has an interest in maximizing the distribution and use of the intellectual property, a license generally will further the goals and missions of the department and be a benefit to the state. A license to a governmental entity is more likely to result in a benefit to the state, as opposed to a license to use intellectual property for a commercial purpose.

In order to streamline licensing procedures for generally available intellectual property, while protecting the department's interest in that property, the amendments authorize licensure to be made through written and unwritten permission to use intellectual property, rather than a formal license agreement, when the intellectual property involved is downloaded from the department's Internet web site or when the intellectual property is not registered with the U.S. Copyright Office or U.S. Patent and Trademark Office, and is generally available to the public, such as articles, maps, plans, and photographs. Intellectual property may only be downloaded from the department's Internet site by indicating assent to the terms and conditions set out on the site. The appropriate notice of copyright, trademark, or other notice of the department's ownership must be inserted in or otherwise included with the intellectual property. The amendments require any written statement used by the department to include permission to use the intellectual property and any restrictions on the licensee's use of the intellectual property.

In order to comply with the requirements of the Public Information Act, Government Code, Chapter 552, and attorney general decisions, the amendments require any requests for the licensure of intellectual property that is determined to be public information to be processed in accordance with the department's public information rules, but require a license agreement or permission to use prior to any release of the intellectual property. The Attorney General has determined that while certain intellectual property is considered public information under the Public Information Act, that act does not prohibit a governmental body

from protecting its intellectual property by entering into licensing or other use agreements.

FISCAL NOTE

James Bass, Director, Finance Division, has determined that for each of the first five-years the amendments are in effect, there are no anticipated fiscal implications for state or local governments as a result of enforcing or administering the amendments. There are no anticipated economic costs for persons required to comply with the amendments as proposed. The amendments do not affect a person's ability to request a license or the department's ability to license its intellectual property and to require license fees. The criteria considered by the department in those circumstances and in determining whether to waive license fees remain unchanged from current procedures.

Richard D. Monroe, General Counsel, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT

Mr. Monroe has also determined that for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be to protect and maximize the department's investment in intellectual property. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments may be submitted to Richard D. Monroe, General Counsel, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on December 10, 2001.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Transportation Code, §201.205, which authorizes the department to adopt rules concerning the protection and use of department intellectual property.

No statutes, articles, or codes are affected by the proposed amendments.

§22.20. Purpose.

Transportation Code, §201.205 [~~Texas Civil Statutes, Article 6673a-4~~] and Government Code, §2054.115 authorize the department to apply for, register, secure, hold, license, and protect copyrights, trademarks, patents, or other evidence of protection or exclusivity. The department may receive license fees, royalties, or other consideration, both monetary and nonmonetary, for the use of its intellectual property. This [~~The sections under this~~] subchapter prescribes [~~prescribe~~] the policies and procedures governing the protection of department intellectual property, and the use of department intellectual property by third parties.

§22.21. Definitions.

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

(1) Department--The Texas Department of Transportation.

(2) District engineer--The chief administrative officer of a district of the department.

(3) Division director--The chief administrative officer of a division of the department.

(4) [~~(2)~~] Executive director--The chief administrative officer of the department.

(5) [~~(3)~~] Intellectual property--Ideas, publications, and other original innovations fixed in a tangible medium, including, but not limited to:

(A) literary works;

(B) logos;

(C) service marks;

(D) studies;

(E) maps and planning documents;

(F) engineering, architectural, and graphic designs;

(G) manuals;

(H) automated systems software;

(I) audiovisual works;

(J) sound recordings;

(K) travel literature, including but not limited to pamphlets, bulletins, books, maps, periodicals, and electronic information published or produced under Texas Civil Statutes, Article 6144e; and

(L) mechanical devices.

(6) Office director--The chief administrative officer of an office of the department.

(7) Unregistered--Intellectual property that is not registered with the U.S. Copyright Office or U.S. Patent and Trademark Office.

[~~(4) Intellectual Property Committee--Individuals appointed by the executive director to evaluate and make recommendations to the executive director or his or her designee concerning issues relating to ownership and protection of intellectual property.~~]

[~~(5) Senior management team member--The department administrative officer responsible for a department division or special office.~~]

§22.22. Licensure.

(a) Policy. The department may authorize the licensure of department owned intellectual property. This section prescribes the procedure for obtaining a license.

(b) Request. A person must [~~may~~] submit a written request for a license to the district engineer, division director, or office director with jurisdiction over the intellectual property [~~department's General Services Division~~]. A request must include, but is not limited to:

(1) the name of the requestor and if an organization, the name of the organization;

[~~(2) number of copies or licenses requested;~~]

(2) [~~(3)~~] the name or description of the intellectual property requested to be licensed;

(3) [~~(4)~~] the purpose for which the intellectual property will be used;

(4) [~~(5)~~] the plan of distribution and marketing, if applicable;

(5) [~~(6)~~] the term of the license, if applicable; and

(6) [~~(7)~~] a request for waiver of fees, if applicable.

(c) Approval. The district engineer, division director, or office director [~~senior management team member~~] with jurisdiction over the intellectual property will approve the request if he or she determines that the [~~distribution of copies or the~~] granting of a license:

(1) is consistent with Transportation Code, §201.205 [~~Texas Civil Statutes, Article 6673a-4~~], and Government Code, §2054.115;

(2) will benefit the department; and

(3) does not conflict with department plans or activities.

(d) Disapproval. If the department denies the request, it will provide the requestor with a written statement describing the reason for denial.

(e) Fees. The department will determine the monetary value of department intellectual property, or an equivalent nonmonetary value, and will set license fees.

(1) Amount of fee [~~Fee schedule~~]. In determining an appropriate [~~developing a~~] fee for licensure of department intellectual property [~~schedule~~], the department will consider the:

(A) commercial rates for comparable property;

(B) original development cost;

(C) intended use of the property;

(D) private or public status of the requestor; and

(E) primary beneficiary of the license.

(2) Waiver of fee. The department may waive or reduce the amount of fees, royalties, or other monetary or nonmonetary value to be assessed if the executive director or his or her designee determines that such waiver or reduction will further the goals and missions of the department and result in a net benefit to the state. In making this determination, the executive director or designee will consider whether:

(A) the licensee is a governmental entity;

(B) the intellectual property will be used for a commercial purpose;

(C) the department is the primary beneficiary of the licensee's use of the intellectual property; and

(D) the department has an interest in maximizing the distribution and use of the intellectual property.

(f) Agreement. Except as provided in subsection (g) of this section, if [~~If~~] the department approves the granting of a [~~copies or~~] license, the requestor must execute a written agreement with the department prior to any delivery or use of the intellectual property [~~receiving the copies or the license~~]. The agreement will contain terms and conditions the department deems necessary to protect the department, including, but not limited to:

(1) license term and geographical area;

(2) rights granted, including patent-rights;

(3) description of products utilizing the trademark;

(4) fees or royalties;

(5) inspection of licensee's books and records;

(6) policing of trademark or copyright infringement;

(7) prohibited uses; and

(8) indemnification of the department.

(g) Exception. A written license agreement is not required for department intellectual property that is downloaded from the department's Internet web site, or for the licensure of unregistered department intellectual property that is generally available to the public, including articles, maps, plans, and photographs. The department will insert in or otherwise include with the intellectual property the appropriate notice of copyright, trademark, or other notice of the department's ownership. The department may provide a requestor with a written statement that includes permission to use the intellectual property and any restrictions on the licensee's use of the intellectual property.

(h) [~~(g)~~] Appeal. A requestor may appeal department denial of the license request to the executive director or designee not below the level of assistant executive director [~~Intellectual Property Committee~~] by submitting a written request for appeal. The decision of the executive director or his or her designee [~~Intellectual Property Committee~~] will be final.

(i) Public information. Requests for the licensure of department intellectual property that is determined to be public information under Government Code, Chapter 552 will be processed in accordance with Chapter 3, subchapter B of this title (relating to Public Information). Any release of intellectual property is subject to compliance with subsections (f) and (g) 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 October 25, 2001.

TRD-200106479
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: December 9, 2001
For further information, please call: (512) 463-8630

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WITHDRAWN RULES

An agency may withdraw a proposed action or the remaining effectiveness of an emergency action by filing a notice of withdrawal with the ***Texas Register***. The notice is effective immediately upon filling or 20 days after filing as specified by the agency withdrawing the action. If a proposal is not adopted or withdrawn within six months of the date of publication in the ***Texas Register***, it will automatically be withdrawn by the office of the Texas Register and a notice of the withdrawal will appear in the ***Texas Register.***

TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 1. PRACTICE AND PROCEDURE
SUBCHAPTER I. PERMIT PROCESSING

16 TAC §1.201

The Railroad Commission of Texas has withdrawn from consideration proposed amendment to §1.201 which appeared in the August 24, 2001, issue of the *Texas Register* (26 TexReg 6218).

Filed with the Office of the Secretary of State on October 23, 2001.

TRD-200106425
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Effective date: October 23, 2001
For further information, please call: (512) 475-1295

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CHAPTER 3. OIL AND GAS DIVISION

16 TAC §3.14, §3.78

The Railroad Commission of Texas has withdrawn from consideration proposed amendments to §3.14 and §3.78 which appeared in the August 10, 2001, issue of the *Texas Register* (26 TexReg 5919).

Filed with the Office of the Secretary of State on October 23, 2001.

TRD-200106424
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Effective date: October 23, 2001
For further information, please call: (512) 475-1295

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PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS
SUBCHAPTER M. OPERATOR SERVICES

16 TAC §26.315

The Public Utility Commission of Texas has withdrawn from consideration proposed amendment to §26.315 which appeared in the June 15, 2001, issue of the *Texas Register* (26 TexReg 4365).

Filed with the Office of the Secretary of State on October 25, 2001.

TRD-200106496
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: October 25, 2001
For further information, please call: (512) 936-7308

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TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 181. VITAL STATISTICS
SUBCHAPTER A. MISCELLANEOUS PROVISIONS

25 TAC §§181.1 - 181.11, 181.13, 181.14

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.65(c)(2), the proposed amended sections, submitted by the Texas Department of Health has been automatically withdrawn. The amended sections as proposed appeared in the April 20, 2001 issue of the *Texas Register* (26 TexReg 2932).

Filed with the Office of the Secretary of State on October 26, 2001.

TRD-200106546

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SUBCHAPTER B. VITAL RECORDS

25 TAC §§181.21 - 181.32

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.65(c)(2), the proposed amended and new sections, submitted by the Texas Department of Health has been automatically withdrawn. The new and amended sections as proposed appeared in the April 20, 2001 issue of the *Texas Register* (26 TexReg 2935).

Filed with the Office of the Secretary of State on October 26, 2001.

TRD-200106547

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25 TAC §181.22

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.65(c)(2), the proposed repealed section, submitted by the Texas Department of Health has been automatically withdrawn. The repealed section as proposed appeared in the April 20, 2001 issue of the *Texas Register* (26 TexReg 2941).

Filed with the Office of the Secretary of State on October 26, 2001.

TRD-200106548

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SUBCHAPTER C. CENTRAL ADOPTION REGISTRY

25 TAC §§181.41 - 181.47

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.65(c)(2), the proposed amended sections, submitted by the Texas Department of Health has been automatically withdrawn. The amended sections as proposed appeared in the April 20, 2001 issue of the *Texas Register* (26 TexReg 2941).

Filed with the Office of the Secretary of State on October 26, 2001.

TRD-200106549

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25 TAC §181.48, §181.49

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.65(c)(2), the proposed repealed sections, submitted by the Texas Department of Health has been automatically withdrawn. The repealed sections as proposed appeared in the April 20, 2001 issue of the *Texas Register* (26 TexReg 2943).

Filed with the Office of the Secretary of State on October 26, 2001.

TRD-200106550

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 19. TEXAS DEPARTMENT OF PROTECTIVE AND REGULATORY SERVICES

CHAPTER 745. LICENSING

SUBCHAPTER H. RESIDENTIAL CHILD-CARE MINIMUM STANDARDS

DIVISION 2. CHILD-PLACING AGENCY STANDARDS

40 TAC §745.4021, §745.4023

The Texas Department of Protective and Regulatory Services has withdrawn from consideration proposed new §745.4021 and §745.4023 which appeared in the September 21, 2001, issue of the *Texas Register* (26 TexReg 7230).

Filed with the Office of the Secretary of State on October 26, 2001.

TRD-200106572
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Effective date: October 26, 2001
For further information, please call: (512) 438-3437

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ADOPTED RULES

An agency may take final action on a section 30 days after a proposal has been published in the ***Texas Register***. The section becomes effective 20 days after the agency files the correct document with the ***Texas Register***, unless a later date is specified or unless a federal statute or regulation requires implementation of the action on shorter notice.

If an agency adopts the section without any changes to the proposed text, only the preamble of the notice and statement of legal authority will be published. If an agency adopts the section with changes to the proposed text, the proposal will be republished with the changes.

TITLE 1. ADMINISTRATION

PART 4. OFFICE OF THE SECRETARY OF STATE

CHAPTER 81. ELECTIONS

SUBCHAPTER F. PRIMARY ELECTIONS

1 TAC §§81.101 - 81.135

The Office of the Secretary of State adopts the repeal of §§81.101 - 81.135, concerning primary elections. The repeal allows for the adoption of new funding rules to be proposed for the 2002 Primary Elections.

The Office of the Secretary of State adopts new §§81.101-81.135, concerning primary election funding. Sections 81.101-81.116 and 81.118-81.135 are adopted without changes to the proposed text as published in the September 28, 2001, issue of the *Texas Register* (26 TexReg 7365). Section 81.117 is adopted with changes to the Figure 1 TAC 81.117(a). The formula is changed to reflect the number of voters in October 2001 instead of December 2001. Because the initial cost estimate may be filed beginning November 1, 2001, the rule must reflect voter registration information as it exists prior to November.

The new sections concern the financing of the 2002 primary elections with state funds, including the determination of necessary and proper expenses relating to the proper conduct of primary elections by party officials and the procedures for requesting reimbursement by the parties for such expenses.

The new sections are necessary for the proper and efficient conduct of the 2002 primary elections. It is in the public interest to establish adequate procedures to insure the best use of state funding.

Written comments were filed by Mr. Raymond, County Democratic Chair for Montgomery County.

(All references to "the Code" refer to the Texas Election Code.)

Comment: §81.128(h) should allow for notary expenses to be paid from the primary fund. Response: Most notarized expenses are associated with notarizing candidate's filings, and are not directly related to the conduct of the primary. The financial documents filed by a county chair that require notarization are few, and we note that notarial services are often performed free of cost by county clerks and at many banks.

Comment: §81.130 should place a dollar limit on the amount of rent that may be charged for the leasing of office space. Response: Due to the regional fluctuations in cost for leasing office space in the state, it is not possible to adopt a single rental rate with statewide applicability.

Figure 1 TAC §81.117(a) has been changed. In the original version the formula provided that "B = the number of registered voters as of December 2001." This has been changed for final adoption to state "B = the number of registered voters as of October 2001."

The repeals are adopted under §31.003 and §173.006 of the Code, which provide the Office of the Secretary of State with the authority to obtain and maintain uniformity in the application, interpretation, and operation of provisions under the Code and other election laws. It also allows the Secretary of State in performing such duties, to prepare detailed and comprehensive written directives and instructions based on such laws. These sections additionally authorize the Secretary of State to adopt rules consistent with the Code that reduce the cost of the primary elections or facilitate the holding of the elections within the amount appropriated by the legislature for that purpose.

Statutory Authority: Texas Election Code §31.003 and §173.006.

The Texas Election Code, Chapter 173, Subchapter A, §173.006 is affected by these sections.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 30, 2001.

TRD-200106633
David Roberts
General Counsel
Office of the Secretary of State
Effective date: November 19, 2001
Proposal publication date: September 28, 2001
For further information, please call: (512) 463-5561

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1 TAC §§81.101 - 81.135

The new sections are adopted under §31.003 and §173.006 of the Code, which provide the Office of the Secretary of State with the authority to obtain and maintain uniformity in the application, interpretation, and operation of provisions under the Code and

other election laws. It also allows the Secretary of State in performing such duties, to prepare detailed and comprehensive written directives and instructions based on such laws. These sections additionally authorize the Secretary of State to adopt rules consistent with the Code that reduce the cost of the primary elections or facilitate the holding of the elections within the amount appropriated by the legislature for that purpose.

Statutory Authority: Texas Election Code §31.003 and §173.006.

The Texas Election Code, Chapter 173, Subchapter A, §173.006 is affected by these sections.

§81.117. Estimating Voter Turnout.

(a) The county chair shall use the formula set out in this subsection, with necessary modifications as determined by the chair, to determine the estimated voter turnout for the 2002 primary elections. This general formula must be adjusted if the local political situation indicates a higher voter turnout than that derived by the formula.
Figure: 1 TAC §81.117(a)

(b) After estimating the voter turnout for each precinct, the county chair shall use the guidelines set forth in §§81.118, 81.125, and 81.126 of this title (relating to the Number of Election Workers per Polling Place, Number of Paper or Electronic Voting System Ballots per Voting Precinct, and Number of Voting Machines, Punch-Card Voting Devices, or Precinct Ballot Counters per Voting Precinct) to determine the necessary personnel, supplies, and equipment for each precinct (i.e. ballots, election judges and clerks, voting devices, or machines).

(c) After estimating the need for personnel, supplies, and equipment for each precinct, the county chair shall combine all precinct data to determine the total countywide estimate.

(d) The county chair may use the estimate calculated under subsection (c) of this section to determine the cost of the election.

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 October 30, 2001.

TRD-200106634
David Roberts
General Counsel
Office of the Secretary of State
Effective date: November 19, 2001
Proposal publication date: September 28, 2001
For further information, please call: (512) 463-5561

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SUBCHAPTER G. JOINT PRIMARY ELECTIONS

1 TAC §§81.145 - 81.157

The Office of the Secretary of State adopts the repeal of §§81.145-81.157, concerning joint primary elections. The repeal allows for the adoption of new joint primary election funding rules for 2002.

The Office of the Secretary of State adopts new §§81.145-81.157, concerning joint primary election funding. Sections 81.145-81.151 and 81.153-81.157 are adopted without changes to the proposed text as published in the September 28, 2001, issue of the *Texas Register* (26 TexReg 7372). Section 81.152 is adopted with changes to Figure 1 TAC §81.152(a). The formula is changed to reflect the number of voters in October 2001 instead of December 2001. Because the initial cost estimate may be filed beginning November 1, 2001, the rule must reflect voter registration information as it exists prior to November.

The new sections concern the financing of the 2002 joint primary elections with state funds, including the determination of necessary and proper expenses relating to the proper conduct of joint primary elections by party officials and the procedures for requesting reimbursement by the parties for such expenses.

The new sections are necessary for the proper and efficient conduct of the 2002 joint primary elections. It is in the public interest to establish adequate procedures to insure the best use of state funding.

No comments were received regarding these rules.

Figure 1 TAC §81.152(a) has been changed. In the original version the formula provided that "B = the number of registered voters as of December 2001." This has been changed for final adoption to state "B = the number of registered voters as of October 2001."

The repeals are adopted under the Texas Election Code, §31.003 and §173.006, which provides the Office of the Secretary of State with the authority to obtain and maintain uniformity in the application, interpretation, and operation of provisions under the Texas Election Code and other election laws. It also allows the Secretary of State in performing such duties, to prepare detailed and comprehensive written directives and instructions based on such laws. These sections additionally authorize the Secretary of State to adopt rules consistent with the Election Code that reduce the cost of the primary elections or facilitate the holding of the elections within the amount appropriated by the legislature for that purpose.

Statutory Authority: Texas Election Code, §31.003 and §173.006, §172.126(c) and (i) and §173.011(c)

The Texas Election Code, Chapter 173, Subchapter A, §173.006 is affected by these adopted rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 30, 2001.

TRD-200106636
David Roberts
General Counsel
Office of the Secretary of State
Effective date: November 19, 2001
Proposal publication date: September 28, 2001
For further information, please call: (512) 463-5561

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1 TAC §§81.145 - 81.157

The new sections are adopted under the Texas Election Code, §31.003 and §173.006, which provides the Office of the Secretary of State with the authority to obtain and maintain uniformity in the application, interpretation, and operation of provisions under the Texas Election Code and other election laws. It also

allows the Secretary of State in performing such duties, to prepare detailed and comprehensive written directives and instructions based on such laws. These sections additionally authorize the Secretary of State to adopt rules consistent with the Election Code that reduce the cost of the primary elections or facilitate the holding of the elections within the amount appropriated by the legislature for that purpose.

The new sections are also adopted under the Texas Election Code, §172.126(c) and (i) and §173.011(c) which provide the Office of the Secretary of State with the authority to prescribe procedures for appointment of election day workers, to ensure orderly and proper administration of as well as fair and efficient financing of joint primary elections.

Statutory Authority: Texas Election Code, §31.003 and §173.006, §172.126(c) and (i) and §173.011(c)

The Texas Election Code, Chapter 173, Subchapter A, §173.006 is affected by these adopted rules.

§81.152. Estimating Voter Turnout for Joint Primaries.

(a) Each county chair shall estimate voter turnout for each precinct using the formula set out in this subsection.
Figure: 1 TAC §81.152(a)

(b) The county clerk/elections administrator shall combine the turnout estimates provided by each party chair for each joint-primary precinct.

(c) The county clerk/elections administrator shall enter this information in Section B of the Joint Primary Resolution.

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 October 30, 2001.

TRD-200106638
David Roberts
General Counsel
Office of the Secretary of State
Effective date: November 19, 2001
Proposal publication date: September 28, 2001
For further information, please call: (512) 463-5561

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PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 352. QUALITY ASSURANCE FEE FOR LONG-TERM CARE FACILITIES

1 TAC §§352.1 - 352.9

The Health and Human Services Commission. (HHSC) adopts new chapter 352, Quality Assurance Fee for Long-term Care Facilities, §352.1 (concerning the Purpose and Duration of chapter 352), §352.2 (concerning Definitions), §352.3 (concerning quality assurance fee), §352.4 (concerning required reports), §352.5 (concerning review and Determination of the Quality Assurance Fee), §352.6 (concerning Payment and Collection of Quality Assurance Fee), §352.7 (concerning Enforcement), §352.8 (concerning Penalty), and §352.9 (concerning Informal Reviews) with changes from the proposed text published in the August 31, 2001, issue of the *Texas Register*, (26 TexReg 6507).

The proposed chapter establishes a methodology for the determination of the quality assurance fee, the reporting of data by regulated facilities, the collection of the quality assurance fee, the assessment of a penalty for certain types of noncompliance, and the conduct of informal reviews and formal appeals by the Commission or its designee.

During the 30-day public comment period, comments were received from the Texas Council of Community Mental Health and Mental Retardation Centers, Inc., and by EduCare Community Living Corporation-America. In addition, HHSC has, in response to concerns expressed about the initial financial impact on facilities, revised Section 353.4 and 352.5 of the rules to ensure that initial reporting and assessment activities occur as soon as December, 2001. This change is intended to minimize the initial impact of the quality assurance fee assessment on facilities and to facilitate the prompt implementation of rate increases required by.

The following is a summary of the comments received and HHSC's response to each comment.

Comment: One commenter stated that the collection of the quality assurance fee would be administratively complex and costly for both providers and the state agencies involved. He suggested that Texas consider the automatic deduction system now used by the State of Indiana.

Response: HHSC disagrees with the statement that the collection of the quality assurance fee will be administratively complex and costly for both providers and the state agencies involved. To help simplify the collection process, a web-based system is under development that will enable providers to report information directly to the administering state agencies and at no extra cost to the providers. The web-based system will allow an easy way to compute the monthly fee and to submit the required reports. HHSC declines to implement an automatic deduction of the quality assurance fee from payments made to a facility because chapter 252, subchapter H, Health and Safety Code, does not expressly authorize deduction of the quality assurance fee from payments otherwise made by the state to a facility.

Comment: One commenter stated that HHSC and TDMHMR also reimburse small, community-based ICF/MR facilities, owned by the state but managed by community MHMR centers at the same level of reimbursements the other community-based ICF/MR providers.

Response: HHSC has added language that will allow facilities owned and/or operated by community MHMR centers to participate in quality assurance fee collection and distribution.

Comment: One commenter requested that the Commission clarify what the quality assurance fee will be applied to beginning November 1, 2001, when the fee changes to 5.5%.

Response: The quality assurance fee calculated beginning November 1, 2001, will be based on a factor of 5.5% applied to the total rate that is paid to a provider, by facility size and Level of Need (LON). The quality assurance fee will be a fixed dollar amount rather than a calculation by the provider of the amount of the quality assurance fee due.

The rules are adopted under Section 531.033, Government Code, which provides the commissioner of HHSC with the authority to adopt rules necessary to carry out the duties of

HHSC under Chapter 531, Government Code, and Section 252.205(a), Health & Safety Code, which requires HHSC to adopt rules to implement the quality assurance fee required by chapter 252, subchapter H, Health and Safety Code.

§352.1. Purpose and Duration of Chapter.

(a) This chapter implements the determination, assessment, collection, and enforcement of the quality assurance fee authorized under chapter 252, Health and Safety Code, subchapter H.

(b) The purpose of the quality assurance fee established under this chapter is to improve the quality of care provided to persons with mental retardation as follows:

(1) The quality assurance fee is intended to support and/or maintain an increase in reimbursement to licensed intermediate care facilities for the mentally retarded and facilities operated according to the requirements of chapter 252, Health and Safety Code and owned and/or operated by a community mental health and mental retardation center as described in chapter 534, subchapter A, Health and Safety Code, that participate in Medicaid program, subject to legislative appropriation for this purpose; and

(2) If funds generated from the collection of quality assurance fees under this chapter are available following fulfillment of the purpose described in subsection (b)(1) of this section, such funds may be allocated to the Home and Community Based waiver program and the Mental Retardation Local Authority waiver program established pursuant to 42 U.S.C. § 1396n(c).

(3) The Commission or its designee may also offset allowable expenses to administer the quality assurance fee program against revenues generated by the collection of the quality assurance fee.

(c) This chapter will expire on September 1, 2005, unless chapter 252, subchapter H, Health and Safety Code, is extended by the 79th Texas Legislature.

§352.2. Definitions.

As used in this chapter, the following terms shall have the meanings prescribed below, unless the context clearly indicates otherwise:

(1) "Facility" means:

(A) An intermediate care facility for the mentally retarded or the corporate parent of an intermediate care facility for the mentally retarded licensed under chapter 252, Health and Safety Code; or

(B) A facility operated according to the requirements of chapter 252, Health and Safety Code, and owned and/or operated by a community mental health and mental retardation center as described in chapter 534, subchapter A, Health and Safety Code.

(2) "Gross receipts" means money paid to a facility as compensation for services provided to patients, including client participation, but does not include charitable contributions to a facility.

(3) "Total patient days" means the sum, computed on a monthly basis, of the following:

(A) The total number of patients occupying a facility bed immediately before midnight on each day of the month;

(B) The total number of facility beds that are on hold on each day of the month and that have been placed on hold for a period not to exceed three consecutive calendar days during which a patient is in a hospital during the month; and

(C) The total number of beds that are on hold on each day of the month and that have been placed on hold for a period not to exceed three consecutive calendar days during which a patient is on therapeutic home leave during the month.

(D) The total number of days a patient is discharged from a facility are not counted in the calculation of the total patient days under this chapter.

§352.3. Quality Assurance Fee Determination Methodology.

(a) Interim quality assurance fee. As provided in section 9.02 of the Act of May 28, 2001, 77th Leg. R.S., (Senate Bill 1839), the quality assurance fee for the month September 2001, and for each month thereafter until implementation of a final quality assurance fee under subsection (b) of this section is the total number of patient days reported by a facility under §352.4 of this chapter multiplied by $5.25.

(b) Quality assurance fee. Beginning November 1, 2001 the quality assurance fee for a facility is in the amount of 5.5 percent of each reimbursement or payment rate received, including those received from the resident, for each resident in the facility during a calendar month, provided the amount of all such quality assurance fees assessed for the facility during the 12-month period following assessment of the quality assurance fee do not exceed six percent of the facility's total annual gross receipts in Texas.

(c) Not later than July 31, 2002, and every six months thereafter, the commission or its designee will review each individual facility's quality assurance fee calculation. A facility's liability for the quality assurance fee may be adjusted following this review to ensure that the quality assurance fee does not exceed six percent of annual revenue.

§352.4. Required reports.

(a) The following reports must be filed by a facility in accordance with the instructions of the Commission or its designee:

(1) The monthly patient day report required under subsection (c) of this section; and

(2) The semi-annual report of gross receipts required under subsection (d) of this section.

(b) Amended reports.

(1) A facility may amend a report required under subsections (c) or (d) of this section;

(2) An amended monthly patient day report must be filed no later than 10 calendar days following the filing of the report required under subsection (c) of this section.

(3) An amended report of gross receipts must be filed no later than 10 calendar days following the filing of the report required under subsection (d) of this section.

(c) Monthly patient day report.

(1) A facility must report, not later than the 10th calendar day after the last day of a month, the total number of patient days for the facility during the preceding month.

(2) A facility must file the report required by this subsection on forms or in the format and according to the instructions prescribed by the commission or its designee.

(3) The first report required under this subsection is not due until the 10th day after the end of the month this chapter takes effect. This report will cover the months September 1, 2001 through the end of the month this chapter takes effect.

(d) Reporting of gross receipts.

(1) A facility must report, not later than the 10th calendar day following the last day of the sixth month following the effective

date of this chapter, the total gross receipts the facility received during the preceding 6-month period.

(2) A facility must file the report required by this subsection on forms or in the format and according to the instructions prescribed by the commission or its designee.

§352.5. Payment and Collection of Quality Assurance Fee.

A facility must:

(1) Pay the amount of the quality assurance fee in accordance with the instructions of the commission or its designee not later than the 30th day of the month; or

(2) Pay the amount of the quality assurance fee in accordance with the instructions of the commission or its designee and request an informal review of the calculation of the quality assurance fee in accordance with §352.8 of this chapter.

(3) The first payment required under this section is not due until the 30th day after the end of the month this chapter takes effect. That payment will cover all the months beginning September 1, 2001 through the end of the month this chapter takes effect.

(4) The commission or its designee may review the calculation of the quality assurance fee to ensure its accuracy and instruct the facility to correct its calculation and payment.

§352.6. Enforcement.

(a) The commission or its designee may audit a facility's records or the record of any corporate parent or affiliate of a facility for the purpose of determining the total patient days or gross receipts of the facility.

(b) The commission may not grant any exceptions from the quality assurance fee or the provision of any data necessary for the Commission or its designee to calculate the fee.

§352.7. Penalty.

(a) The commission or its designee will assess a financial penalty against a facility that:

(1) Fails to timely file the monthly facility report required under §352.4 of this chapter;

(2) Files a false, erroneous, or fraudulent monthly facility report that the commission or its designee concludes resulted in the assessment of a quality assurance fee that is less than the facility should have been assessed; or

(3) Fails to timely pay a quality assurance fee assessed under §352.5 of this chapter.

(4) A penalty assessed under this section is in an amount equal to one-half the amount of the outstanding quality assurance fee or fees, not to exceed $20,000.

(b) The commission or its designee will notify a facility in writing of the assessment of a penalty under this section and the amount of the penalty.

(c) The commission or its designee may make a referral to an appropriate authority in cases where the commission or its designee makes a good faith determination that a facility has:

(1) Committed fraud in the submission of information to the commission or its designee;

(2) Willfully submitted erroneous information to the commission or its designee; or

(3) Violated a requirement of its license or Medicaid certification.

(d) The commission or its designee may report a facility that fails to pay the quality assurance fee to the Comptroller of Public Accounts or other appropriate authority for purposes of implementing a suspension of payments to the provider.

(e) The assessment of a penalty under this section does not relieve a facility from:

(1) Providing services to patients in accordance with its obligations under contract or the law;

(2) Paying additional quality assurance fees that may be assessed to the facility; or

(3) Otherwise complying with licensure and certification requirements.

§352.8. Informal review.

(a) A facility that believes the commission or its designee incorrectly calculated the amount of a quality assurance fee as defined in this chapter may request an informal review from the commission or its designee in accordance with this section.

(b) The purpose of an informal review is to provide for the informal and efficient resolution of the matters in dispute. An informal review is not a formal administrative hearing, but is a prerequisite to obtaining a formal administrative hearing and is conducted according to the following procedures:

(1) The facility must request an informal review in writing to the commission or its designee, delivered by United States mail or special mail delivery within 20 calendar days of the date on the written notification of any of the actions described in subsection (a) of this section.

(2) A facility's written request for an informal review must include:

(A) A concise statement of the specific actions or determinations the facility disputes;

(B) The facility's recommended resolution; and

(C) Any supporting documentation the facility deems relevant to the dispute. It is the responsibility of facility to submit all pertinent information at the time of its request for an informal review.

(c) On receipt of a request for informal review, the commission or its designee assigns the review to appropriate staff.

(1) The lead staff member coordinates a review by appropriate staff of the information submitted by the interested party.

(2) Staff may request additional information from the facility, which the facility must submit in writing to the lead staff member within 14 calendar days of the request for additional information. Information received after 14 days may not be used in the panel's written decision unless the interested party receives approval of the lead staff member to submit the information after 14 days.

(d) Within 30 days of the date the request for informal review is received by the commission or its designee or the date additional requested information is received by the commission or its designee, the lead staff member must send the interested party its written decision by certified mail, return receipt requested.

§352.9. Formal Appeal of Penalty.

A facility that wishes to appeal the assessment of a penalty under §352.8 of this chapter may request a formal appeal from the Texas Department of Human Services in accordance with 40 T.A.C. §90.236.

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 October 29, 2001.

TRD-200106618
Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Effective date: November 18, 2001
Proposal publication date: August 31, 2001
For further information, please call: (512) 424-6576

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 11. SURFACE MINING AND RECLAMATION DIVISION

SUBCHAPTER E. QUARRY AND PIT SAFETY

16 TAC §11.1004

The Railroad Commission of Texas adopts amendments to 16 TAC §11.1004, relating to Definitions, without changes to the version published in the August 10, 2001, issue of the *Texas Register* (26 TexReg 5932). The Commission adopts the amendments to maintain consistency with Attorney General Opinion No. JC-0164 dated December 30, 1999.

The Commission amends §11.1004(14) to add the clause "that includes an industrial aggregate extraction plant" to the definition of "Inactive quarry or pit." This amendment is adopted to parallel JC-0164 which concludes that the Texas Aggregate Quarry and Pit Safety Act, Tex. Nat. Res. Code Ann. §§133.001, *et seq.* (The Act) definition of "inactive quarry or pits" incorporates only "sites" and the term "sites" includes only those locations with a plant used in the extraction of aggregates, so that the Act applies only to those inactive pits located near and associated with a plant.

The Commission amends 16 TAC §11.1004 (30)(C) to remove from the definition of "Unacceptable and unsafe location" the sentence, "Other locations will be decided on a case by case basis." The Commission removes this sentence to comport with JC- 0164 which concludes that the provision is invalid because it does not give adequate notice of proscribed conduct.

The Commission received no comments on the proposed rule.

The Commission adopts the amendments under Texas Natural Resources Code §134.011, which provides the Commission the authority to promulgate rules pertaining to quarry safety.

Texas Natural Resources Code, §133.003, is affected by the proposed amendments.

Issued in Austin, Texas, on October 23, 2001.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 23, 2001.

TRD-200106426
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Effective date: November 12, 2001
Proposal publication date: August 10, 2001
For further information, please call: (512) 475-1295

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 101. ASSESSMENT

The State Board of Education (SBOE) adopts the repeal of §§101.1-101.6 and new §§101.1, 101.5, 101.7, 101.9, 101.11, 101.13, 101.21, 101.23, 101.25, 101.27, 101.29, 101.31, 101.33, 101.61, 101.63, 101.65, 101.81, 101.83, and 101.101, concerning the statewide assessment program. The sections provide requirements for the development and administration of tests, testing for graduation, testing accommodations and exemptions, test security and confidentiality, reporting of test results, and administering and reporting group-administered achievement tests as mandated by Texas Education Code (TEC), Chapter 39, Subchapter B. The repeal of §§101.1-101.6 is adopted without changes to the proposed text as published in the June 1, 2001, issue of the *Texas Register* (26 TexReg 3894) and will not be republished. New §§101.5, 101.9, 101.11, 101.13, 101.21, 101.23, 101.25, 101.27, 101.29, 101.31, 101.33, 101.61, 101.63, 101.81, 101.83, and 101.101 are adopted without changes to the proposed text as published in the June 1, 2001, issue of the *Texas Register* (26 TexReg 3894) and will not be republished. New §§101.1, 101.7, and 101.65 are adopted with changes to the proposed text as published in the June 1, 2001, issue of the *Texas Register* (26 TexReg 3894). No adopted rule action is being filed at this time on §101.3, pending an Attorney General's opinion.

The statewide assessment program has changed over recent years largely in response to changes required by the Texas Legislature. Changes have also occurred as needed for more effective implementation and administration across the state. A critical part of the accountability system, the assessment program is dynamic and continues to evolve, guided by its goal to provide all eligible Texas students an appropriate statewide assessment that measures and supports their achievement of the state- mandated curriculum. The adopted repeals and new sections include revisions to comply with changes in statute and revisions related to new assessments as well as other clarifying amendments.

The repealed sections were largely adopted by the SBOE in November 1995 and describe the current statewide assessment program. The intent of the adopted new sections is not only to reflect the recent changes to update the assessment program, but also to more effectively define, reinforce, and communicate state law and rules governing the assessment program. Hence, the new sections represent the following three changes. First, the new sections include revisions to comply with changes in statute, including recently enacted Senate Bill (SB) 676, 77th

Texas Legislature, 2001, which immediately modified state testing requirements for certain limited English proficient (LEP) students in Grades 3-8. SB 676 requires the SBOE and the commissioner of education to establish rules for assessing LEP students. Much of the detail on LEP exemptions is located in commissioner's rules in accordance with SB 676. Second, the chapter is organized to clarify the policy and standards, roles and responsibilities, and requirements of the statewide assessment program. Finally, the chapter provides clarity and readability for all stakeholders in public education so that the rules may more effectively promote public understanding of the assessment program and full compliance with program requirements.

The adopted new sections have taken into consideration the federal court ruling in January 2000 by United States District Court Judge Edward Prado of San Antonio. This ruling in support of standardized, statewide testing in Texas public schools sets forth the constitutional and legal standards that states must meet in developing and implementing high-stakes tests that are valid and reliable and educational policies that are fair and reasonable. The agency has adopted the new sections to ensure that the testing program continues to uphold the standards affirmed in this important case.

The new sections are organized under subchapters for greater clarity and readability for all public education stakeholders. These subchapters correspond to broad program areas. Reference to open- enrollment charter schools wherever public schools are referenced emphasizes that charter schools must adhere to the requirements of the testing program. In addition, the new sections specify that any testing irregularity would cause a charter to come under review by the commissioner of education for possible sanction or revocation. The new sections include details relating to the Reading Proficiency Tests in English (RPTE) and the State-Developed Alternative Assessment (SDAA) components of the statewide assessment program. Various test development, administration, and reporting requirements are specified. Language related to testing requirements for students receiving special education services is consistent with federal law and regulations. The new sections also give emphasis to training for every test administrator in the state that is provided annually by the Texas Education Agency (TEA) through education service centers and test administrator manuals. Specific reporting deadlines are also mandated for scoring contractors to provide results for machine-scorable assessments.

The new sections emphasize the inclusiveness of the assessment program, and exemption language is minimized to the greatest extent possible. The decision-making process for providing an appropriate assessment as required for every eligible student is specified. Grade advancement requirements for the new testing program are specified and the responsibilities at the state and local levels in providing remediation are clarified. In addition, the new sections incorporate recommendations relating to the assessment program from the Comptroller's Public Education Integrity Task Force, including specifying the responsibility of the superintendent for maintaining the integrity of test administration, giving greater emphasis to the penalties for testing and data reporting irregularities, revising the penalties to follow those listed in the State Board for Educator Certification (SBEC) rules, and including parents or legal guardians in rules concerning notification by superintendents of testing requirements. Language is also included to clarify existing policy regarding group-administered tests.

The following changes have been made to the following sections since published as proposed.

Section 101.1(a) was revised to add more specific language related to the SBOE's role in the statewide assessment program.

Section 101.7(b) was revised to clarify that the new testing requirements apply to students who were enrolled in Grade 8 or a lower grade on January 1, 2001.

Section 101.65(c) was revised to reflect the transfer of authority from the board to the commissioner of education in the area of charter school sanctions or revocations due to the passage of House Bill 6, 77th Texas Legislature, 2001.

The following comments were received regarding adoption of the new sections.

Issue. Scope of Rules.

Comment. An individual suggested a modification to add: "The SBOE shall establish criteria for the statewide assessment program."

Agency Response. The agency disagrees with this comment; however, 19 TAC §101.1 has been modified to add more specific language related to the SBOE's role in the statewide assessment program. This individual's proposed language was modified by replacing the word "criteria" with the word "goals" and included as 19 TAC §101.1(a)(2).

Issue. Policy.

Comment. An individual representing the Texas Public Policy Foundation requested having ACHIEVE, Inc., verify the validity and reliability of the Texas Assessment of Academic Skills (TAAS). ACHIEVE, Inc., is a nationally recognized educational organization, based in Washington, D.C., that analyzes state tests to determine how well they match state curriculum standards.

Agency Response. The comment does not specifically address the rules proposed by the agency. However, language in adopted 19 TAC §101.3(b)(2) does specify that the tests should be reliable and valid, as required by the TEC, §39.023(i). The adopted rules were informed by the federal court ruling in January 2000 by United States District Court Judge Edward Prado of San Antonio. This ruling in support of standardized, statewide testing in Texas public schools set forth the constitutional and legal standards that states must meet in developing and implementing high-stakes tests that are valid and reliable. The agency drafted the newly adopted rules to ensure that the testing program continues to uphold the standards affirmed in this important case. ACHIEVE, Inc., was asked to determine the correlation between the new Texas Assessment of Knowledge and Skills (TAKS) objectives and the Texas Essential Knowledge and Skills (TEKS). The TAAS has already been found valid and reliable in federal court. Due to a question regarding language in another subsection of §101.3, rule action related to this section will be filed subsequent to receipt of an Attorney General's opinion.

Issue. Test Development.

Comment. An individual representing the Texas Public Policy Foundation, an individual representing herself, and an individual representing the Texas Justice Foundation suggested that the SBOE request an Attorney General's opinion regarding its authority as it relates to the Texas Assessment Program.

Agency Response. The agency agrees with this comment. A question arose regarding the respective authority of the SBOE

and the agency as specified in TEC, Chapter 39, Subchapter B, which mandates the statewide assessment program. An Attorney General's opinion regarding test development authority was requested in September 2001. Under §402.042(c) of the Texas Government Code, the Attorney General is given 180 days to make a decision regarding this request. In this case, the Attorney General has until March 2002 to issue an opinion.

Comment. An individual suggested a modification to add: "Each assessment item shall assess subject- area knowledge or subject-area knowledge and skills with rigor appropriate to the grade level assessed."

Agency Response. The agency disagrees with this comment. The agency is responsible for developing the assessments referenced in TEC, §39.023. A critical part of test development is the alignment of every test item with the TEKS, as adopted by the SBOE. In some subject areas the skill is the part of the TEKS that is being assessed. In addition, the agency considers that this modification is addressed, though in different language, in 19 TAC §101.3(a). Due to a question regarding language in another subsection of §101.3, rule action related to this section will be filed subsequent to receipt of an Attorney General's opinion.

Comment. An individual suggested a modification to add: "Each assessment item shall measure knowledge or knowledge and skills without providing information the students would be expected to know, such as formulas or other basic information."

Agency Response. The agency maintains that it is responsible for developing the assessments referenced in TEC, §39.023, and has submitted a request for an Attorney General's opinion regarding test development authority. This modification is also addressed in 19 TAC §101.3(b)(2). When the blueprint for the mathematics portion of TAAS was first developed with the input of Texas educator committees, it was decided to provide the students with a formula chart. This is consistent with other state assessment programs. Discussions about formula charts for TAKS (Texas Assessment of Knowledge and Skills) have been ongoing with the educator committees that have convened for TAKS. Due to a question regarding language in another subsection of §101.3, rule action related to this section will be filed subsequent to receipt of an Attorney General's opinion.

Comment. An individual suggested a modification to add: "Math assessments shall require students to solve math problems."

Agency Response. The agency agrees every test item should be reviewed to ensure it validly measures TEKS. In response to this comment, the agency made a change to proposed new 19 TAC §101.3(b)(1), adding "in all subject areas tested" to emphasize every tested subject area is aligned with the TEKS. This concern is addressed in the rigorous test development process, based on the input of Texas educators. Due to a question regarding language in another subsection of §101.3, rule action related to this section will be filed subsequent to receipt of an Attorney General's opinion.

Comment. An individual suggested a modification to add: "Assessment items shall require knowledge independently from the assessment booklet and assessment item."

Agency Response. The agency agrees with the purpose of this comment, but does not consider a change in language is needed. This is a fundamental aspect of the Texas assessment program and is specified in adopted 19 TAC §101.21(b), providing that the commissioner shall ensure that each criterion-referenced test meets accepted standards for educational testing. This critical educational testing standard is currently addressed by the test development process, which is based upon extensive educator input and consists of three years of a series of steps each characterized by careful and rigorous quality controls. The involvement of educators representing the diversity of the state throughout the test development process ensures that every item is appropriate. This extensive review is essential for ensuring the validity of the assessments.

Comment. An individual suggested a modification to add: "No assessment item will provide a choice of answers of which all but one are very easily identified as false or impossible."

Agency Response. The agency disagrees with this comment. The concern about appropriate answer choices is currently addressed in the policy and procedures of the testing program. Language found in adopted 19 TAC §101.21(b) specifies the commissioner shall ensure the tests meet acceptable standards for educational testing. An Attorney General's opinion regarding test development authority has been requested.

Comment. An individual suggested a modification to add: "When identical or similar TEKS appear at multiple grade levels, they shall be tested at the lowest grade level in which they first appear, or the rigor of the test item shall be increased when an identical or similar TEK is tested at a higher grade level."

Agency Response. The agency disagrees with this comment. Students cannot be expected to show mastery of skills for which they were not given the opportunity to learn. Language found in adopted 19 TAC §101.21(a) addresses this by requiring those most familiar with identifying which items would be most suitable at which grade level, namely Texas educators, to assist agency staff in making those determinations.

Comment. An individual suggested a modification to add: "Assessments shall measure knowledge and skills without the use of manipulatives or concrete models."

Agency Response. The agency disagrees with this comment. Language in adopted 19 TAC §101.3(b)(2) ensures the intent of this modification is met by specifying that the tests shall be reliable and valid measures of the TEKS. TEC, §39.023, requires that assessments be based on the TEKS. Both manipulatives and concrete models appear in the TEKS. Although there are currently no plans to use either manipulatives or concrete models in the assessments, by law they must remain as eligible test items. Due to a question regarding language in another subsection of §101.3, rule action related to this section will be filed subsequent to receipt of an Attorney General's opinion.

Comment. An individual suggested a modification to add: "The assessment instrument must be a test of objective knowledge, based on measurable, verifiable, and widely accepted professional testing and assessment standards, and the instrument shall not assess the personal opinions, attitudes, or beliefs of the student being tested."

Agency Response. The agency agrees with this comment. Language in adopted 19 TAC §101.21(b) addresses the intent of this proposed modification by specifying that the commissioner shall ensure that each criterion-referenced test meet accepted standards for educational testing. Fairness in testing is an integral portion of that requirement.

Comment. An individual suggested a modification to add: "Texas educators and subject-area experts, such as scientists, historians, and mathematicians, recommended by the SBOE shall assist Texas Education Agency staff in reviewing and developing test objectives, assessment guidelines, and test items."

Agency Response. The agency agrees with this comment but does not consider a change in language is needed. Language in adopted 19 TAC §101.21(a) addresses this by specifying that the agency convene Texas educators to help the agency develop test objectives, assessment guidelines, and test items. The commissioner of education, who is responsible for the test development process, as specified by TEC, §39.023, strongly encourages recommendations from the SBOE for individuals to serve on these committees. This ongoing invitation to the SBOE was reiterated in the selection process for the educator committees to advise the agency on item development for TAKS.

Comment. An individual suggested a modification to add: "The Board shall approve the assessment objectives."

Agency Response. The agency disagrees with this comment. Upon review by agency General Counsel, approval of the test objectives was found to be within the authority of the commissioner of education and the agency under TEC, §39.023. Test objectives were last adopted by the SBOE in November 1988 when the SBOE was part of the Central Education Agency, which, at that time, had the authority to develop the assessment. In brief, TEC, Chapter 39, Subchapter B, now assigns certain duties to the SBOE and the TEA. The SBOE is directed to establish a statewide curriculum and to "create and implement a statewide assessment program" within the statutory framework. These duties include rules for test administration, accommodations in taking the tests, the annual release of tests, and setting the passing standards. The agency recognizes the importance of the test objectives, and the language in adopted 19 TAC §101.3(b) addresses the intent of this proposed modification by specifying the tests shall be aligned to the essential knowledge and skills as adopted by the board. Due to a question regarding language in another subsection of §101.3, rule action related to this section will be filed subsequent to receipt of an Attorney General's opinion.

Comment. An individual suggested a modification to add: "The exit-level assessment will [assess] Algebra I and Geometry TEKS, not 8th grade level TEKS."

Agency Response. The agency disagrees with this comment. Language in adopted 19 TAC §101.5(a) states that every eligible student shall take the appropriate criterion-referenced tests, as required by the TEC, §39.023(a), (b), (c), (l) and §39.027(e). The TEC currently specifies that the exit-level assessment include algebra and geometry. After two extensive rounds of review by Texas educators statewide of the TAKS exit-level objectives, the majority found some Grade 8 TEKS to be appropriate to the exit-level TAKS math assessment.

19 TAC §§101.1 - 101.6

The repeals are adopted under the Texas Education Code, Chapter 39, Subchapter B, which authorizes the State Board of Education to adopt rules to create and implement a statewide assessment program.

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 October 26, 2001.

TRD-200106604
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Manager, Policy Planning
Texas Education Agency
Effective date: November 15, 2001
Proposal publication date: June 1, 2001
For further information, please call: (512) 463-9701

CHAPTER 101. ASSESSMENT

SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §§101.1, 101.5, 101.7, 101.9, 101.11, 101.13

The new sections are adopted under the Texas Education Code, Chapter 39, Subchapter B, which authorizes the State Board of Education to adopt rules to create and implement a statewide assessment program.

§101.1. Scope of Rules.

(a) The State Board of Education (SBOE) shall:

(1) create and implement the statewide assessment program to ensure the program supports the goals of education as specified in the Texas Education Code (TEC); and

(2) establish goals for the statewide assessment program.

(b) When adopting rules, the SBOE shall maintain the stability of the statewide assessment program to the greatest extent possible in accordance with the TEC, Chapter 39, Subchapter B.

(c) The statewide assessment program consists of the following criterion-referenced tests:

(1) the assessment of academic skills in English and Spanish for the grades and subjects as specified in the TEC, Chapter 39, Subchapter B;

(2) the alternative assessment of academic skills for eligible students receiving special education services as specified in the TEC, Chapter 39, Subchapter B;

(3) the assessments required for graduation as specified in the TEC, Chapter 39, Subchapter B; and

(4) the reading proficiency tests in English for eligible limited English proficient students as specified in the TEC, Chapter 39, Subchapter B.

§101.7. Testing Requirements for Graduation.

(a) To be eligible to receive a high school diploma, a student must demonstrate satisfactory performance as determined by the State Board of Education (SBOE) on the assessments required for graduation as specified in the Texas Education Code (TEC), Chapter 39, Subchapter B.

(1) To fulfill the testing requirements for graduation, a student must be tested by either a Texas school district, Texas education service center, open-enrollment charter school, the Texas Education Agency (TEA), or other individual or organization designated by the commissioner of education.

(2) On the tests required for graduation, a student shall not be required to demonstrate performance at a standard higher than the one in effect when he or she was first eligible to take the test.

(3) A foreign exchange student who has waived in writing his or her intention to receive a Texas high school diploma may be excused from the exit level testing requirement as specified in the TEC, Chapter 39, Subchapter B.

(b) Beginning with the 2003-2004 school year, students who were enrolled in Grade 8 or a lower grade on January 1, 2001, must fulfill testing requirements for graduation with the Grade 11 exit level tests, as specified in the TEC, §39.023(c).

(c) A student receiving special education services under the TEC, Chapter 29, Subchapter A, who successfully completes the requirements of his or her individualized education program (IEP) shall receive a high school diploma.

(d) According to procedures specified in the applicable test administration materials, an eligible student or out-of-school individual who has not met graduation requirements may retest on a schedule determined by the commissioner of education.

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 October 26, 2001.

TRD-200106605
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Manager, Policy Planning
Texas Education Agency
Effective date: November 15, 2001
Proposal publication date: June 1, 2001
For further information, please call: (512) 463-9701

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SUBCHAPTER B. DEVELOPMENT AND ADMINISTRATION OF TESTS

19 TAC §§101.21, 101.23, 101.25, 101.27, 101.29, 101.31, 101.33

The new sections are adopted under the Texas Education Code, Chapter 39, Subchapter B, which authorizes the State Board of Education to adopt rules to create and implement a statewide assessment program.

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 October 26, 2001.

TRD-200106606
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Effective date: November 15, 2001
Proposal publication date: June 1, 2001
For further information, please call: (512) 463-9701

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SUBCHAPTER C. SECURITY AND CONFIDENTIALITY

19 TAC §§101.61, 101.63, 101.65

The new sections are adopted under the Texas Education Code, Chapter 39, Subchapter B, which authorizes the State Board of Education to adopt rules to create and implement a statewide assessment program.

§101.65. Penalties.

(a) Violation of security or confidential integrity of any test required by the Texas Education Code (TEC), Chapter 39, Subchapter B, shall be prohibited.

(b) A person who engages in conduct prohibited by this section may be subject to sanction of credentials.

(c) Charter school test administrators are not required to be certified; however, any irregularity in the administration of any test required by the TEC, Chapter 39, Subchapter B, would cause the charter itself to come under review by the commissioner of education for possible sanctions or revocation, as provided under the TEC, §12.115(a)(4).

(d) Procedures for maintaining the security and confidential integrity of a test shall be specified in the appropriate test administration materials. Conduct that violates the security and confidential integrity of a test is defined as any departure from the test administration procedures established by the commissioner of education. Conduct of this nature may include the following acts and omissions:

(1) duplicating secure examination materials;

(2) disclosing the contents of any portion of a secure test;

(3) providing, suggesting, or indicating to an examinee a response or answer to a secure test item or prompt;

(4) changing or altering a response or answer of an examinee to a secure test item or prompt;

(5) aiding or assisting an examinee with a response or answer to a secure test item or prompt;

(6) encouraging or assisting an individual to engage in the conduct described in paragraphs (1)-(5) of this subsection; or

(7) failing to report to an appropriate authority that an individual has engaged in conduct outlined in paragraphs (1)-(6) of this subsection.

(e) Any person who violates, assists in the violation of, or solicits another to violate or assist in the violation of test security or confidential integrity, and any person who fails to report such a violation are subject to the following penalties:

(1) placement of restrictions on the issuance, renewal, or holding of a Texas teacher certificate, either indefinitely or for a set term;

(2) issuance of an inscribed or non-inscribed reprimand;

(3) suspension of a Texas teacher certificate for a set term; or

(4) revocation or cancellation of a Texas teacher certificate without opportunity for reapplication for a set term or permanently.

(f) Any irregularities in test security or confidential integrity may also result in the invalidation of student results.

(g) The superintendent and campus principal of each school district and chief administrative officer of each charter school and any private school administering the tests as allowed under the TEC,

§39.033, shall develop procedures to ensure the security and confidential integrity of the tests specified in the TEC, Chapter 39, Subchapter B, and shall be responsible for notifying the Texas Education Agency in writing of conduct that violates the security or confidential integrity of a test administered under the TEC, Chapter 39, Subchapter B. Failure to report can subject the person responsible to the applicable penalties specified in this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 26, 2001.

TRD-200106607
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Effective date: November 15, 2001
Proposal publication date: June 1, 2001
For further information, please call: (512) 463-9701

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SUBCHAPTER D. SCORING AND REPORTING

19 TAC §101.81, §101.83

The new sections are adopted under the Texas Education Code, Chapter 39, Subchapter B, which authorizes the State Board of Education to adopt rules to create and implement a statewide assessment program.

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 October 26, 2001.

TRD-200106608
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Effective date: November 15, 2001
Proposal publication date: June 1, 2001
For further information, please call: (512) 463-9701

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SUBCHAPTER E. LOCAL OPTION

19 TAC §101.101

The new section is adopted under the Texas Education Code, Chapter 39, Subchapter B, which authorizes the State Board of Education to adopt rules to create and implement a statewide assessment program.

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 October 26, 2001.

TRD-200106609
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Effective date: November 15, 2001
Proposal publication date: June 1, 2001
For further information, please call: (512) 463-9701

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TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 1. TEXAS BOARD OF HEALTH

SUBCHAPTER B. FORMAL HEARING PROCEDURES

The Texas Department of Health (department) adopts the repeal of §§1.21 - 1.34 and new §§1.21, 1.23, 1.25, and 1.27 concerning updated and revised formal hearing procedures. The rules are adopted without changes to the proposed text as published in the July 27, 2001, issue of the *Texas Register* (26 TexReg 5572), and therefore the sections will not be republished.

Specially, the new rules replace the previous rules with updated statutory references and references to the State Office of Administrative Hearings, which is now responsible for conducting formal contested hearings under the Administrative Procedures Act, Texas Government Code, Chapter 2001. The new rules also provide for a default procedure to be used if the opposing party does not appear at a properly scheduled hearing and provide time periods for the filing of exceptions and replies to proposals for decision rendered in administrative cases.

No comments were received on the proposal during the comment period.

25 TAC §§1.21 - 1.34

The repeals are adopted under the Health and Safety Code, §12.001 which provides the Texas Board of Health (board) with the authority to adopt rules for its procedure and for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 26, 2001.

TRD-200106591
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Effective date: November 15, 2001
Proposal publication date: July 27, 2001
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25 TAC §§1.21, 1.23, 1.25, 1.27

The new sections are adopted under the Health and Safety Code, §12.001 which provides the Texas Board of Health (board) with the authority to adopt rules for its procedure and for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 26, 2001.

TRD-200106592
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Effective date: November 15, 2001
Proposal publication date: July 27, 2001
For further information, please call: (512) 458-7236

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CHAPTER 139. ABORTION FACILITY REPORTING AND LICENSING

The Texas Department of Health (department) adopts amendments to §§139.2, 139.8, 139.41, 139.49 and 139.51, concerning abortion facilities without changes to the proposed text as published in the July 27, 2001, issue of the *Texas Register* (26 TexReg 5577), and therefore the sections will not be republished.

The amendments are based upon a decision of the US Court of Appeals for the 5th Circuit on Friday, April 13, 2001, in the challenge to the abortion statute, Health and Safety Code Chapter 245 and rules. The 5th Circuit found three rules unconstitutionally vague because the rules impermissibly subjected physicians to sanctions based not on their own objective behavior, but on the subjective viewpoints of others. The rules found unconstitutionally vague and which have been deleted were: §139.51(1) requiring a physician licensed as an abortion provider to "ensure that all patients...are cared for in a manner and in an environment that enhances each patient's dignity and respect in full recognition of her individuality"; §139.51(2), requiring physicians to ensure that each patient will "receive care in a manner that maintains and enhances her self-esteem and self-worth"; and §139.2(41), which defines the standard of "quality" care as "the degree to which care meets or exceeds the expectations set by the patient." Each of the three provisions measured compliance by the subjective expectations or requirements of an individual patient as to the enhancement of her dignity or self-esteem.

In addition, the department identified and has deleted instances where the term "quality" was used in the manner deemed unconstitutionally vague. Specifically, the deletions occurred in renumbered §139.2(41) concerning the definition of "quality assurance"; §139.8(a) concerning the quality assurance program; §139.8(e)(1) and (2) concerning quality issues; §139.8(f)(2) and (3) concerning departmental review; §139.41(a) concerning the facility's responsibility for developing, implementing, enforcing and monitoring written policies; §139.49(d) concerning policies and procedures for decontamination, disinfection, sterilization, and storage of sterile supplies; and renumbered §139.51(3) concerning access to quality care and treatment. New language is adopted in §§139.8(a) and 139.8(e) in order to clarify the intent of the rule. The word "quality" has been sustained in the rules where it is used in a manner generally recognized and accepted by the health care industry, as in "quality assurance" and "quality improvement."

No comments were received on the proposal during the comment period.

SUBCHAPTER A. GENERAL PROVISIONS

25 TAC §139.2, §139.8

The amendments are adopted under Health and Safety Code, Chapter 245 which establishes the licensing requirements for abortion facilities; and Health and Safety Code §12.001 which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

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 October 29, 2001.

TRD-200106611
Susan K. Steeg
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Texas Department of Health
Effective date: November 18, 2001
Proposal publication date: July 27, 2001
For further information, please call: (512) 458-7236

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SUBCHAPTER D. MINIMUM STANDARDS FOR LICENSED ABORTION FACILITIES

25 TAC §§139.41, 139.49, 139.51

The amendments are adopted under Health and Safety Code, Chapter 245 which establishes the licensing requirements for abortion facilities; and Health and Safety Code §12.001 which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

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 October 29, 2001.

TRD-200106612
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Effective date: November 18, 2001
Proposal publication date: July 27, 2001
For further information, please call: (512) 458-7236

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CHAPTER 169. ZOONOSIS CONTROL

SUBCHAPTER E. DOG AND CAT STERILIZATION

25 TAC §169.101

The Texas Department of Health (department) adopts an amendment to §169.101 concerning the Animal Friendly Advisory Committee (committee) with changes to the proposed text as published in the August 3, 2001 issue of the *Texas Register* (26 TexReg 5741). The committee provides advice to the Texas Board of Health (board) on the dispensing of grant money in the animal friendly account. The committee is governed by the Health and Safety Code, §828.014. Chapter 828 was modified by the 77th Legislature (Chapter 1292) to extend the term of committee members.

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 and 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 1998, the board established a rule relating to the Animal Friendly Advisory Committee. The rule states that the committee will automatically be abolished on September 1, 2001. The board has now reviewed and evaluated the committee and has determined that the committee should continue in existence until September 1, 2011.

This section amends provisions relating to the operation of the committee. Specifically, language is revised to reflect a change in the applicable law from the Texas Civil Statutes to the Government Code; to clarify that, according to statute, the committee makes recommendations to the department regarding applications for grants funded through the animal friendly account; to continue the committee until September 1, 2011; to change the term of office for committee members to four years expiring on alternating even-numbered years; to change the process for filling vacancies in the offices of presiding officer and assistant presiding officer; to clarify how the committee will conduct meetings in accordance with the Open Meetings Act; and to clarify that the committee must prepare an annual report to the board.

No public comments were received during the comment period for the rule.

Change: concerning the §169.101(e), due to staff comments the department extended the review and duration period for the commissioner to initiate and complete a review of the committee to determine continuation, consolidation or abolishment from September 1, 2005, as proposed, to September 1, 2011.

The amendment is adopted under Health and Safety Code, §828.015, Animal Friendly Advisory Committee, which requires that the commissioner of health establish an advisory committee; §12.001 which provides the Texas Board of Health with the authority to adopt rules for the performance of every duty imposed by law on the Texas Board of Health, the Texas Department of Health, and the Commissioner of Health; and Government Code §2110.005 which requires the department to adopt rules stating the purpose and tasks of its advisory committees.

§169.101. Animal Friendly Advisory Committee.

(a) The committee. An advisory committee shall be appointed under and governed by this section.

(1) The name of the committee shall be the Animal Friendly Advisory Committee.

(2) The committee is required to be established by the commissioner of health (commissioner) by the Texas Health and Safety Code, §828.015, Dog and Cat Sterilization.

(b) Applicable law. The committee is subject to Government Code, Chapter 2110, relating to state agency advisory committees.

(c) Purpose. The purpose of the committee is to provide advice to the Texas Board of Health (board) on the dispensing of grant money in the animal friendly account.

(d) Tasks.

(1) The committee shall meet at least twice a year and more frequently if deemed necessary by the commissioner.

(2) The committee shall assist the board in establishing guidelines for the expenditure of money credited to the animal friendly account.

(3) The committee shall review and make recommendations to the Texas Department of Health (department) on applications submitted to the department for grants funded with money credited to the animal friendly account.

(e) Review and duration. By September 1, 2011, the commissioner 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 seven members.

(1) The composition of the committee shall include:

(A) one person licensed to practice veterinary medicine in this state;

(B) one representative from a private releasing agency;

(C) one representative from a public releasing agency;

(D) one representative from an animal welfare agency;

(E) two representatives of the general public; and

(F) one representative from the department.

(2) Members of the committee shall be appointed by the commissioner.

(g) Terms of office. The term of office of each member shall be four years.

(1) Members shall be appointed for staggered terms expiring on January 31 of each even-numbered year.

(2) Those members whose terms expire on January 31, 2003, will be extended to January 31, 2004.

(3) If a vacancy occurs, a person shall be appointed to serve the unexpired portion of that term.

(h) Officers. The commissioner shall designate one member as presiding officer of the committee and one other member as the assistant presiding officer.

(1) The presiding officer and the assistant presiding officer shall serve for one year.

(2) The presiding officer shall preside at all committee meetings at which he or she is in attendance, call meetings in accordance with this section, appoint subcommittees of the committee as necessary, and cause proper reports to be made to the board. The presiding officer may serve as an ex-officio member of any subcommittee of the committee.

(3) The assistant presiding officer shall perform the duties of the presiding officer in case of the absence or disability of the presiding officer. In case the office of presiding officer becomes vacant, the assistant presiding officer will serve until a successor is selected to complete the unexpired portion of the term of the office of presiding officer.

(4) If the office of assistant presiding officer becomes vacant, it may be filled temporarily by vote of the committee until a successor is appointed by the commissioner.

(5) A member shall serve no more than two consecutive terms as presiding officer and/or assistant presiding officer.

(6) The committee may reference its officers by other terms, such as chairperson and vice-chairperson.

(7) The presiding officer and assistant presiding officer serving on January 1, will continue to serve until the commissioner appoints their successors.

(i) Meetings. The committee shall meet only as necessary to conduct committee business.

(1) A meeting may be called by agreement of department staff and either the presiding officer or at least three members of the committee.

(2) Meeting arrangements shall be made by department staff. Department staff shall contact committee members to determine availability for a meeting date and place.

(3) The committee is not a "governmental body" as defined in the Open Meetings Act. However, in order to promote public participation, each meeting of the committee shall be announced and conducted in accordance with the Open Meetings Act, Texas Government Code, Chapter 551, with the exception that the provisions allowing executive sessions shall not apply.

(4) Each member of the committee shall be informed of a committee meeting at least five working days before the meeting.

(5) A simple majority of the members of the committee shall constitute a quorum for the purpose of transacting official business.

(6) The committee is authorized to transact official business only when in a legally constituted meeting with quorum present.

(7) The agenda for each committee meeting shall include an item entitled public comment under which any person will be allowed to address the committee on matters relating to committee business. The presiding officer may establish procedures for public comment, including a time limit on each comment.

(j) Attendance. Members shall attend committee meetings as scheduled. Members shall attend meetings of subcommittees to which the member is assigned.

(1) A member shall notify the presiding officer or appropriate department staff if he or she is unable to attend a scheduled meeting.

(2) It is grounds for removal from the committee if a member cannot discharge the member's duties for a substantial part of the term for which the member is appointed because of illness or disability, is absent from more than half of the committee and subcommittee meetings during a calendar year, or is absent from at least three consecutive committee meetings.

(3) The validity of an action of the committee is not affected by the fact that it is taken when a ground for removal of a member exists.

(4) The attendance records of the members shall be reported to the commissioner. The report shall include attendance at committee and subcommittee meetings.

(k) Staff. Staff support for the committee shall be provided by the department.

(l) Procedures. Roberts Rules of Order, Newly Revised shall be the basis of parliamentary decisions except where otherwise provided by law or rule.

(1) Any action taken by the committee must be approved by a majority vote of the members present once quorum is established.

(2) Each member shall have one vote.

(3) A member may not authorize another individual to represent the member by proxy.

(4) The committee shall make decisions in the discharge of its duties without discrimination based on any person's race, creed, gender, religion, national origin, age, physical condition, or economic status.

(5) Minutes of each committee meeting shall be taken by department staff.

(A) A draft of the minutes approved by the presiding officer shall be provided to the board and each member of the committee within 30 days of each meeting.

(B) After approval by the committee, the minutes shall be signed by the presiding officer.

(m) Subcommittees. The committee may establish subcommittees as necessary to assist the committee in carrying out its duties.

(1) The presiding officer shall appoint members of the committee to serve on subcommittees and to act as subcommittee chairpersons. The presiding officer may also appoint nonmembers of the committee to serve on subcommittees.

(2) Subcommittees shall meet when called by the subcommittee chairperson or when so directed by the committee.

(3) A subcommittee chairperson shall make regular reports to the advisory committee at each committee meeting or in interim written reports as needed. The reports shall include an executive summary or minutes of each subcommittee meeting.

(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.

(o) Reports to board. The committee shall file an annual written report with the board.

(1) The report shall list the meeting dates of the committee and any subcommittees, the attendance records of its members, a brief description of actions taken by the committee, a description of how the committee has accomplished the tasks given to the committee, the status of any rules which were recommended by the committee to the

board, anticipated activities of the committee for the next year, and any amendments to this section requested by the committee.

(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.

(3) The report shall cover the meetings and activities in the immediate preceding 12 months and shall be filed with the commissioner each May. It shall be signed by the presiding officer and appropriate department staff.

(p) Reimbursement for expenses. Members of the advisory committee are not entitled to compensation, a per diem, or expense reimbursement for their service on the advisory committee.

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 October 26, 2001.

TRD-200106603
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: December 1, 2001
Proposal publication date: August 3, 2001
For further information, please call: (512) 458-7236

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

CHAPTER 39. PUBLIC NOTICE

SUBCHAPTER H. APPLICABILITY AND GENERAL PROVISIONS

30 TAC §39.402

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts new §39.402, Applicability to Air Quality Permit Amendments. This new section is adopted as part of the implementation of House Bill (HB) 2518 (an act relating to the issuance of certain permits for the emission of air contaminants), as passed by the 77th Legislature, 2001. The new section concerns public notice requirements for amendment applications to air quality preconstruction permits. Section 39.402 is adopted *with changes* to the proposed text as published in the August 24, 2001 issue of the *Texas Register* (26 TexReg 6233).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

House Bill 2518 amended the Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.0518, Preconstruction Permit, which establishes new criteria for public participation in the approval process of proposed air quality permit amendments. As amended by HB 2518, TCAA, §382.0518(h) provides that public notice of proposed air permit amendments is not required for facilities affected by TCAA, §382.020, Control of Emissions from Facilities that Handle Certain Agricultural Products, if the total emission increases from all facilities authorized under the amended permit, including new facilities, is not significant as defined for public notice and the emissions will not change in character. Furthermore, §382.0518(h) provides that public notice for all other air permit amendment applications is not required if the total emission increases from all facilities authorized under the amended permit, including new facilities, will meet the public notice de minimis criteria defined by commission rule and the emissions will not change in character. The public notice procedures enacted under HB 801 by the 76th Legislature, 1999, and codified in Chapter 39, continue to be applicable to permit amendment applications to the extent that those procedures are not changed as a result of HB 2518. In addition, HB 2518 does not affect the technical review of air permit amendment applications, including evaluation of best available control technology (BACT), off-property impacts of air contaminants, or any other review, such as federal applicability or pollution prevention, to ensure that the public health and safety are protected. The changes in law made by HB 2518 apply to applications for a permit amendment pending before the commission on September 1, 2001 or filed with the commission on or after September 1, 2001.

The commission adopts new §39.402 to implement the public notice provisions of HB 2518. Under this adopted rule, the criteria for determining whether permit amendment applications concerning facilities affected by TCAA, §382.020 are subject to Chapter 39 public notice requirements differs from the criteria that will govern public notice applicability for all other permit amendment applications. The criteria, or thresholds, consist of emission rates for various air contaminants. Amended permits with total emission increases from all facilities authorized under the amended permit below these criteria could be reviewed and issued without Chapter 39 public notice. However, the commission by rule retains the executive director's ability to require public notice in certain circumstances, even where the total emission increases from all facilities authorized under the amended permit are below the threshold criteria.

SECTION DISCUSSION

General

New §39.402 is adopted with changes to the proposed text. The commission has reorganized the adopted section for clarity as well as in response to comments received during the comment period. New §39.402(a) identifies when air permit amendments require public notice and §39.402(b) identifies the circumstances when air permit amendments are not required to publish notice.

Change in Character of Emissions

The commission adopts new §39.402(a)(1) to require public notice under Chapter 39 when the permit amendment application includes a change in character of emissions. Notice is required if the amendment includes any new air contaminant not previously emitted at the permitted facility. This requirement was originally proposed as a part of §39.402(b) but has been moved to §39.402(a)(1) because it applies to all amendments, regardless of emission increases or type of facility.

Agricultural Facilities and Public Notice Significance

The commission adopts new §39.402(a)(2) to address the applicability of Chapter 39 public notice requirements to permit amendment applications for facilities affected by TCAA, §382.020, which are facilities that handle grain, seed, legumes,

or vegetable fibers and emit particulate matter (PM). To be subject to public notice requirements, the total emission increases from all facilities authorized under the amended permit must be greater than any one of the values defined as significant for public notice in §39.402(a)(2)(A) - (D). As required by HB 2518, consistent with TCAA, §382.05196, Permits by Rule, significant for public notice values are based on the annual emission rates outlined in 30 TAC §106.4(a)(1) - (3), and are included in adopted §39.402(a)(2).

Facilities and Public Notice De Minimis

The commission adopts new §39.402(a)(3) to address public notice requirements for all other permit amendment applications (i.e., those involving facilities not affected by TCAA, §382.020) by establishing public notice de minimis criteria to determine whether an air quality permit amendment application is subject to Chapter 39 public notice requirements. Permit amendment applications are subject to public notice if the total emission increases from all facilities authorized under the amended permit exceed any one of the public notice de minimis values, which are adopted as follows: for carbon monoxide (CO), 50 tons per year (tpy); for sulfur dioxide (SO_2), ten tpy; for lead (Pb), 0.6 tpy; and for all other air contaminants, including nitrogen oxides (NO_x), volatile organic compounds (VOC), PM, or any other air contaminant (except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen), five tpy.

The public notice de minimis criteria defined in §39.402(a)(3) are based on an evaluation of state and federal de minimis thresholds and annual emission rates for major source determinations, impact review, and other analyses of the criteria pollutants CO, VOC, SO_2, PM, Pb, and NO_x (the surrogate for nitrogen oxide (NO_2)). The commission has adopted de minimis for public notice values which are less than or equal to these federal or state definitions of "de minimis." The concept of de minimis in the context of public notice is intended to focus the attention of the public and the commission on emission increases that could have a greater potential for public interest and questions regarding impacts to public health and welfare. This adoption does not change the requirements for the technical review of a permit application, which include a BACT and emissions impacts review. Rather, this adoption builds on an approach used by the United States Environmental Protection Agency's (EPA's) prevention of significant deterioration (PSD) and national ambient air quality standards (NAAQS) assessment for determining federal major source de minimis thresholds for criteria pollutants.

The EPA uses emission rates to determine if a source must apply for a federal permit. Once it is determined that a federal permit is required, EPA uses de minimis impacts levels (concentration thresholds based on a percentage of each NAAQS, as applicable) to determine the scope of the air quality analysis (the impacts review). The commission reviewed the EPA report which was the basis for federal de minimis impacts evaluation for criteria air pollutants and PSD permitting procedures. Please refer to EPA-450/2-80-072, *Impact of Proposed and Alternative De Minimis Levels for Criteria Pollutants*; the August 7, 1980 issue of the *Federal Register* (45 FR 52706); and EPA's *New Source Review Workshop Manual*, October, 1990. The EPA evaluation determined impacts from single sources, as well as the cumulative effect on increment consumption of multiple sources. This latter analysis had the most influence on the choice of federal de minimis emissions levels. The EPA evaluation used a screening model and data on sources that had been permitted under the PSD program. Because of concerns about over-prediction of Pb concentrations, EPA used refined modeling results as a supplementary data base for the federal de minimis Pb evaluation. The commission used the federal de minimis concentrations and corresponding emission rates as a starting point to determine emissions rates for public notice de minimis and adjusted them to account for other limits associated with nonattainment, PSD, and federal operating permit major source definitions, and the general limits for permits by rule (PBR). In addition, because EPA established federal de minimis emission rates based on design concentrations of 2% or 4% of selected NAAQS averaging periods, the commission took into account all averaging periods and applicable levels for each NAAQS.

Specifically, the commission adopts §39.402(a)(3)(A) to set the public notice de minimis criterion for CO at 50 tpy. The commission adopts this threshold after consideration of the federal operating permit major source threshold for CO of 100 tpy (see 30 TAC §122.10(13)(C) and §116.12(10)). Based on the EPA de minimis assessment procedure described above, the commission believes that this rate is too high for public notice de minimis. While the commission agrees that the federal CO limit is reasonable and appropriate for its purpose, a more restrictive emission rate is appropriate for public notice. Because EPA did not use a design concentration to set the 100 tpy rate, the commission applied the EPA process of using between 2% and 4% of the NAAQS for other criteria pollutants to determine the emission rate for CO. The federal air quality analysis de minimis level for both the one-hour and eight-hour CO NAAQS is set at 5% of the NAAQS, which corresponds to the federal emission rate of 100 tpy. Reducing the public notice de minimis criterion to a conservative 50 tpy would relate to a design concentration of 2.5% of both CO NAAQS. This public notice de minimis rate and potential public notice requirements will not affect the technical review of air permit amendment applications, including evaluation of BACT, off-property impacts of air contaminants, or any other review, such as federal applicability or pollution prevention.

The commission adopts §39.402(a)(3)(B) to set the public notice de minimis criterion for SO_2 at ten tpy based on consideration of the following facts: 1.) the lowest significance threshold for SO_2 is 25 tpy for PBR under TCAA, §382.057, as implemented by 30 TAC Chapter 106 (see §106.4(a)(1)); and 2.) the EPA federal de minimis evaluation was based on a concentration of 4% of the 24-hour NAAQS, which corresponds to approximately 40 tpy. The commission determined that a public notice de minimis emission rate of ten tpy (which is based on 1% of the 24-hour NAAQS) was more appropriate because it is the lowest air quality analysis level to trigger a detailed air quality analysis for any of the three NAAQS for SO_2. This public notice de minimis rate and potential public notice requirements will not affect the technical review of air permit amendment applications, including evaluation of BACT, off-property impacts of air contaminants, or any other review, such as federal applicability or pollution prevention.

The commission adopts §39.402(a)(3)(C) to set the public notice de minimis criterion for lead at 0.6 tpy, which is the federal major modification threshold (see §116.12(10)) and is the amount at which a PSD air quality analysis must be conducted. Based on the refined evaluation conducted by EPA for Pb, the commission is adopting the public notice de minimis rate at the federal de minimis rate. This rate and potential public notice requirements will not affect the technical review of air permit amendment applications, including evaluation of BACT, off-property impacts of air contaminants, or any other review, such as federal applicability or pollution prevention.

The commission adopts §39.402(a)(3)(D) to set the public notice de minimis criteria for all other air contaminants, including NO_x, VOC, PM, or any other air contaminant (except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen) at five tpy.

For NO_x, the commission adopts a five tpy threshold based on consideration of the following facts: 1.) the EPA evaluation procedure would result in an emission rate of 20 tpy based on the current NAAQS air quality analysis significance level of 1% for a detailed air quality analysis for NO_2; and 2.) the lowest state or federal de minimis or significance level for NO_x is five tpy in nonattainment areas and is the threshold test (netting) for major stationary sources (see 30 TAC §116.150(a)). The commission believes that a five tpy rate is reasonable to address NO_x and associated impact on ozone formation. This rate and potential public notice requirements will not affect the technical review of air permit amendment applications, including evaluation of BACT, off-property impacts of air contaminants, or any other review, such as federal applicability or pollution prevention.

For VOC, the commission adopts the five tpy threshold based on consideration of the following facts: 1.) the EPA current significance level for a detailed air quality analysis for ozone is an emission rate of 100 tpy of VOCs; and 2.) the lowest federal or state de minimis or significance level for VOC is five tpy in nonattainment areas and is the threshold test (netting) for major stationary sources (see §116.150(a)). The commission believes that, in view of the link between VOC and NO_x in the formation of ozone, an emission rate of five tpy is reasonable. This rate and potential public notice requirements will not affect the technical review of air permit amendment applications, including evaluation of BACT, off-property impacts of air contaminants, or any other review, such as federal applicability or pollution prevention.

For PM, the commission adopts the five tpy threshold based on consideration of the following facts: 1.) the lowest federal de minimis or significance level is 15 tpy for a PSD major modification (see 30 TAC §101.1(22) and §116.12(10)); and 2.) based on EPA's federal de minimis assessment procedure, the commission determined that an emission rate based on 2% of the 24-hour NAAQS for PM (five tpy) was appropriate because 2% is the lowest air quality analysis significance level to require a detailed air quality analysis for either the 24-hour or annual NAAQS for PM. To ensure that the public health and safety are protected, this rate will not affect the technical review of air permit amendment applications, including evaluation of BACT, off-property impacts of air contaminants, or any other review, such as federal applicability or pollution prevention.

For all other air contaminant categories (such as hydrogen chloride, hydrogen sulfide, or other air contaminants not considered a part of a group under criteria pollutants), the commission adopts five tpy as a conservative threshold, which is less than the 25 tpy significance threshold for PBR under TCAA, §382.057, as implemented by Chapter 106 (see §106.4(a)(1)). While the commission did not evaluate species of pollutants, the commission believes that, for consistency and based on the analysis for VOC and PM, an emission rate of five tpy should apply for other contaminant categories as well. This rate and potential public notice requirements will not affect the technical review of air permit amendment applications, including evaluation of BACT, off-property impacts of air contaminants, or any other review, such as federal applicability or pollution prevention.

Clarification of Total Emission Increases

For purposes of determining the total emission increases in an amended permit, the total emission increases would be the sum of emission increases and emissions decreases in the amendment application. For all cases, emission increases or reductions should be considered after the application of BACT or other additional voluntary control technology. The commission intends that the total emission increases for each pollutant category defined in the rule could include, but is not limited to: 1.) increases in emissions as a result of new facilities at an existing permitted site; 2.) changes to permitted allowable emission rates as a result of physical or operational changes and modifications to existing facilities; 3.) changes to allowable emission rates as a result of incorporation of a previous authorization when actual emissions are above that authorization's current limitations or authorized actual emission rates; 4.) changes to allowable emission rates due to sampling when actual emissions are above that facility's current limitations or authorized allowable emission rates; and 5.) emissions due to routine maintenance, start-up, or shutdown at only the new or modified facilities when these emissions are required to be included in permits under commission policy or rule. The commission does not intend the total emission increases for each pollutant category defined in the rule to include: 1.) consolidation or incorporation of any previously authorized facility or activity (PBR, standard permits, existing facility permits, etc.); 2.) changes to permitted allowable emission rates when those changes are exclusively due to changes to standardized emission factors; or 3.) actual existing emissions due to routine maintenance, start-up, or shutdowns at permitted facilities, where those emissions were not previously listed on a Maximum Allowable Emission Rate Table (MAERT).

Authority of Executive Director

The commission adopts new §39.402(a)(4) to allow the executive director to require public notice of air permit amendment applications for reasons other than exceedance of the adopted criteria in §39.402(a)(1) - (3). Mirroring current §39.403(b)(8)(C), the new rule provides that the executive director may use his discretion to require public notice for any application when: 1.) there is a reasonable likelihood for emissions to impact a nearby sensitive receptor; 2.) there is a reasonable likelihood of high nuisance potential from the operation of facilities; 3.) the application involves a facility or site for which the compliance history contains violations which are unresolved or constitute a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process; or 4.) there is a reasonable likelihood of significant public interest in a proposed activity. The commission intends to develop and make available guidelines for applications which may fall into these categories.

Conditions When Public Notice not Required

The commission adopts new §39.402(b) to clearly indicate that facilities which meet all the criteria set in §39.402(a) will not be required to publish notice.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the act. Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a).

A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human

health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Because the specific intent of the rulemaking is procedural in nature and revises procedures for providing public notice, an opportunity for public comment, and an opportunity for public hearing, the rulemaking does not meet the definition of a "major environmental rule."

In addition, even if the adopted rule is a major environmental rule, a regulatory impact assessment is not required because the rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopt a rule solely under the general powers of the agency. This adoption does not exceed a standard set by federal law. This adoption does not exceed an express requirement of state law because it is authorized by the following state statutes: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal state agency procedures; as well as the other statutory authorities cited in the STATUTORY AUTHORITY section of this preamble. In addition, the adoption is in direct response to HB 2518, and does not exceed the requirements of this bill. This adoption does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. This rulemaking does not adopt a rule solely under the general powers of the agency, but rather under specific state laws (i.e., Texas Government Code, §2001.004; and THSC, Chapter 382, Subchapter C). Finally, this rulemaking is not being adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether the rule is subject to Texas Government Code, Chapter 2007. The following is a summary of that analysis. The specific primary purpose of the rulemaking is to revise commission rules relating to procedures for public participation in certain air quality permitting proceedings as required by HB 2518. The adoption relates to procedures for providing public notice. As amended by HB 2518, TCAA, §382.0518(h) provides that public notice of proposed air permit amendments is not required for facilities affected by TCAA, §382.020, Control of Emissions from Facilities that Handle Certain Agricultural Products, if the total emission increases from all facilities authorized under the amended permit, including new facilities, is not significant as defined for public notice and the emissions will not change in character. Furthermore, §382.0518(h) provides that public notice for all other air permit amendment applications is not required if the total emission increases from all facilities authorized under the amended permit, including new facilities, will meet the public notice de minimis criteria defined by commission rule and the emissions will not change in character as described in the BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE and SECTION DISCUSSION portions of this preamble. The adopted rule will substantially advance these stated purposes by providing specific procedural requirements. Promulgation and enforcement of the rule will not burden private real property. The adopted new section does 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 governmental action. Consequently, the adopted new section does not meet the definition of a takings under Texas Government Code, §2007.002(5).

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the rulemaking does not relate to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Management Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.) and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The adopted actions concern only the procedural rules of the commission, are not substantive in nature, do not govern or authorize any actions subject to the CMP, and are not themselves capable of adversely affecting a coastal natural resource area (Title 31 Natural Resources and Conservation Code, Chapter 505; 30 TAC §§281.40 et seq.).

HEARING AND COMMENTERS

A public hearing on this rulemaking was held in Austin on September 20, 2001 at 10:00 a.m. at TNRCC in Building F, Room 2210, located at 12100 Park 35 Circle. No oral testimony or written comments were submitted at this hearing. Nine commenters submitted written comments during the comment period which closed at 5:00 p.m., September 24, 2001. Written comments were submitted by the American Electronics Association (AeA); Baker Botts L.L.P. on behalf of the Texas Industry Project (TIP); Brown McCarroll, L.L.P. (Brown); ExxonMobil Downstream Refining and Supply (ExxonMobil); Frederick-Law on behalf of the Lone Star Chapter of the Sierra Club, Environmental Defense, Public Citizen, law firm of Lowerre and Kelly, and law firm of Henry and Levin (Frederick); Texas Association of Business and Chambers of Commerce (TABCC); Texas Chemical Council (TCC); Texas Cotton Ginners' Association (TCGA); and Texas Oil and Gas Association (TxOGA).

RESPONSE TO COMMENTS

General

Brown raised concerns over the adequacy of the proposed rule notice and content of the preamble and commented that the proposal did not comply with the Texas Administrative Procedure Act, specifically with regard to the fiscal note section. Brown commented that the fiscal note should have addressed an analysis of costs, or benefits, in several areas, including: 1.) the commission, including the potential costs of processing additional public notice authorizations, responses to comments, and participation in additional contested case hearings; 2.) the State Office of Hearings Examiners (SOAH) to address the potential increase in contested case hearings; 3.) applicants and commission to address the likely potential impact on processing times for air permit amendment applications due to an increase in the number of applications which would be subject to public notice; and 4.) applicant costs for additional publication and sign posting beyond *Notice of Intent to Obtain a Permit*, including *Notice of Application and Preliminary Decision*, public meetings, or contested case hearings which could potentially reach $15,000.

The commission has not changed the rule or preamble in response to this comment and believes that the notice of the proposed rule change was sufficient to satisfy the requirements of

Texas Government Code, §2001.024, Content of Notice, and provided adequate notice to solicit comments from interested persons. House Bill 2518 amended the law to reduce the number of applications required to undergo public notice when certain emission requirements are satisfied. This law, and the adopted rule, would not require notice in addition to the notice required by §39.603 and §39.604 (publication and sign posting), nor would it require additional processing, meetings, hearings or other actions. Thus, no additional cost assessment is required.

AeA, TABCC, and TCGA submitted comments in strong support of the proposed rule. They noted that the level of emission increases allowed in the rule as proposed would facilitate small changes at permitted facilities (upgrading manufacturing processes, additional abatement and emissions controls, etc.) while ensuring effective public participation. Additionally, they commented that this rule will help streamline the permitting process while ensuring protection of the public health and welfare and establish explicit circumstances when public notice would be required for air permit amendments.

The commission acknowledges the comments and support of the proposed rule by AeA, TABCC, and TCGA.

TIP requested clarification on whether this rule, and subsequent notice requirements, applies to authorizations other than air permit amendments. Specifically, TIP requested assurances that if a project satisfies the requirements for a permit by rule or standard permit, public notice would not apply in any way.

The commission notes that §39.402 applies only to air permit amendments. If facilities or modifications can meet the requirements of another authorization mechanism such as permit by rule, standard permit (except for concrete batch plants), or changes to qualified facilities, this rule, and subsequent public notice requirements do not apply.

Frederick commented that the exemptions from public notice that will result from this rule are inconsistent with an important federal minor new source review requirement in Title 40 Code of Federal Regulations (CFR), §51.160, and with the Texas state implementation plant (SIP) and the SIP approval standard in 40 CFR, §51.161. The commenter noted the only exception from public notice in the approved SIP was 30 TAC §116.10(a)(7) which allowed relocation or change of location of previously permitted facilities in certain circumstances. Frederick also commented that it appears the limitations on public notice and public participation opportunities authorized under HB 2518 are in conflict with the terms of EPA granting full delegation of the PSD program.

The commission has not revised the rule in response to this comment. This rule will be submitted to the EPA as a revision to the SIP in the near future. The delegation by EPA of the federal New Source Review Program, commonly referred to as PSD, applies only to major sources, or major modifications, of air contaminants. This adoption does not allow any major or significant increase in the amount of air contaminants to be emitted from a source or facility which must comply with PSD requirements without undergoing public notice. In addition, this rule is based on EPA's PSD NAAQS assessment for federal de minimis impacts reviews of criteria air pollutants and this adoption does not change the requirements for the technical review of a permit application, which includes a complete BACT and impacts review.

TCC and TxOGA requested that the commission consider removing notice requirements for all permit renewal applications. The commenters stated that notice should not be required when there will be no new air contaminants nor increased emissions as a part of a permit renewal and notice should be eliminated, at a minimum, for those facilities with good compliance history.

The commission has not revised the rule in response to this comment. Changes to public notice requirements for permit renewal applications are beyond the scope of this rulemaking. In addition, TCAA, §382.056(a) specifically requires public notice and opportunity for participation for permit renewals under TCAA, §382.055, Review and Renewal of Preconstruction Permit.

Change in Character of Emissions

Frederick disagreed with the proposed rule in that emissions thresholds are established on categories of air contaminants, particularly non-criteria pollutants. The commenter noted that HB 2518 did not include this exception and release of any new individual air contaminant should require public notice. Frederick noted that the 77th Legislature directed the TNRCC to adopt procedures and policies that are more protective of the public and democratic principles. Thus the commission should not broadly interpret HB 2518 requirements and instead should implement this legislation in a way that limits its scope and impact.

The commission has revised the rule in response to this comment. The requirement for public notice in all cases where there is a change in character of emissions was originally proposed as a part of §39.402(b), but has been moved to §39.402(a)(1) because it applies to all amendments, regardless of the amount of emission increases or type of facility. By changing the organization of the rule, the commission is emphasizing that public notice is required if an amendment includes emissions of any air contaminant not previously emitted at the permitted facility.

Brown objected to the requirement that a change in character of emissions requires public notice. The commenter stated that the "total increase in emissions" includes the possibility of public notice de minimis emissions of new air contaminants and that "HB 2518 contains no limitation on a change in character of emissions" as proposed in the commission's rule.

The commission has not revised the rule in response to this comment. House Bill 2518 amended TCAA, §382.056(h) to specifically require public notice when emissions "change in character." House Bill 2518 amended the TCAA to allow certain facilities to avoid public notice when emissions do not exceed public notice "de minimis" or "significant" levels and where emissions will not change in character. The converse of this is that if emissions change in character, public notice is required.

Agricultural Facilities and Public Notice Significance

Frederick objected to the proposed public notice insignificant threshold values as proposed and stated the proposed emissions thresholds for public notice did not include sufficient rationale or explain the relationship between air contaminant annual increases below federal major modification thresholds and values proposed for public notice by noting that the proposal did not address the "universe that is 'significant,' though not 'major.' "

The commission has not changed the rule in response to this comment. House Bill 2518 requires that "a finding that a total emissions increase is not significant must be made as provided under Section 382.05196 for a finding under that section." The public notice significance thresholds adopted for agricultural facilities are consistent with TCAA, §382.05196, Permits by Rule, and are based on the annual emission rates outlined in 30 TAC §106.4(a). All PBR must meet the general quantity limits of §106.4(a)(1) - (3), and have emission quantities less than the

most restrictive of 250 tpy for CO or NO_x; 25 tpy of any other air contaminant; or any applicable major source threshold. This adoption mirrors these PBR emission limits, which are not exclusively based on major source thresholds.

Facilities and Public Notice De Minimis

ExxonMobil recommended that the rule include the term "de minimis" to ensure clear and understandable regulatory language.

The commission has revised the rule language in response to this comment. To ensure clarity, §39.402(a)(2) and (3) has been revised to include the statutory terms "significant" and "de minimis" for public notice purposes.

Frederick objected to the proposed public notice de minimis threshold values as proposed because the proposed emissions thresholds for public notice did not include sufficient rationale for the relationship between air contaminant annual increases below federal major modification thresholds and de minimis values proposed for public notice.

The commission has not changed the rule in response to this comment. The SECTION DISCUSSION portion of this preamble has been further clarified for the public notice de minimis thresholds adopted by the commission. The public notice de minimis criteria in §39.402(a)(3) are based on an evaluation of state and federal de minimis and annual emission rates for criteria pollutants (CO, NO_x, VOC, SO_2, PM, and Pb) and are less than or equal to these federal or state definitions of "de minimis." The concept of public notice de minimis is intended to focus the attention of the public and the commission on emission increases that could have a potential for public interest where there may be questions regarding effects to public health and welfare.

Brown, ExxonMobil, TCC, TIP, and TxOGA commented that the values for public notice de minimis were too low, had little or no justification, and should be increased. ExxonMobil commented that the proposed public notice de minimis thresholds are overly conservative, resulting in public notices "with little resultant benefit to the environment." TCC and TxOGA stated that the proposed criteria will have little value in terms of significantly reducing the number of amendments that must go through public notice. The commenters all noted that the proposed levels are arbitrarily based on approximately 2% of a NAAQS with no explicit justification as to why this value should be used. TIP noted that the values differed between pollutants (1% - 2.5%) without a clear explanation. Brown commented that the rule proposal lacked justification, recited facts without logic, and failed to explain the significance of why the values presented would be of any concern whatsoever. Brown also noted confusion over which NAAQS had been used for the determination of the proposed values. Brown, TCC, TIP, and TxOGA recommended that the public notice de minimis values should be increased to the levels at which PSD and nonattainment significance is determined. Brown also suggested that these values be set at the federal PSD de minimis modeling and impacts review levels.

The commission has not changed the rule in response to these comments. The SECTION DISCUSSION portion of this preamble has been clarified in response to these comments. The concept of pubic notice de minimis is intended to focus the attention of the public and the commission on emission increases that could have a potential for public interest or questions on impacts to public health and welfare.

Brown, Frederick, and TIP commented that the public notice de minimis values should consider the location of the proposed or modified facilities. They suggested that, instead of a single standard throughout Texas, the public notice de minimis values should be different based on geographic location of the proposed facility, especially between attainment and nonattainment areas in the state. Frederick noted that in nonattainment areas, it would be likely that facility construction or modification would have higher public interest, and thus the trigger for public notice should be different for facilities in attainment areas. Brown and TIP suggested that facility proximity to the public and nearest off-site sensitive receptors should also be a consideration in determining public notice de minimis values.

The commission has not revised the rule in response to these comments. While the commission recognizes that it is important to ensure that any specific permit or permit amendment application complies with SIP strategies and does not cause or contribute to a condition of air pollution, each permit review includes a case-by-case determination of impacts and BACT to ensure protection of the public health and welfare. Specifically, although VOCs are ozone precursors, they are also individual compounds and constituents which require a toxicity and impacts evaluation, and have corresponding questions from the perspective of public interest. In addition, public notice requirements under current statute and regulations do not distinguish geographic location for determinations of public notice and HB 2518 did not direct or contemplate the commission to adopt rules for public notice de minimis using a geographic distinction. The commission also considered the complex technical review and implementation procedure, and potentially frequent rulemaking for unforeseen future changes concerning the criteria pollutants across the state that would be required if geographic location is included in this rule. The commission also recognizes that public interest is not limited solely based on location. Therefore, the commission is adopting this rule without consideration of location of a facility.

Clarification of Total Emission Increases

Brown commented that the determination of total emission increases is outside the scope of public notice requirements and should instead be addressed in 30 TAC Chapter 116.

The commission has not revised the rule or preamble in response to this comment. The commission is clarifying total emission increases as a part of this adoption because HB 2518 specifically includes this phrase and, for purposes of determining public notice applicability, it is necessary to provide information on the scope of implementation.

Frederick suggested that the rule include provisions paralleling concepts in §106.4(a)(4) and limit the total amount of emission increases at a site which may occur without public notice. The current proposal may allow different amendment applications to avoid public notice, but the proposal may also allow overall emissions at the site to increase above the levels of public notice de minimis or insignificant as defined in rule, thus circumventing the opportunity for public notice and participation.

The commission has not revised the rule in response to this comment. The purpose of Chapter 106 provisions are to ensure that at a certain point, emissions will be subject to permit review. Since all amendments are subject to the technical permit review requirements, and the public notice de minimis criteria are less than the general requirements of Chapter 106, there is no need for a site-wide emissions cap. In addition, HB 2518 and TCAA, §382.056 do not address site-wide emissions, but only "all facilities authorized under the amended permit."

TCC and TxOGA suggested clarification was needed when determining "total emission increases," specifically when referring to consideration of emission rates after the application of control technology.

The commission has revised the SECTION DISCUSSION preamble language to clarify and emphasize that total emission increases should be determined by evaluating emission increases, or reductions, after the application of controls, consistent with the commission's long-standing practice of emissions increase determinations for amendments. All amendment reviews require the use of BACT. The commission encourages additional control of air pollution beyond BACT where the applicant wishes to propose additional reductions by providing abatement, recycling, or other control beyond the level of BACT. The commission will allow applicants to take credit for these additional voluntary reductions when considering whether the amendment should be subject to public notice.

Brown commented that the description of emission increases as a result of construction of new facilities was confusing and may inappropriately lead to the conclusion that construction-related emissions should be included in the permit application as well as determination for public notice. Brown requested clarification on this point.

The commission has revised the SECTION DISCUSSION preamble language to reduce confusion caused by referring to "construction."

Brown requested clarification that the emission increases related to facility modifications are limited to increases in permitted allowables due to the change, rather than the entire value of the new allowable permit limit.

Only emission increases resulting from facility modification, and not the entire allowable emission limit, shall be considered for determination of public notice.

Brown expressed concerns over the incorporation of previous authorizations and requested clarification to ensure that the commission would only consider the emission increases which are in excess of the previous authorization.

When reviewing incorporation of previously authorized facilities, the commission will consider only emission increases in excess of the previous authorization, and not the entire allowable emission limit, for purposes of determining the total emission increases.

Brown expressed confusion over the situations when sampling results in a change in allowable emissions. Brown requested clarification regarding whether this circumstance referred to a situation when a facility needed authorization to conduct sampling or when sampling demonstrates that a facility emits more than the current authorized limits.

The commission included this criterion to cover the latter situation, where a facility has performed sampling and has determined that the actual emissions exceed the authorized allowables. The commission intends only to consider emission increases in excess of the previous emission limits, and not the entire allowable emission limit, for purposes of determining the total emission increases.

Brown, TCC, and TxOGA expressed concerns regarding the inclusion of maintenance, start-up, and shutdown emissions and requested clarification on when the associated emissions would be counted in the estimation of total emission increases. TIP requested that the commission clarify that emissions due to routine maintenance, start-up, and shutdown at new or modified facilities are considered as a part of total emission increases only if the emissions are "new." In addition, TIP asked the commission to verify that if a facility was modified, but the routine maintenance, start-up, and shutdown would remain unchanged, and were not previously included in the permit, they should not be counted as an emission increases. Brown also noted that the incorporation of maintenance, start-up, and shutdown emissions that exist, but are not currently listed in a permit, should not be considered for purposes of total emission increases. ExxonMobil noted that the netting process for determining total emission increases includes the commission's encouragement for facilities to include routine maintenance, start-up, and shutdown emissions in permits and is providing renewed emphasis to reduce these emissions where safe and technically feasible. Brown also objected to the current policy for incorporation of any maintenance, start-up, and shutdown emissions into permits and stated that before these emissions are included, the commission must address this issue in rulemaking under Chapter 116. ExxonMobil requested that the commission develop additional regulations to allow a permit applicant to develop a netting strategy that would provide emission reduction credits for these activities when reduction benefits can be demonstrated.

The commission has revised the SECTION DISCUSSION portion of this preamble to clarify that the emissions from routine maintenance, start-ups, and shutdowns should only be considered for purposes of determining public notice applicability and "total emission increases" when there are new emissions directly associated with new or modified facilities needing authorization under the permit amendment application. Actual emissions from routine maintenance, start-ups, and shutdowns for any other facilities covered by the permit which are not being modified as a part of the amendment action should not be considered for purposes of public notice applicability, as these emissions already exist and are not changing as a result of the amendment application. In addition, any other maintenance, start-up, or shutdown emissions for facilities not directly associated with the amendment application which the applicant requests to be incorporated into the permit will not be considered for purposes of total emission increases. Currently, the executive director is requesting certain routine maintenance, start-up, and shutdown emissions to be considered for controls and potential impacts during all new permit and permit amendment reviews. The commission is expected to propose rules in Chapter 116 in the near future to require routine maintenance, start-up, and shutdown emissions to be incorporated into all permit actions as appropriate.

Brown and TIP supported three specific categories of emissions identified as being outside the scope of the rule for determining public notice: changes in standardized emission factors; inclusion of previously existing routine maintenance, start-up, and shutdown emissions; and incorporation of previously authorized facilities.

The commission acknowledges the comments and has not changed the rule or justification.

TIP requested that the commission provide specific examples of determining "total emission increases" because the proposal justification was not clear.

The commission has revised the SECTION DISCUSSION portion of this preamble to address this comment. In addition, the commission is providing the following examples to demonstrate

how total emission increases are determined. These examples, and the list of parameters provided in this adoption, are not exclusive. The commission will continue to develop additional parameters and guidance as additional circumstances and questions arise.

Example A

An amendment application requests to: 1.) increase gas usage for an existing permitted gas-fired boiler, resulting in an additional 1.5 tpy VOC, 1.0 tpy NO_x, 2.0 tpy CO, 0.5 tpy PM, and 1.2 tpy SO_2; and 2.) replace three existing small fixed-roof gasoline tanks permitted for 5.0 tpy VOC with a single larger gasoline tank with a floating roof at 2.5 tpy VOC. Because the NO_x, CO, PM, and SO_2 increases are already permitted contaminants and the total increases are below the public notice de minimis thresholds, they would not trigger public notice. The tank replacement will continue to handle gasoline and the character of VOC would not change. The total increase in VOC emissions associated with this example would be the following: + 1.5 tpy (boiler) + 2.5 tpy (new tank) - 5.0 tpy (remove existing tanks) = -1.0 tpy VOC. Based on this information, public notice would not be required.

Example B

An amendment application requests to: 1.) construct a new storage tank and include associated maintenance emissions, resulting in an additional 8.5 tpy VOC for process emissions and 1.2 tpy for maintenance; 2.) incorporate an existing storage tank currently registered under a PBR, certified for 3.5 tpy VOC; 3.) add voluntary emission controls to an existing permitted storage tank, resulting in reduction of 12.5 tpy VOC; and 4.) quantify maintenance emissions from a permitted thermal oxidizer at 6.0 tpy VOC. Assuming all VOC compounds associated with this amendment are currently permitted and there is no change in character of emissions, the total increase in VOC emissions associated with this example would be the following: + 9.7 tpy (new tank) - 12.5 tpy (remove existing tanks) + 0.0 tpy (PBR tank and existing actual maintenance of thermal oxidizer) = -2.8 tpy VOC. Based on this information, public notice would not be required.

Example C

An amendment application requests to: 1.) increase production through a manufacturing line by physically changing several pieces of equipment, resulting in an additional 6.2 tpy PM for process emissions and 1.2 tpy for associated maintenance; and 2.) incorporate the maintenance emissions of the existing manufacturing line, resulting in 4.1 tpy PM. Assuming all PM compounds associated with this amendment are currently permitted and there is no change in character of emissions, the total increase in PM emissions associated with this example would be the following: + 7.4 tpy (new process and maintenance) + 0.0 tpy (existing maintenance) = +7.4 tpy PM. Based on this information, public notice is required.

Authority of Executive Director

Frederick supported the proposed §39.402(a)(3), renumbered as §39.402(a)(4) in this adoption, regarding discretionary authority of the executive director to require public notice in situations when total emission increases are less than the proposed public notice de minimis or significant thresholds.

The commission acknowledges the comment and support of the rule.

Brown commented that the factors proposed in §39.402(a)(4)(A) - (C) for use by the executive director in determining the need for public notice were supported by statute and are appropriate. However, Brown also noted that the §39.402(a)(4)(D) factor, "likelihood of public interest" is not appropriate as it is vague and arbitrary. Brown asked who would make this determination and how the commission would distinguish between the interest of the public in general and the interest of the public for a particular application.

The commission acknowledges Brown's comment and support of §39.403(a)(4)(A) - (C). The "likelihood of public interest" factor is not a new rule requirement and is currently codified in §39.403(b)(8)(C)(iv) as adopted by commission in September, 1999. The commission explained its opinion on the "likelihood of public interest" factor in the HB 801 adoption as follows: "The TCAA, §382.056(a) states 'the commission may require publication of additional notice' which is implemented by this rule. The commission believes that the general public should have the opportunity to comment on actions which are likely to affect ambient air quality, public health and welfare, or actions where it would be in the public interest to provide notice. This requirement addresses the concerns of the TCAA as noted in §382.0526(a) and 382.002. This rule establishes guidance for the foreseeable circumstances when notice would be required to ensure meaningful public participation. Particularly the factor of 'likelihood of public interest' covers situations in which the executive director has received inquiries on an application or has some other reason to believe that an application will generate significant public interest." The commission believes this continues to be a valuable criteria in providing the executive director with the necessary flexibility to require public notice when circumstances warrant.

STATUTORY AUTHORITY

The new section is adopted under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC. The new section is also adopted under THSC, TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; §382.020, which authorizes the commission to adopt rules to control the emissions of PM from plants which handle certain agricultural products; §382.051, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; §382.0518, which authorizes the commission to issue preconstruction permits; §382.056, which requires an applicant for a permit issued under §382.0518 to publish notice of intent to obtain a permit; and §382.05196, which authorizes the commission to adopt PBR for certain types of facilities that will not make a significant contribution of air contaminants to the atmosphere. The new section is also adopted under HB 2518, as passed by the 77th Legislature, 2001.

§39.402. Applicability to Air Quality Permit Amendments.

(a) Air quality permit amendment applications under §116.116(b) of this title (relating to Changes to Facilities) or amendment applications to flexible permits under §116.710(a)(2) and (3) of this title (relating to Applicability) must comply with this subchapter and Subchapter K of this chapter regarding notices when the amendment involves:

(1) a change in character of emissions or release of an air contaminant not previously authorized under the permit;

(2) a facility affected by TCAA, §382.020, where the total emissions increase from all facilities to be authorized under the

amended permit exceeds significant levels for public notice by being greater than any of the following levels:

(A) 250 tons per year (tpy) of carbon monoxide (CO) or nitrogen oxides (NO_x);

(B) 25 tpy of volatile organic compounds (VOC), sulfur dioxide (SO_2), particulate matter (PM), or any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen;

(C) a new major stationary source or major modification threshold as defined in §116.12 of this title (relating to Nonattainment Review Definitions); or

(D) a new major stationary source or major modification threshold, as defined in 40 Code of Federal Regulations (CFR), §52.21, under the new source review requirements of the FCAA, Part C (Prevention of Significant Deterioration); or

(3) a facility not affected by TCAA, §382.020, where the total emissions increase from all facilities to be authorized under the amended permit exceeds public notice de minimis levels by being greater than any of the following levels:

(A) 50 tpy of CO;

(B) ten tpy of SO_2;

(C) 0.6 tpy of lead; or

(D) five tpy of NO_x, VOC, PM, or any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen; or

(4) any amendment when the executive director determines that:

(A) there is a reasonable likelihood for emissions to impact a nearby sensitive receptor;

(B) there is a reasonable likelihood of high nuisance potential from the operation of the facilities;

(C) the application involves a facility or site for which the compliance history contains violations which are unresolved or constitute a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process; or

(D) there is a reasonable likelihood of significant public interest in a proposed activity.

(b) Except as provided in subsection (a) of this section, air quality permit amendment applications are not required to comply with this subchapter and Subchapter K of this chapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 24, 2001.

TRD-200106464
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Effective date: November 13, 2001
Proposal publication date: August 24, 2001
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CHAPTER 80. CONTESTED CASE HEARINGS

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts new §80.108, Executive Director Party Status in Permit Hearings and §80.118, Administrative Record. The commission also adopts amendments to §80.17, Burden of Proof; §80.21, Witness Fees; §80.109, Designation of Parties; §80.117, Order of Presentation; §80.127, Evidence; §80.131, Interlocutory Appeals and Certified Questions; §80.153, Issuance of Subpoena or Commission to Take Deposition; §80.251, Judge's Proposal for Decision; §80.252, Judge's Proposal for Decision; §80.257, Pleadings Following Proposal for Decision; and §80.261, Scheduling Commission Meetings. Sections 80.108, 80.109, 80.118, 80.127, 80.131, and 80.257 are adopted *with changes* to the proposed text as published in the August 24, 2001, issue of the *Texas Register* (26 TexReg 6244). Sections 80.17, 80.21, 80.117, 80.153, 80.251, 80.252, and 80.261 are adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Prior to the enactment of House Bill (HB) 2912, 77th Legislature, 2001, Texas Water Code (TWC), §5.228, provided that the executive director of the commission was required to be a party in all contested case hearings. As a result of public testimony received during its comprehensive review of the commission, the Sunset Advisory Commission recommended that the statute be changed to allow, rather than require, the executive director to participate in contested case permit hearings. The Sunset Advisory Commission also recommended that: 1) the role of the executive director be more clearly defined; 2) the executive director be expressly prohibited from rehabilitating non-agency witnesses in permit hearings; and 3) the commission adopt rules specifying the factors the executive director must take into account when considering whether to be a party in a permit hearing.

This recommendation was codified in HB 2912, the Sunset Bill for the commission. Under HB 2912, TWC, §5.228 (the "Act") was amended to provide that the executive director is required to be a party in a contested case hearing only in a matter where the executive director bears the burden of proof (e.g., an enforcement proceeding). For permit hearings, the executive director may be a party only for the purpose of providing information to complete the administrative record. The commission is required to specify, by rule, the factors the executive director must consider in determining, on a case-by-case basis, whether to participate in a hearing as a party. Factors the commission must consider in developing these rules include: 1) the technical, legal, and financial capacities of the parties; 2) whether the parties have previously participated in a hearing; 3) the complexity of the issues; and 4) the available resources of commission staff. The executive director is expressly prohibited from rehabilitating the testimony of non-agency witnesses or from assisting an applicant in meeting its burden of proof unless that applicant fits a category of permit applicants that under commission rule are eligible for such assistance. The amendments to TWC, §5.228 took effect September 1, 2001, and apply only to hearings in which the executive director is named as a party on or after that date.

This rulemaking is necessary to implement HB 2912 §1.20 and §18.09 as close as practicable to the effective date.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a).

Major environmental rule means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Because the specific intent of the adopted rulemaking is procedural in nature and establishes procedures for the executive director's participation as a party in contested case hearings on permitting matters, the rulemaking does not meet the definition of a major environmental rule.

In addition, even if the adopted rules are a major environmental rule, a regulatory impact assessment is not required because the rules do not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or propose to adopt a rule solely under the general powers of the agency. This adoption does not exceed a standard set by federal law. This adoption does not exceed an express requirement of state law because it is expressly authorized by the following state statutes: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice; and TWC, §5.228, as well as the other statutory authorities cited in the STATUTORY AUTHORITY section of this preamble. This adoption does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program because the rule is consistent with, and does not exceed, federal requirements, and is in accordance with TWC, §5.228, which expressly requires the commission to adopt rules specifying the factors the executive director must consider in determining whether to participate as a party in a contested case permit hearing. Further, TWC, §5.228, requires the commission to adopt rules that establish categories of permit applicants eligible to receive assistance from the executive director in meeting their burden of proof. This adoption does not adopt a rule solely under the general powers of the agency, but rather under specific state law (i.e., TWC, §5.228 and Texas Government Code, §2001.004). Finally, this rulemaking is not being adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

The commission received no comments related to the regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rules and performed a final analysis of whether Texas Government Code, Chapter 2007 is applicable. The commission's final analysis indicates that Texas Government Code, Chapter 2007 does not apply to the adopted rules. Nevertheless, the commission further evaluated the adopted rules and performed a final analysis of whether the adopted rules constitute a takings under Texas Government Code, Chapter 2007. The specific primary purpose of the adopted rules is to revise the commission rules to establish procedures for executive director party participation in contested case permit hearings as required by HB 2912, §1.20. The adoption relates to the factors the executive director must consider when deciding whether to participate as a party in a contested case permit hearing as well as to categories of permit applicants eligible to receive assistance in meeting their burden of proof from the executive director. The adopted rules will substantially advance these stated purposes by providing specific provisions on the aforementioned matters. Promulgation and enforcement of these rules will not affect private real property which is the subject of the rules because the adopted language relates to procedural matters relating to executive director party status rather than any substantive requirements.

The commission received no comments related to the takings impact assessment analysis.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the adopted rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adopted rules are not subject to the Texas Coastal Management Program.

HEARING AND COMMENTERS

A public hearing was held on September 18, 2001 at 10:00 a.m. in Room 2210 of TNRCC Building F, located at 12100 Park 35 Circle, Austin. Two individuals provided oral comments at the hearing. The following provided oral comments and/or written comments during the comment period: Sierra Club on behalf of the Alliance for a Clean Texas (ACT); Association of Electric Companies of Texas, Inc. (AECT); Guadalupe-Blanco River Authority (GBRA); Lone Star Chapter of the Sierra Club, Environmental Justice (Sierra Club); Texas Association of Business and Chambers of Commerce (TABCC); Texas Center for Policy Studies (TCPS); Texas Chemical Council (TCC); Baker Botts, L.L.P. on behalf of the Texas Industry Project (TIP); and Vinson & Elkins (V&E).

All the commenters suggested changes to the proposal as stated in the SECTION BY SECTION/RESPONSE TO COMMENTS section of the preamble; regarding the rulemaking proposal overall, TCC and TABCC made comments generally supporting the agency's approach on the rule proposal. While many of the commenters recommended changes to the proposed rules, no commenter expressly opposed this rulemaking. Sierra Club did state concern that the rules as proposed were not following the legislative intent of HB 2912.

SECTION BY SECTION/RESPONSE TO COMMENTS

General

ACT commented that the rules should provide that even when the executive director is not a party, he is subject to the same ex parte prohibitions in communicating with the commissioners as the named parties in the hearing. ACT further commented that such a rule will prevent parties from using the executive director as a way around ex parte provisions and ensure a fair decision.

The commission has made no change in response to this comment. The commission will continue to fully comply with all applicable laws related to ex parte prohibitions and in particular, Texas Government Code, §2001.061. The commission notes that Texas Government Code, §2001.061(c) provides that the commission may communicate ex parte with an agency employee who has not participated in a hearing for the purpose of using the special skills or knowledge of the agency and its

staff in evaluating the evidence in contested case proceedings. Texas Government Code, §2001.090(d) provides that the decisionmaker may use the special skills or knowledge of the state agency and its staff in evaluating the evidence. The commission responds that the Texas Government Code provisions apply to contested case hearings concerning permitting matters and allow certain communications between the commission and the executive director's staff. At this time, the commission declines to modify ex parte prohibitions beyond current law.

TCC expressed general agreement on the agency's approach on the rules. TCC commented that at least one of the primary goals of a contested case hearing is to develop the best possible permit that can be issued. TCC further commented that the legislation that these proposed rules implement does not change or effect that goal and that the executive director is a valuable, if not necessary, participant and must be provided the maximum flexibility under the rules in determining party status. TCC also stated that to the extent the draft permit is amended or modified in contested case proceedings, it would not be in the public's interest to exclude the executive director. Finally, TCC noted that these rules should be narrowed or expanded, as appropriate, as the agency gains more experience in the future.

The commission responds that the primary goal of a contested case hearing in a permitting matter is to allow informed decision-making on all relevant statutory and regulatory requirements so that a decision can be made on whether the permit should be issued, and if issued, the provisions protective of human health and the environment that should be included in the permit. The commission agrees that effective implementation of the Act requires that the executive director have a certain amount of flexibility in determining party status. The commission, however, also responds that the Act anticipated that interested parties have some degree of certainty relating to the cases in which the executive director will or will not participate. In addition, there are some cases where the administrative and technical review of the permit by agency staff prior to the contested case hearing may suffice and further elaboration by the staff is not necessary for informed decision-making by the commission. The commission responds that these rules and, in particular, new §80.108 strike the appropriate balance in that regard. The commission agrees that the executive director plays an important role in the preparation and evaluation of proposed permit provisions. Indeed, one of the factors that weighs in favor of executive director participation is the likelihood that changes to the draft permit could adversely affect human health or the environment. Further, even if the executive director did not participate as a party in a matter for which changed permit provisions are recommended after contested case hearing, the executive director may file briefs after issuance of the proposal for decision on legal or policy issues in response to commission or general counsel request. In response to TCC's request for future re-evaluation of these rules, the commission notes that as it develops further experience with the implementation of the amendments to TWC, §5.228 under HB 2912, it may further refine in future rulemakings the provision relating to Executive Director Party Status in Permit Hearings.

ACT commented that all parties to a contested case hearing should be able to conduct discovery regarding documents or other information held by the executive director as if he were a party, even when the executive director is not a party.

The commission has made no changes in response to this comment. New §80.118 lists all those documents which at a minimum will constitute the administrative record. The documents identified include documents created by the commission staff which reflect the administrative and technical review of the application. These documents will be available to the parties regardless of the party status of the executive director. Further, the deposition and testimony of agency staff may be obtained by subpoena where it is necessary in accordance with Texas Rule of Civil Procedure 205 and 30 TAC §80.151. Consequently, the rules as written provide for the availability of information held by the executive director. Establishing a process where the executive director acts as a party for some purposes and not for other purposes would introduce confusion and uncertainty into the contested case hearing.

ACT commented that the executive director may have an incentive to vigorously oppose requests for contested case hearings in order to avoid committing time and resources to a hearing. ACT suggested that the executive director should not respond to requests for hearing and that the commissioners can make their decision based on the information from the hearing requestors, OPIC, and the applicant's responses to the requests for hearing.

The commission has made no change in response to this comment. The executive director has a responsibility to ensure that the commission has the benefit of all relevant information when evaluating hearing requests, including whether a request for hearing meets commission rules and whether the law warrants the grant or denial of a hearing request. In addition, TWC, §5.228 governs executive director participation as a party and not functions performed outside of that context.

GBRA commented that the proposed rules appear to be contrary to the intent of the legislature found in Senate Bill (SB) 1, 75th Legislature, 1997, to plan and implement projects for a statewide water plan in Texas.

No change was made as a result of this comment. The commission does not find that the new rules are in any way contrary to SB 1. Specifically, with respect to the statewide water plan for Texas, TWC, §11.134 states that the commission shall not grant an application for a water right unless the application addresses a water supply need in a manner that is consistent with the statewide water plan and an approved regional water plan for the area in which the project will be located, unless the commission determines a waiver is warranted. These rules do not affect this requirement and are not contrary to the provisions of SB 1. Rather, these rules are procedural in nature and primarily relate to the executive director's participation in contested case hearings.

TABCC supported the rule package as a good faith attempt at following legislative intent and reassuring the protestant public, who have the impression that the executive director is biased in favor of the applicant.

The commission appreciates the comment in support of these rules.

Subchapter A, General Rules

Section 80.17, Burden of Proof, will reflect that the executive director must comply with adopted new §80.108, relating to the executive director's party status in permit hearings. This adopted change implements amended TWC, §5.228(e). The commission adopts this change as a cross-reference to new §80.108 to give parties notice regarding changes to the burden of proof consistent with TWC, §5.228.

Section 80.21, Witness Fees, will clarify that a commission employee who is compelled to testify as a witness or deponent

is only entitled to receive those expenses allowed by commission policy and applicable law. The commission anticipates that agency staff may be subpoenaed in more instances than in the past when the executive director participated in all contested case hearings. Thus, the commission seeks to clarify the provisions relating to witness fees paid to commission staff consistent with the provisions of Texas Government Code, §659.005 and agency policy.

Subchapter C, Hearing Procedures

New §80.108, Executive Director Party Status in Permit Hearings, will implement TWC, §5.228(b) - (e). This adopted new section directs when, and under what circumstances, the executive director may participate in contested case permit hearings. This adopted new section provides for mandatory abstention of the executive director in some permitting matters, mandatory participation in other permitting matters, and discretionary participation, based on an evaluation of certain criteria, in permitting matters not covered by the mandatory provisions.

New §80.108(a) will prohibit the executive director from participating in the following permit hearings: 1) an application concerning municipal solid waste where land use is the sole issue at hearing, including hearings held for determination of land use compatibility under Texas Health and Safety Code (THSC), §361.069; 2) an application for an air quality standard permit to authorize a concrete batch plant under THSC, §382.05195; 3) an application for an air quality permit to authorize emissions from facilities which solely emit the types of emissions that do not require health and welfare effects review as specified on the Toxicology and Risk Assessment (TARA) Emissions Screening List; 4) an application for a permit for a municipal solid waste transfer facility under 30 TAC §330.4; 5) an application for a permit for the processing of grit and grease trap waste under 30 TAC §330.4; 6) an application for a permit for composting facilities under 30 TAC §332.3; and 7) an application to authorize solely the irrigation of domestic or municipal wastewater effluent meeting the requirements for secondary treatment in 30 TAC Chapter 309. The hearings identified involve matters for which executive director party participation is not necessary for one or more of the following reasons: 1) commission technical staff have limited expertise on the issue in controversy (e.g., land use compatibility); 2) the permit conditions for the authorization sought have been developed after extensive technical evaluation and no other unique conditions are involved (e.g., concrete batch plant standard permits); or 3) the issues to be considered are of limited complexity or are ones for which the technical evaluation of staff reflected in the administrative record is not likely to require further elaboration.

With regard to municipal solid waste applications where land use is the sole issue at hearing set forth in §80.108(a)(1), the commission's staff has limited expertise on the issue of land use compatibility. Commission staff perform a review of applications to ensure that all the documentation required by TNRCC rules relating to land use is submitted. The rules require an applicant to submit information relating to zoning at the site and in the vicinity, character of surrounding land uses within one mile of the proposed facility, growth trends of nearest community, proximity to residences and other uses, and a description of all known wells within 500 feet of the proposed site. Affected parties in the vicinity of the proposed site are better able to present evidence concerning the impact of the site on the surrounding area. Therefore, it is not necessary for the executive director to participate as a party in a hearing where the only issue is land use compatibility.

Regarding new §80.108(a)(2), the commission issued a new air quality standard permit for concrete batch plants (CBPs) effective September 1, 2000, which is applicable to permanent, temporary, and specialty CBPs. The standard permit is based on a comprehensive evaluation of air quality emissions and potential impacts and statutory requirements of THSC Chapter 382, including changes made by SB 1298, 76th Legislature, 1999. Senate Bill 1298 amended the existing THSC, §382.058, by adding subsection (d), which prohibits the executive director from requiring applicants to submit air dispersion modeling for a CBP registration under THSC, §382.057 if modeling was relied upon in the adoption of an exemption from permitting, and provides that evidence regarding air dispersion modeling may not be submitted in a contested case hearing on that application. Air dispersion modeling is used to demonstrate whether the predicted maximum concentration of emissions from the plant will meet the state and federal ambient air quality standards. The commission relied, in part, on air dispersion modeling in adopting this standard permit, an alternate form of authorization.

The standard permit is designed to allow for registration of a typical CBP. However, it is not intended to provide an authorization mechanism for all possible plant configurations and production rates. Those facilities which cannot meet the standard permit conditions may apply for a case-by-case review air quality permit under 30 TAC §116.111. In addition to combining the requirements in the existing CBP permits by rule (30 TAC §§106.201 - 106.203), the commission added requirements to control dust, based on current best available control technology (BACT) as required by 30 TAC §116.602(c) and distance limitations or setbacks based on emission estimations, computer dispersion modeling, impacts analysis, and plant observations performed to verify the protectiveness of the standard permit. The commission has conducted extensive research which shows that the standard permit for CBPs is protective of the public health and welfare and that facilities which operate under the conditions specified will comply with commission rules and regulations.

Because the conditions under which a CBP can construct and operate are contained within the standard permit, this authorization does not provide for the addition of conditions which are unique to the applicant. Therefore, the commission is exempting the executive director from contested case permit hearings on this type of air authorization.

Regarding new §80.108(a)(3), the TARA Section Emissions Screening List includes types of emissions which do not require effects review. However, this list does not limit staff's discretion to evaluate these types of emissions on a case-by-case basis. The list is included in the agency publication Technical Guidance Package for Modeling and Effects Review Applicability, RG-324 (Revised, Draft October 2000) compiled, published, and distributed by the Air Permits Division and Toxicology and Risk Assessment Section.

A category or type of emissions becomes a candidate for this list after numerous individual emissions sources within the category have undergone full engineering and toxicological review, and have proven, over time, to have the following characteristics: 1) typical sources within the category have been shown not to pose a threat to human health and the environment; and 2) site-specific emissions scenarios are relatively consistent across sites. For these types of applications, the executive director

would not expect to obtain any additional information in a contested case hearing regarding the issue of effects that would result in changing the executive director's preliminary decision or recommended terms of the draft permit. The technical evaluation of staff reflected in the administrative record is not likely to require further explanation. Therefore, the commission is exempting the executive director from contested case hearings on air permits with solely these types of emissions.

Regarding new §80.108(a)(4) and (5), which concerns applications for municipal solid waste transfer station facilities and for grease and grit trap processing permits under 30 TAC §330.4, the commission has determined that the administrative and technical review of these permits by agency staff prior to contested case hearing will suffice and further elaboration by the staff is not necessary for informed decision making by the commission. Application requirements for these types of facilities are relatively straightforward and of limited complexity. Thus, given the available resources of commission staff and the limited complexity of the issues to be considered during the hearing, the commission finds that executive director participation in these matters is not necessary.

Regarding new §80.108(a)(6), under 30 TAC §332.3 operations that compost mixed municipal solid waste or operations that add any amount of mixed municipal solid waste as a feedstock in the composting process are required to obtain a permit. These facilities are not involved in the disposal of waste, instead the composting involves the controlled, biological decomposition of organic solid waste under aerobic conditions. Properly operated compost facilities will result in the reduction of waste and the production of reusable organic material. The commission does not believe that it is necessary for the executive director to participate in contested case hearings for these facilities because the administrative and technical review of these permits by agency staff prior to contested case hearing will suffice and further elaboration by the staff is not necessary for informed decision making by the commission.

Finally, with regard to new §80.108(a)(7), which pertains to applications to authorize solely the irrigation of domestic or municipal wastewater effluent meeting the requirements for secondary treatment in 30 TAC Chapter 309, the commission finds that as a general rule, the administrative and technical review of these permits by agency staff prior to contested case hearing will suffice and further elaboration by the staff is not necessary for informed decision making by the commission. The regulatory requirements detailing the technical analysis necessary to the issuance of an irrigation permit and setting effluent limitations (30 TAC Chapter 309, Subchapters A and C) were promulgated to address the potential for unpermitted discharges and to address potential contamination of waters in the state due to such discharges. This is reflected in the highly technical and detailed requirements of the rules, the nature of information requested in the application, and the extensive review by staff of this information. Thus, further input by the executive director during the course of a contested case hearing is not necessary to complete the administrative record.

New §80.108(b) will require the executive director to participate in the following matters: 1) applications concerning water rights; 2) applications for which the executive director has recommended denial of the permit; 3) involuntary amendments; and 4) applications for which the draft permit includes provisions opposed by the applicant. Executive director participation in the matters identified in 1 - 4 is required for one or more of the following reasons: 1) the executive director is essentially serving in the role of trustee of a natural resource (e.g., water rights); or 2) the executive director's position in the proceeding is contrary to that of the applicant and his participation is necessary to ensure that the commission has the benefit of all relevant information necessary to make a decision (e.g., application for which the executive director has recommended denial).

Concerning §80.108(b)(5), ACT commented that this provision, which was proposed to require the executive director to participate when the applicant requests a hearing, should be eliminated. ACT suggested that the rule should be modified to provide that the executive director consider under §80.108(c) whether the applicant has requested a hearing in order to challenge proposed draft permit provisions, which would weigh in favor of executive director participation.

The commission has deleted proposed §80.108(b)(5) as a factor triggering executive director mandatory participation because the circumstances described in subsection (b)(2) - (4) address the type of situations where the applicant would be in a position contrary to that of the executive director and requesting a hearing on a permitting matter.

Concerning §80.108(b), V&E asked why a direct referral mandates executive director participation. V&E stated that if full HB 801 cases are unlikely to occur again, then all future contested case hearings will be direct referrals and the executive director will participate as a party.

A direct referral does not mandate executive director participation and it was not the intent of the proposed rules to require it. The commission recognizes and agrees that simply because a matter is direct referred for hearing should not by itself trigger executive director party participation. The proposed rules were written to provide that where the applicant requested a hearing on a permitting matter, the executive director should participate in that matter. However, in view of this comment, and after reconsideration of §80.108(b), the commission has eliminated subsection (b)(5) as a factor triggering executive director participation since the circumstances described in subsection (b)(2) - (4) address the type of situations where the applicant would be requesting a hearing on a permitting matter due to disagreement with the executive director's technical evaluation of the proposed permit.

The commission developed the mandatory provisions of §80.108(a) and (b) with due consideration of the factors that the commission is required to take into account in developing rules implementing TWC, §5.228. More specifically, the mandatory provisions are based on an evaluation of whether the complexity of the issues to be presented at the hearing merited executive director participation as a party as well as the best use of available commission resources. The commission's goal is to ensure a complete administrative record in all cases while also focusing the use of agency resources on those matters for which it is likely that the executive director's technical review merits further elaboration during the hearing process.

If the mandatory provisions of this new section for participation or abstention do not apply, then §80.108(c) outlines the factors to be considered by the executive director in determining, on a case-by-case basis, whether to participate in a contested case permit hearing as a party. The executive director, as a preliminary matter, shall consider whether there is any issue that merits his participation, based on the existence of one or more of the following conditions: 1) one or more of the issues to be presented

in the hearing are new, unique, or complex, including consideration of whether an issue relates to more than one medium, and whether it is likely that construction of prior agency policy or practice will be involved; 2) it is likely that the decision on any of the issues to be presented in the hearing will have significant implications for other agency actions or policies; 3) it is likely that changes to proposed permit conditions could adversely affect human health or the environment; or 4) any issue to be considered is likely to affect federal program approval or authorization.

Based on an evaluation of these conditions, the executive director may elect to participate as a party or he may proceed with an analysis of additional party-specific factors. These factors include whether there is a significant disparity in the legal, financial, and technical capacities of the parties, whether there are limitations on the availability of commission staff and whether the draft permit contains any provision included by the executive director to address an applicant's compliance history.

Several commenters expressed concerns over the two-pronged analysis set forth in §80.108(c), which focuses first on issues and then, as a discretionary matter, on other party-specific factors. TCPS commented that the executive director should look at all the factors set forth in TWC, §5.228 at the same time in order to determine party status. AECT similarly stated that nothing in the statute would support the rule provision as written and allow the executive director to consider issues as a preliminary matter prior to consideration of the factors in the Act. ACT, GBRA, and AECT also stated that the factors in TWC, §5.228 are not discretionary and the executive director must consider all the factors in each case.

The commission has made no changes in response to this comment. Section 80.108(c), as structured in the proposal, fully satisfies TWC, §5.228. The statute requires the commission by rule to specify factors the executive director must consider in determining whether to participate as a party in a contested case permit hearing. The statute goes on to state that the commission, and not the executive director, must consider certain enumerated factors in developing the rules. The commission has fully considered each of the statutory factors in TWC, §5.228 in developing these rules and has developed a workable framework bearing each of the factors in mind. The commission has determined that the two-pronged approach to permitting cases not covered by the mandatory provisions best satisfies legislative intent by focusing first on the importance of the issues in a hearing and only thereafter, as necessary, on who the parties to that hearing may be. This approach focuses the available resources of commission staff on those matters involving issues that merit continuing input by staff beyond the input provided during administrative and technical review. It also ensures that the commission, on matters of particular significance to the agency, have available all relevant information including any and all information prepared or presented by commission staff during the contested case hearing.

ACT and TCPS both commented that the rule language in §80.108(c) should be modified to include a provision whereby the executive director documents the basis for his decision to participate in a contested case hearing in a memorandum, which would be provided to the parties, the hearings examiner, and the commissioners. ACT further stated that the memo should clearly explain how the factors were evaluated and balanced. To the contrary, TCC commented that a documentation process is unnecessary and would require an unjustified allocation of agency resources. TCC further stated that the executive director's notice letter can provide a brief justification instead.

The commission agrees in part with this comment and has made certain revisions to the rule. New subsection (k) now provides that the executive director will record his decision on a party status as well as the grounds for that decision on a case-by-case basis. In addition, new subsection (l) requires that the executive director compile the required records and provide the information to the commission in an annual report. The recordation and reporting requirements will ensure appropriate commission oversight of the executive director's party status decisions. Since the executive director's decision is not appealable to the commission or SOAH, the rule does not require that the records be filed in each contested case proceeding.

Concerning §80.108(c), V&E commented that the legislation was intended to even the playing field between applicants and protestants and questioned whether executive director participation where disparity amongst the parties favors participation is contrary to legislative intent.

The commission has made no change in response to this comment. The commission responds that the rule requires that an issue meriting executive director participation be found first before party-specific factors may even be reached in the §80.108(c) party participation analysis. The purpose of providing the preliminary issues analysis by the executive director was to eliminate those cases with routine issues not likely to impact broader agency policy or legal interpretation despite who the parties to the proceeding may be. The commission notes that TWC, §5.228 requires the commission to consider the technical, financial, and legal capacities of the parties in developing these rules. In considering the statutory factors, the commission determined that disparity in capacities is the relevant inquiry. Disparity among the parties' technical, financial, and legal capacities is included in these rules as one factor favoring executive director's participation because it is in those situations where the executive director's participation may even the playing field and ensure that the commission has a complete administrative record on which to base its permitting decisions. The result in all cases should be a complete and accurate record.

AECT commented that it was inappropriate to provide criteria in §80.108(c) for the executive director that "in his discretion" he may or may not consider.

AECT appears to interpret §80.108(c) to allow the executive director to ignore the factors set forth in the rule and develop completely new factors when determining party participation on a case-by-case basis. The commission did not intend to allow the executive director to look outside the criteria set forth in the rule in any permitting case nor did the commission envision that the executive director could develop alternative criteria for considering certain permitting cases. The use of the word "shall" in §80.108(c) is intended to require the executive director to consider at least the issues prong of the two-pronged analysis in permitting cases that are not covered by the mandatory provisions. The commission has modified the rule text to delete the phrase "in his discretion" to clarify that the factors in subsection (c) apply to all permitting cases except those set forth in subsections (a) and (b).

V&E stated that the list in §80.108(c)(1) looks like it give the executive director the option of joining every case or no case.

The commission acknowledges that this subsection does give the executive director a certain amount of flexibility in determining party status for those matters that do not fit within the mandatory participation or abstention provisions. Such flexibility is necessary given that this is a procedural rule that applies to all types of permitting matters and varying situations, not all of which can be precisely anticipated. However, the subsection, consistent with HB 2912, also places certain parameters on the executive director's exercise of discretion. The executive director is required to consider whether any issues to be presented in the hearing merit participation and the factors to be considered are specifically listed in the rule. If the executive director proceeds with a consideration of party-specific factors, the factors to be considered are also prescribed by rule. Therefore, no changes have been made in response to this comment.

Concerning §80.108(c)(1), ACT commented that all of the issues to be evaluated are too broad and should be narrowed. For example, ACT stated that consideration should be limited to an issue that would, "affect adversely" the approval or authorization by a federal agency of a state program. ACT suggested combining the issues analysis into an alternative more pragmatic approach.

The commission has made no changes in response to this comment. The commission acknowledges that the issues to be evaluated are broadly defined. It is important to recognize, however, that the purpose of this rulemaking is to provide guidance, but not unduly constrain the executive director's decision-making regarding party status. These rules are intended to apply to varying types of permitting matters involving a wide variety of situations. The rule does limit the executive director's decision-making in those cases for which mandatory participation or abstention is prescribed, but for the remaining cases for which the commission is not setting out mandatory participation or abstention, there is a need to allow the executive director some degree of flexibility to exercise judgment, within certain parameters, about the cases which merit participation as a party. The commission disagrees that, under subsection (c)(1)(D), consideration should be limited to an issue that would affect adversely the approval of a federal program. There may be circumstances where an issue merits executive director party participation because it may affect federal program approval in some way, but resolution of that issue does not necessarily implicate federal program disapproval.

Concerning §80.108(c)(1), ACT commented that the executive director's participation should, by rule, be limited to those issues which merit his participation.

The commission has made no changes in response to this comment. Establishing a hearing process where the executive director participates as a party for some purposes, but not for others would introduce unnecessary confusion and uncertainty in the hearing process. If the executive director is to participate as a party in a contested case, then he should function as a party subject to the obligations and privileges of a party. To do otherwise would result in a potentially unworkable process whereby depending on the issue the executive director would have differing rights and obligations. This would undermine certainty in the process and complicate administration of the hearing. In addition, certain issues often have a relationship to other equally pertinent issues, and if the executive director's participation is needed for a particular issue, it may also be needed in the context of other issues in the proceeding. The commission recognizes that these rules do allow, in very limited circumstances, post-hearing briefing by the executive director in matters where he has not participated as a party. Thus, there may be circumstances where the executive director is allowed a role in the proceedings more limited than that of a party. However, such circumstances would arise in only a narrow set of proceedings and unlike the suggested change, would not affect or complicate the development of the factual record.

ACT commented that §80.108(c)(2)(A)(ii) should not provide for review of financial capacity only if requested. ACT stated that under HB 2912 a review of the financial capacities of the parties is a mandatory and not an optional consideration. In addition, TCPS commented that it is not clear in §80.108(c)(2)(A)(ii) who requests executive director review of financial capacity.

The commission modified §80.108(c)(2)(A)(ii) to provide for the executive director's review of financial capacity in all cases where §80.108(c)(2) is reached. Further, the rule now provides that the executive director may review financial documentation or evidence of financial disparity if offered by any party. The commission understands the concerns of individuals who seek equity in the financial review process, but sees no viable alternative to the amended language as the statute does not provide a mechanism for compelling an entity to produce financial records prior to discovery if that party does not voluntarily wish to do so. Thus, only a party seeking review of its own financial records can provide documentation or evidence to be considered by the executive director in his review of financial capacity. The commission further responds that the statute requires the commission, and not the executive director, to consider the financial capacities of the parties as one of several factors in developing the rules. The commission has considered financial capacity and included it as a matter the executive director may consider in determining whether to participate as a party in a contested case permitting matter and finds that the regulatory approach adopted satisfies TWC, §5.228.

Concerning §80.108(c)(2)(A)(ii), ACT suggested adding consideration of whether any of the parties is a "low income" person to the financial disparity analysis.

The commission has made no change in response to this comment. The rule allows the executive director to consider whether there is a significant disparity in the experiences and resources of all types of parties. If one of the parties is at a financial disadvantage, the executive director can consider that as a factor. Whether or not a significant disparity exists among the parties can be determined without regard to a defined category applicable to a particular person or entity.

Concerning §80.108(c)(2)(A)(ii)(II), GBRA stated that this provision raises questions concerning unequal application of law regarding non-profit organizations. GBRA commented that the rules usurp the authority of the legislature and the governor to make state policy as found in SB 1. Additionally, GBRA commented that the rules will create an increased workload which will lead to delays, because the rules will encourage an increase in new permit applications. ACT commented that a definition of "non-profit entity" needed to be added to the rules and suggested a definition.

The proposed rules direct the executive director to consider whether there is a significant disparity in the experiences and resources of the parties. One factor which the executive director may consider in determining disparity is whether a party is a non-profit entity. However, the executive director is not required to participate in any case where a non-profit is a party. For water

rights cases, these factors will not come into play, because the commission has determined that the executive director shall be a party in all water rights cases. In addition, the rules do not mandate that the executive director assist an applicant in meeting its burden of proof in any case, but rather allow such assistance only after §80.108(e) has been satisfied.

The commission does not agree that the proposed rules usurp the authority of the legislature and the governor to make state policy. Specifically, the proposed rules are not contrary to SB 1. The statute (codified in relevant part in TWC, §11.134) states that the commission may not issue a water right for municipal purposes in a region that does not have an approved water plan unless the commission determines that conditions warrant a waiver. The proposed rules relating to the executive director's party status do not affect this requirement and are not contrary to the statute.

The commission disagrees that the new rules will generate an additional workload that will result in additional delays. Overall, the rules provide for more limited executive director participation in contested case hearings. With respect to water rights matters, the rules continue the existing practice of the executive director participation in contested case hearings.

The commission agrees with the commenters that the term "non-profit entity" needs to be defined. The commission has added §80.108(j)(3) to provide that a non-profit entity shall mean those entities which are defined in 26 United States Code, §501(c)(3) and (4). The commission recognizes that this definition of non-profit entity is widely used.

Concerning §80.108(c)(2)(A)(ii)(III), ACT commented that many of the companies that would meet the definition of small business have sufficient resources to participate effectively in a contested case hearing. Further, ACT stated that the executive director should focus on "micro-businesses" (20 or less employees) instead of small businesses. TCPS also commented that the small business review should be limited to micro-businesses.

The commission has made no change in response to this comment. The commission notes that whether an entity is a small business is considered in the context of determining the financial capacity of the parties. The rule does not prohibit consideration of any other information relevant to financial capacity. Further, the consideration of financial capacity is significant only with respect to whether there is a significant disparity in the experience and resources of the parties. Significant disparity can be determined regardless of the defined category applicable to a particular entity. Further, the commission notes that the use of the small business category in determining financial capacity is consistent with other legislative enactments that recognize that small businesses may require special considerations. (See, for example, THSC, §382.056(a) which allows for alternative notice procedures for small businesses and TWC, §5.1175, which allows a small business to pay a penalty in periodic installments.)

Concerning §80.108(c)(2)(C), ACT and TCPS both commented that the executive director's need to introduce compliance history information should not be a factor favoring executive director party participation. ACT further stated that because of the new compliance history provisions in HB 2912, compliance history will be an issue in almost all permitting matters. ACT also commented that compliance history information could be available as a certified agency record for introduction by any party.

The commission has modified §80.108(c)(2) in response to these comments. The commission has modified the rule to provide that a factor weighing in support of executive director participation may be whether the draft permit contains any provision that has been included by the executive director to address an applicant's compliance history. The commission has determined that executive director party participation may be necessary to maintain the integrity of a draft permit that contains unique provisions which have been included based on an applicant's compliance history.

New §80.108(d) states that when the executive director participates as a party under subsections (b) or (c), he shall do so solely for the purpose of providing information to complete the administrative record.

Concerning §80.108(d), TABCC and TCC commented that language needs to be added to the rule, or, TCC noted, in guidance, to clarify that "information to complete administrative record" should include evidence or testimony presented by the executive director and should be interpreted broadly to avoid confusion and delay.

The commission has not made changes in response to these comments. The rules as written provide sufficient guidance on what constitutes the administrative record to allow the commission to appropriately interpret their provisions. In addition, §80.127(h) has been clarified to provide that testimony or evidence given by agency staff concerning the administrative record shall not constitute assisting an applicant with its burden of proof.

New §80.108(e) will clarify that the executive director may assist the applicant in meeting its burden of proof only if the applicant is eligible for such help because it meets certain criteria. Those criteria are: 1) the applicant is a qualifying local governmental entity as defined in commission rule; or 2) the applicant is a non-profit entity as defined in commission rule; and 3) there is a significant public need for the permit to avoid adverse impact to human health or the environment.

AECT commented that §80.108(e) appears to limit the executive director's assistance to an applicant to situations involving discharge permits from publicly-owned treatment works where a significant environmental problem exists. AECT suggested that the factors in the statute should be considered in determining whether the executive director will assist an applicant with its burden of proof. V&E commented that the "imminent adverse impact" threshold seems too high if the rule was intended to allow the executive director to help small utilities amend their wastewater discharge permits.

The provision allowing the executive director to assist an applicant in meeting its burden of proof does provide for this specialized type of assistance in very limited circumstances. This is consistent with the statutory requirement that the commission by rule establish categories of permit applicants eligible to receive such assistance. The commission disagrees, however, that only the type of applicant described by AECT would fit into the defined category. While the commission has written the rule in such a way as to consider the capacities of the parties, TWC, §5.228 mandates that the statutory factors including technical, legal, and financial capacity be considered in developing the rules related to executive director party participation to assist in completing the administrative record and not in determining the categories of applicants eligible to receive assistance in meeting their burden of proof. The commission intends to interpret the burden of proof provisions narrowly in order to satisfy legislative intent and limit situations where the executive director assists the

applicant in meeting the burden of proof to the circumstances set forth in §80.108(e). Notwithstanding all of the these considerations, the commission acknowledges that requiring that a significant public need for the permitting action to avoid imminent adverse impact on human health or the environment may set too high a bar on the type of situations for which an applicant might be eligible to receive assistance. Therefore, the commission has modified the rule language to delete the reference to "imminent" to avoid unduly limiting the application of rule to what might be considered an emergency.

TCC commented that the commission should clarify that §80.108(e) relating to burden of proof applies to situations where the executive director is participating as a party and not to situations where agency staff are available to be called by another party as expert witnesses to provide technical information through testimony in a contested case permit hearing.

The commission has modified §80.108(e) to clarify the intent of the commission and limit the burden of proof section to situations where the executive director is participating as a party and not to include situations where an agency witness is testifying at hearing upon the subpoena of a party other than the executive director.

Concerning §80.108(e), V&E asked how a qualifying local government goes about demonstrating that it lacks the technical, legal and financial resources to go forward and who at the TNRCC decides that the local government has made that showing. V&E also asked why a non-profit should apply for a permit and automatically get help.

The commission has made no changes in response to this comment. The rule does not prescribe any procedures for a qualifying local government to demonstrate lack of technical, legal, or financial capacity. It is the intent of these rules that qualifying local governmental entities be allowed a flexible approach to demonstrate that they meet the relevant criteria. Ultimately, the executive director decides that a local government has made the appropriate showing in this regard. The commission disagrees that a non-profit entity automatically receives assistance under these rules. The rules provide that the executive director may not provide an applicant assistance with meeting its burden of proof unless it fits into prescribed categories that include a non-profit entity. To be eligible for assistance, the applicant must fall within a prescribed category and there must also be a finding that there is a significant public need for the permitting action to avoid adverse impact to human health or the environment. Further, the satisfaction of those conditions makes an applicant eligible for assistance but does not require the executive director to provide such assistance.

Concerning §80.108(e), GBRA expressed concern that the commission would represent non-profits in water rights hearings.

The commission has made no changes in response to this comment. The executive director may, in his discretion, assist non-profit entities in meeting their burden of proof only if there is a significant public need for the permitting action to avoid adverse impact to human health and the environment.

Concerning §80.108(e), GBRA asked if the executive director would be required to represent the San Marcos River Foundation in water rights permit application No. 5724, even though the permit is not part of the region L water plan approved by the Texas Water Development Board.

The new rule states that the executive director may assist an applicant in meeting its burden of proof if the applicant is a qualifying local government entity or a non-profit entity, and there is a significant public need for the permitting action to avoid adverse impact to human health or the environment. With regard to specific applications, the executive director, as part of its technical review, must first determine whether the application meets the elements of TWC, §11.134, then make a determination of whether to assist an applicant under §80.108(e). The executive director is not required to provide assistance even where the conditions in §80.108(e) are satisfied.

Concerning §80.108(e), GBRA commented that the rules raise issues of unequal application of the law, and asked what justification the commission has for affording non-profit organizations special status.

The rules state that the executive director "may" assist a non-profit organization in meeting its burden of proof, provided that there is a significant public need for the permitting action to avoid adverse impact to human health or the environment. Non-profit organizations may lack the technical, legal, and financial resources of other organizations. In those cases, the executive director would have the option of assisting the organization; however, the executive director would not be required to assist all non-profit organizations.

Concerning §80.108(e), GBRA commented that giving the executive director discretion in deciding which non-profits to assist usurps the authority of the legislature and the governor to determine state policy.

The commission does not agree that the proposed rules usurp the authority of the legislature and the governor to make state policy. Specifically, the proposed rules are not contrary to SB 1. The statute (codified in relevant part in TWC, §11.134) states that the commission may not issue a water right for municipal purposes in a region that does not have an approved water plan unless the commission determines that conditions warrant a waiver. The rules relating to the executive director's party status do not affect this requirement and are not contrary to the statute. The rules are consistent with the requirement under TWC, §5.228(e) for the commission to designate categories of permit applicants eligible to receive assistance.

Concerning §80.108(e), GBRA commented that the additional workload generated could be considerable and result in additional delays.

The commission disagrees that the new rules will generate an additional workload that will result in additional delays. Overall, the rules limit executive director participation in hearings. With respect to water rights matters, the rules continue the existing practice of the executive director party participation in contested case permit hearings. If the executive director makes a determination to assist an applicant in meeting its burden of proof, the additional workload is not expected to be significant.

New §80.108(f) will provide that the executive director may assist an applicant in meeting its burden of proof once subsection (e) has been satisfied, notwithstanding subsections (a) - (d), which set forth the matters in which the executive director shall and shall not participate as well as the factors to be considered.

A number of commenters had concerns regarding the language of §80.108(f). AECT stated that §80.108(f) appears to contradict sections §80.108(d) - (e). TABCC supported the language

of the rule and believes that the executive director must continue to exercise significant flexibility under these rules so that he can determine whether and to what extent to participate as a party in a contested case hearing. TCC strongly agreed with §80.108(f) because it is crucial to provide the executive director with maximum flexibility to determine whether and to what extent to participate as a party in a contested case hearing. V&E stated that §80.108(f) appears to contradict subsection (e). ACT commented that §80.108(f) should be eliminated from the proposed rule because the provision could circumvent the statutory language and intent of HB 2912. Alternatively, ACT recommended that the provision be modified to tie it to the burden of proof section. Sierra Club commented that the "notwithstanding" language in §80.108(f) is problematic and alarming and does not follow legislative intent. Thus, the Sierra Club recommended that the subsection be deleted. TCPS commented that §80.108(f) would have the effect of allowing the executive director to participate in all hearings and, therefore, should be deleted.

The commission recognizes that the proposed rule as written may be subject to more than one interpretation. Therefore, the rule has been modified to more clearly reflect that the executive director may assist an eligible applicant with its burden of proof without going through the analysis required by §80.108(a) - (c). In order to be eligible to receive such assistance, an applicant must satisfy §80.108(e).

New §80.108(g) will require the executive director to notify all parties of his intention to participate in a contested case permit hearing as a party as soon as practicable, but no later than one week after the end of the preliminary hearing.

Concerning §80.108(g), ACT commented that the executive director should make his decision to participate before the matter is referred for hearing because ACT argued that there is plenty of information available at that point. Further, if the case is referred directly to hearing, ACT commented that the executive director should make his decision before the preliminary hearing.

Section 80.108(g) does not prohibit the executive director from notifying the parties prior to or at the preliminary hearing of his intention to participate as a party. It is anticipated that in some situations the executive director will be able to do so. The executive director needs to know the issues that will be the subject of the contested case hearing to apply the factors in §80.108(c). Without knowing what the issues are, the executive director cannot comply with subsection (c). The time period before the preliminary hearing affords parties the opportunity to narrow the issues and, if that is done, the executive director would have a different set of issues to evaluate under the analysis in subsection (c). Although some of the parties will be known prior to the preliminary hearing, there is always the possibility that other persons can be admitted as parties by the administrative law judge (ALJ) at that time in accordance with 30 TAC §55.27(f) or §55.211(e). If new parties are admitted, the executive director needs the time to conduct the analysis in §80.108(c), if needed, particularly the analysis in subsection (c)(2) regarding the technical, legal, and financial capacity of the parties to make a final decision as to party participation. While in direct referral cases and in those matters subject to the HB 801 process for which the commission has specified the issues to be considered by the ALJ, the issues are known prior to the preliminary hearing, additional parties may be named at the preliminary hearing. Therefore, the executive director needs the opportunity to timely collect and evaluate the information necessary to conduct such analysis. The commission believes that one week is a reasonable maximum amount of time to conduct the analysis and notify the parties of its decision on party participation.

Concerning 80.108(g), AECT stated that it is inappropriate for the executive director to have the option to wait until one week after a preliminary hearing before deciding to participate, and that it is more appropriate for the executive director to make his intention known not later than one week prior to the first preliminary hearing. TCPS commented that the executive director should make his decision on participation before the preliminary hearing. TABCC commented that it would be more efficient for the executive director to provide notice about participation as a party at or before the preliminary hearing and that the current subsection appears to be backsliding from HB 801 which directed the agency to expedite the contested case process. TCC is concerned that delaying the executive director's announcement could cause a hardship to the other parties and the ALJ and could present significant delay in time, and wants the executive director to designate party participation at or before the preliminary hearing.

The commission disagrees that the only appropriate time period for the executive director to make his decision as to party participation is one week prior to the preliminary hearing or the day of the preliminary hearing. Although some of the parties will be known prior to the preliminary hearing, there is always the possibility that other persons can be admitted as parties by the ALJ at that time. If new parties are admitted, the executive director needs the time to conduct the analysis in §80.108(c) to make a final decision as to party participation. Therefore, the executive director needs the opportunity to timely collect and evaluate the information necessary to conduct such analysis. The commission finds that one week is a reasonable maximum amount of time to conduct the analysis and notify the parties. Section 80.108(g) does not prohibit the executive director from notifying the parties prior to or at the preliminary hearing. Given these considerations, the commission finds that a one week time period is appropriate and is not contrary to the mandates set forth in HB 801. If there is any hardship caused by the week's delay, as in conducting discovery, the executive director may be in an equal or more difficult position in meeting the schedule for the hearing because of that delay. The commission agrees that clarifying the rule to notify SOAH and providing the option of notification on the record at the preliminary hearing are appropriate changes and has modified the rule accordingly.

Concerning §80.108(g), V&E stated that letting the executive director decide about party participation one week after the preliminary hearing is too late for applicants because of the applicant's need to prefile testimony of any executive director staff witnesses that they may call. V&E additionally commented that without the ability to prefile agency witness testimony, it will be a nightmare trying to pull testimony out of them and will also eat up all the applicant's hearing time.

Applicants are responsible for meeting their burden of proof and presenting any evidence necessary to support the application. This includes anticipating the availability of witnesses and participants to the proceedings and conducting any discovery necessary. While the commission recognizes that the potential lack of certainty regarding executive director party status until after the preliminary hearing may impose certain challenges for parties in managing discovery and hearing schedules, the commission has determined that in order to comply with the analysis required by §80.108(c), the executive director must be given the flexibility to make his decision after the preliminary hearing if necessary.

New §80.108(h) provides that the executive director's decisions on party participation and on whether an applicant is eligible to receive assistance are not subject to review by either the commission or SOAH.

Concerning §80.108(h), TIP, AECT, ACT and TCPS commented that the executive director's decision to participate should be subject to review by the commissioners. Further, ACT and TIP stated that the review should be available at the request of a party to the hearing. ACT commented that such a review will ensure consistency, objectivity, and fairness and reduce the opportunity for arbitrary decision-making. ACT also suggested the procedures for how this review should be done. TCC commented to the contrary that the commission should not be allowed to review the executive director's decision because to do so would introduce significant delay in the process. TCC added that the statute specifically addresses this oversight issue by requiring the commission to adopt rules regarding executive director party participation and does not provide any appeals process.

The commission made no change to the rule as a result of this comment. This interlocutory process cause delay in the hearings process. The commission has specifically enumerated what information should be considered by the executive director in making the party participation decision in those matters not subject to the mandatory provision. While consistency and fairness are goals, the determination is a case by case decision and calls for discretion based on individual circumstances. The commission responds that §80.108 offers adequate and appropriate guidance to the executive director on when to participate as a party and commission review of the executive director's decision to participate or not is unnecessary and may cause delay in the hearings process. Further, the statute directs the commission to adopt rules for executive director participation but does not require a commission decision on whether the executive director should be a party in a particular case.

Concerning §80.108(h), V&Es questions whether the district court will exercise the same restraint as the commission in not reviewing executive director party status determinations.

Texas Water Code, §5.228(f), expressly provides that the fact that the executive director is not named as a party is not grounds for appealing a commission decisions. Where the executive director has elected to participate, judicial remedies may arguably not be available. If they are, nothing in these rules affects the availability of those remedies.

Section 80.109(a), Designation of Parties, will provide that under certain circumstances, the executive director may be added as a party to a permit hearing after the date of the preliminary hearing, without the otherwise required finding of good cause and extenuating circumstances.

Concerning §80.109(a), TCC, V&E, and AECT commented that the executive director should not be admitted (without showing good cause) after parties are designated.

The commission made no change to the rule as a result of these comments. The rule amendment is intended only to allow the addition of the executive director as a party within one week after the conclusion of the preliminary hearing as provided for in §80.108(g). If new parties are admitted at the preliminary hearing, the executive director needs the time to conduct the analysis in §80.108(c) to make a final decision as to party participation. Therefore, the executive director needs the opportunity to timely collect and evaluate the information necessary to conduct such analysis. The commission concludes that the one week period provided for in §80.108(g) is a reasonable maximum amount of time to conduct the analysis and notify the parties. The executive director is not prohibited from notifying the parties prior to or at the preliminary hearing of his decision to participate as a party. The requirements to show that good cause and extenuating circumstances exist for late intervention and that the hearing in progress will not be unreasonably delayed are applicable to the executive director if he seeks party status after the one week period has passed.

Section 80.109(b) will provide that the executive director is a required party in commission proceedings concerning matters in which the executive director bears the burden of proof. The executive director will also be named as a party to commission proceedings in matters concerning TWC, §§11.036, 11.041, and 12.013; TWC, Chapters 13, 35, 36, and 49 - 66; Texas Local Government Code, Chapters 375 and 395; matters arising under Texas Government Code, Chapter 2260 and 30 TAC Chapter 11, Subchapter D; and matters under TWC, Chapter 26, Subchapter I, and 30 TAC Chapter 334, Subchapters H and L. The executive director may also be a party in contested case hearings concerning permitting matters if he participates as a party in accordance with the provisions of §80.108. Adopted §80.109(b)(5) (formerly §80.109(b)(3)) will correct cross-references to rules relating to affected persons. The amended section will be renumbered to accommodate the changes made in the rule.

Section 80.109(b)(1)(A), regarding proceedings under TWC Chapters 11 and 12 relates to the state's obligation to serve as a trustee of an important natural resource, state water. Therefore, it is appropriate for the executive director to participate in proceedings concerning the provision of state water or the rates charged for the purchase of state water.

In proceedings under TWC, Chapter 13, the executive director is statutorily required to fulfill a particular role that necessitates the executive director's active party participation in hearings. Section 13.011 provides that the executive director's duties include "preparation and presentation of evidence before the commission or its appointed examiner in proceedings" and "protection and representation of the public interest, together with the public interest advocate, before the commission." In addition, in rate cases in particular, intervening parties do not generally have the technical, legal, or financial capacity to ensure that a thorough record addressing all relevant issues is developed.

For district matters under TWC, Chapters 35, 36, and 49 - 66 and Texas Local Government Code, Chapters 375 and 395, the statutes at issue implement provisions of the Texas Constitution specifically related to the conservation and development of all natural resources. In order to assist the commission in fulfilling this purpose, it is appropriate for the executive director to be a party in district proceedings and use the special expertise of commission staff with respect to the issues involved. Furthermore, for standby fees and impact fees, the executive director's participation assists the commission in ensuring that the fees equitably allocate costs among all feepayers.

Concerning §80.109(b)(1)(B) and (C), regarding matters arising under Texas Government Code, Chapter 2260 and Chapter 11, Subchapter D and matters under TWC, Chapter 26, Subchapter I and Chapter 334, Subchapter H and L, the executive director is a necessary party in these cases because the executive director is the respondent in both cases and is required to be present in order to have a complete adjudication of the claims and counterclaims and to protect the interests of the agency.

Section 80.117, Order of Presentation, will remove the requirement that the executive director open with a simple statement of his position in a permit hearing. The applicant will open the proceeding instead. In those cases where the executive director is participating as a party, the executive director will follow the applicant, protesting parties, and public interest counsel in presenting evidence and testimony. The rule change is necessary to provide an appropriate order of presentation for permitting matters both in cases where the executive director participates and where he does not participate.

ACT commented that §80.117(b) should be modified to allow the SOAH judge reasonable flexibility in setting the order of presentation, and allow the judge to align any party.

No change was made as a result of this comment. This issue is addressed by existing commission rule at 30 TAC §80.4(c)(5), which gives SOAH judges the authority to align parties and establish the order for presentation of evidence, but provides that the executive director and the public interest counsel shall not be aligned with any party.

New §80.118, Administrative Record, will list those documents which at a minimum constitute the administrative record. These documents include: 1) the final draft permit, including any special provisions or conditions; 2) the executive director's preliminary decision, or the executive director's decision on the permit application, if applicable; 3) the summary of the technical review of the permit application; 4) the compliance summary of the applicant; 5) copies of the published and/or mailed public notices relating to the permit application, as well as affidavits of public notices; and 6) any agency document determined by the executive director to be necessary to reflect the administrative and technical review of the application. New §80.118(b) states that for the purpose of referrals to SOAH under §80.5 and §80.6, the chief clerk's case files must include the documents described in subsection (a).

Concerning §80.118, AECT stated that as written it seems the documents listed in this section do not need to be introduced into evidence or meet the requirements of the Texas Government Code prior to becoming part of the record. ACT stated that this seems inappropriate for §80.118(a)(5). Further, ACT stated that there is no provision that would allow another party to supplement or question the determination of the executive director on what to include in §80.118(a)(5).

No change has been made as a result of this comment. New §80.118 lists those documents which at a minimum constitute the administrative record. The rule requires that certified copies of documents be provided. In accordance with Texas Rules of Evidence 902(4) and 1005, certified copies of public records are self-authenticating. Any of the documents in §80.118 can be challenged by a party during the hearing and any party can subpoena the author of the document in accordance with the Texas Rules of Civil Procedure. With regard to §80.118(a)(5), the rule specifies that these documents must be necessary to reflect the administrative and technical review of the application. Thus, the executive director does not have unlimited discretion to introduce any agency documents he desires. In addition, the parties are free to supplement the record with additional documents which support or contradict agency records. Section 80.118(a)(5) is intended to be broad enough to cover the documents produced by agency staff in their technical and administrative reviews of all types of permit applications, but is not intended to provide limitless discretion to the executive director on what may be included as part of the record under this subsection.

Concerning §80.118, TABCC and TCC commented that language needs to be added to the rule to clarify that "information to complete administrative record" should be interpreted broadly to avoid confusion.

The commission partly agrees with this comment and has added language to the rule which states that the record in a contested case hearing includes, "at a minimum" the documents which are enumerated in §80.118(a)(1) - (5). The commission has provided adequate guidance in these rules on what constitutes "information to complete the administrative record."

Concerning §80.118, V&E stated that this section defines the record but doesn't say who prepares it or who offers it. In addition, V&E stated that there is no provision for objection to anything tossed in under the catch-all §80.108(a)(5) or left out.

No change was made as a result of this comment. In accordance with the rules applicable to the various media over which the commission has jurisdiction, it is understood that the executive director prepares the draft permit, compliance summary, and technical summary. The public notices and affidavits are prepared by the applicant and filed with the commission's chief clerk consistent with applicable law. Documents constituting subsection (a)(5) are also prepared by the executive director and vary depending upon which media the permitting case involves. These documents are all produced in the commission's regular course of business and are self-authenticating in accordance with Texas Rules of Evidence 902(4) and 1005. Any party has the option of subpoenaing the author of the documents set forth under §80.118(a) to question their findings or authenticity. In addition, parties are free to supplement the record by introducing additional documents which support or contradict agency records. In accordance with §80.5 and §80.6, the commission's chief clerk shall send a copy of the chief clerk's file to SOAH upon referral of a contested case. Section 80.118(b) states the chief clerk's case file contain the administrative record as defined by §80.118(a).

Concerning §80.118, ACT commented that the definition of "administrative record" should be clarified to state that the record "includes, but is not limited to, ..." the enumerated documents.

The commission agrees in part with this comment and has modified the rule to state that the administrative record include "at a minimum" the enumerated documents. The commission does not intend for this rule to be interpreted to limit a party's ability to introduce evidence consistent with applicable law.

Concerning §80.118, ACT additionally commented that this section should be clarified to state that the agency documents referred to in §80.118(a)(1)-(5) be admissible under the Texas Rules of Evidence as applied in TNRCC hearings.

No change was made as a result of this comment. New §80.118 lists those documents which at a minimum constitute the administrative record. Section 80.127(a) provides that the Texas Rules of Evidence shall be followed in contested case proceeding. However, when necessary to ascertain facts not reasonable susceptible of proof under those rules, the commission rule provides that evidence not admissible under those rules may be admitted, except when precluded by statute, if it is of a type commonly relied upon by reasonably prudent people in the conduct of their affairs. The commission intends to abide by its rules in considering the admission of the administrative record. In addition, Texas Rules of Evidence 902(4) and 1005 provide that certified copies of public records are self-authenticating. Based on these considerations and the fact that the commission needs certain

information before it in order to make a final decision on a permit matter, the commission finds that the administrative record rule is justified and consistent with applicable law.

Concerning §80.118, ACT commented that documentation of the executive director's decision to participate should also be included in the administrative record.

No change has been made in response to this comment. As set forth more fully in response to the comments concerning §80.108(c), the commission does not intend to require the filing of written documentation of the executive director's analysis on party participation. This rule section is not intended to be a comprehensive list of all documents included in the administrative record and is not intended to limit a party's ability to introduce evidence consistent with applicable law. The documents included in §80.118(a) are intended to primarily evidence the executive director's technical and administrative review of the permit application. Since the executive director's party status determination is not appealable to the commission or SOAH, it is not necessary for the documentation required by §80.108(k) to be included by rule in the administrative record.

Concerning §80.118(a)(1), ACT commented that the term "final draft permit" should be replaced by the phrase, "decision of the executive director on the application," and that "to any draft permit" should be added to the end of the sentence after the language concerning special provisions or conditions.

The commission agrees in part with this comment and has included in the rule language an additional subsection which provides for inclusion of the executive director's preliminary decision or the executive director's decision on the permit application, if applicable.

Section 80.127, Evidence, will prohibit the executive director from rehabilitating the testimony of a non-agency witness in permitting matters. The executive director may only rehabilitate agency witnesses who are testifying solely for the purpose of completing the administrative record. The adopted change implements TWC, §5.228(d). New subsection (h) will also be added to clarify that commission staff testimony or evidence relating to the administrative record as defined by adopted new §80.118 or any other executive director function required by law shall not constitute assistance to permit applicants in meeting their burden of proof.

Concerning §80.127(h), AECT stated that parties other than the executive director should be free to offer whatever relevant evidence they feel is appropriate so long as it meets the admissibility requirements of the Texas Government Code. AECT further commented that it is beyond legislative intent to exclude expert testimony from state employees who have expended significant time reviewing an application.

The rule has been clarified in response to this comment and those detailed the following comments. Neither the statute nor the rule excludes expert testimony of state employees who have reviewed an application, prepared a draft permit, and responded to comments. In addition, §80.127(h) does not limit what evidence or testimony a party can present at hearing. Regardless of whether the executive director is a party to a case, agency staff may be subject to being subpoenaed as witnesses by the parties in a permit application hearing. However, there is no requirement in the rules that expert testimony from agency employees be included in the hearing. New §80.118 (relating to Administrative Record) requires that for all permit hearings, the record in a contested case includes certified copies of documents which reflect the required commission review of permit applications. Therefore, at a minimum, the identified documents evidencing the review will be before the commission at the time it makes its decision on the application. How the parties use the administrative record or whether the parties subpoena agency staff as witnesses at the hearing are matters which are controlled by the parties to a proceeding in cases where the executive director is not a party.

Concerning §80.127(h), TIP stated that the rule should expressly recognize that the applicant or other parties to the proceeding may need to offer testimony or evidence relating to the staff's review of the application. TCC strongly agreed with the goal of this provision, but is concerned about how the terms, "offered by agency staff" may be interpreted. TCC stated that the correct interpretation is that it includes testimony or evidence presented by the agency staff when they are called by other parties. V&E stated that this section should not be left open to interpretation, and suggested language which clarifies that any party may offer any agency staff witness, and evidence so elicited shall not be construed as assisting the permit applicant in meeting its burden of proof. AECT stated that the rule should clarify that all staff testimony offered as evidence other than by the executive director, which is otherwise admissible, does not constitute assistance to the permit applicant in meeting its burden of proof. ACT commented that in the first sentence of §80.127(h) the words, "relating to" should be changed to "explaining" to more closely reflect the nature of the testimony. Further, ACT commented that this provision should be clarified to provide that such testimony or evidence is not automatically required to complete the administrative record.

The commission's rationale in drafting §80.127(h) was not intended to be interpreted to prevent the parties from utilizing agency resources such as documentation or witnesses under appropriate circumstances and consistent with applicable discovery law. The commission agrees that parties should not be limited as to who may offer testimony and evidence and has revised the rule to clarify that other parties may subpoena commission staff witnesses and/or introduce TNRCC records without such evidence or testimony being considered assistance by the executive director to the permit applicant in meeting its burden of proof. Regardless of whether the executive director is a party to a particular hearing, commission staff may be subject to being subpoenaed as witnesses and additional documents may be obtained from the commission by any party for use in the hearing in accordance with Texas Rule of Civil Procedure 205.

Section 80.131, Interlocutory Appeals and Certified Questions, will reflect that the judge must send copies of certified questions to the executive director, whether or not he is a party to the hearing. Copies of all briefs and replies must be served on the executive director in accordance with 30 TAC §1.11. The executive director may file briefs and responses to all certified questions within the deadlines imposed on the parties to the proceeding. Finally, the chief clerk is required to give the executive director notice of any commission meeting where the certified questions will be considered. These amendments will allow executive director participation on significant policy issues certified to the commission regardless of party status. Since policy implications often affect more than the parties in a particular contested case hearing, the executive director is a necessary participant in certified questions.

Concerning §80.131, ACT suggested that language be added to the rule to clarify that when the executive director is not a party, he should only be allowed to provide responses to certified questions to the commissioner upon written request, and that other parties should be able to respond to those responses.

The commission has made clarifying changes to §80.131, but makes no changes as a result of this comment. The commission has determined that the executive director is an essential participant in all certified questions brought to the commission. Section 80.131(b) states that a question regarding commission policy, jurisdiction, or the imposition of any sanction by the judge may be certified by the judge to the commission. Appropriate policy questions may concern the commission's interpretation of its rules and applicable statues, the applicability of law to the proceeding, or whether policy should be established or clarified on a substantive or procedural issue of significance. Since policy and jurisdictional implications often affect more than the parties in a particular contested case and affect the functions which are statutorily delegated to the executive director, his response to certified questions pertaining to such issues is crucial to the commission's deliberation and decision on those issues and to the executive director's ability to administer agency responsibilities and the functions of his office. The commission additionally responds that the procedural safeguards afforded to the parties prevent any due process concerns.

Concerning §80.131, V&E stated that the rule should clarify that the deadline for the executive director in all certified question is established by the ALJ.

No change was made as a result of this comment. The rule as written states that if a question is certified, the judge shall file a request to answer the certified question with the chief clerk and serve copies on the parties and the executive director. The rule further states that within five days after the request is filed, the executive director and all parties to the proceeding may file briefs or replies.

Subchapter D, Discovery

Section 80.153(a), Issuance of Subpoena or Commission To Take Deposition, will add a cross-reference to §80.21, which specifies the witness fees that must be paid. A new subsection (f) will also be added to explicitly provide that the executive director's legal staff may participate in defending the deposition of any agency employee upon whom a subpoena or commission is served. The commission anticipates that agency staff may be subpoenaed in more instances than in the past when the executive director participated in all contested case hearings. Thus, the commission seeks to clarify witness fees paid to commission staff consistent with the provisions of Texas Government Code, §659.005 and agency policy and the ability of the commission's legal staff to defend the deposition of an agency employee.

Subchapter F, Post Hearing

Section 80.251, Judge's Proposal for Decision, applies to any application that is administratively complete before September 1, 1999. Section 80.252, Judge's Proposal for Decision, applies to any application that is administratively complete on or after September 1, 1999. These sections will require that the SOAH judge send to the executive director a copy of the proposal for decision regardless of his party status. These amendments are intended to keep the executive director informed about the status of permit applications for which he has performed administrative and technical review.

Section 80.257, Pleadings Following Proposal for Decision, will clarify that any party may file exceptions or briefs. For permit hearings in which the executive director has not participated as a party, the commission or the general counsel may request that the executive director file briefs concerning legal or policy issues. The request shall be in writing and served on the parties and the ALJ. In addition, the request shall set deadlines for the executive director's response and the parties' replies to the response, avoiding delay of the matter to the extent practicable.

Concerning §80.257, ACT commented that when the executive director is not a party, he should be able to provide briefs after a proposal for decision in cases only upon written request of the commissioners or general counsel. Further, ACT commented that the rules should provide that a copy of the request, stating the reasons why a brief is needed and the issues to be briefed should be timely served on all parties and the parties should be given a fair opportunity to respond to the executive director's brief. ACT further commented that the rules should limit the opportunity for the commissioners or general counsel to request briefs to key policy or legal issues. TCPS similarly commented that there should be some clear limits on briefs filed by the executive director after the proposal for decision when the executive director has not participated in the contested case proceeding as a party. V&E commented that the executive director should not be allowed to file post hearing briefs where he has not participated as a party. V&E urges that where briefs are necessary, the executive director should have participated as a party from the beginning of the contested case proceeding. Finally, V&E states that the inclusion of the executive director so late in the process is sure to cause additional delay in the hearing process.

The commission has made changes in response to these comments. The proposed rule text has been modified to provide that the commissioners or general counsel's request that the executive director file post hearing briefs where he has not participated as a party should be in writing and should concern a legal or policy issue. In addition, the rule text has been modified to provide that the written request shall be served on all parties, shall specify the issues to be briefed, and shall set reasonable time frames for the executive director's response and the parties' replies to that response. The commission responds that it would be impractical for the executive director to ascertain all permitting cases which will have issues which merit his participation when the executive director must determine party status so early in the process. Therefore, the rule allows for executive director briefs in order to provide the commission with some assurance that important policy and legal interpretations are given due consideration, based on a complete administrative record. The commission declines to modify the rule to provide that the request state the reasons why a brief is needed. The commission intends to use this provision in limited circumstances and the rule must provide some flexibility to the commissioners or general counsel in identifying which cases merit the request for the executive director to file briefs.

Section 80.261, Scheduling Commission Meetings, will require that the SOAH judge, in all cases, notify the executive director of the date of the commission meeting at which a proposal for decision will be heard. Additionally, this section will require that the chief clerk notify the executive director of any rescheduled commission meetings, whether or not he is a party to the hearing. This amendment is intended to keep the executive director informed about the status of permit applications for which he has performed administrative and technical review and provide the

executive director with notice of the commission's intent to consider a particular matter at its public meeting.

SUBCHAPTER A. GENERAL RULES

30 TAC §80.17, §80.21

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.228, which establishes the executive director's authority to participate in contested case permit hearings.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; and §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency.

Additionally, the amendments are adopted under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation.

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 October 26, 2001.

TRD-200106508
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Effective date: November 15, 2001
Proposal publication date: August 24, 2001
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SUBCHAPTER C. HEARING PROCEDURES

30 TAC §§80.108, 80.109, 80.117, 80.118, 80.127, 80.131

STATUTORY AUTHORITY

The amendments and new sections are adopted under TWC, §5.228, which establishes the executive director's authority to participate in contested case permit hearings.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; and §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency.

Additionally, the amendments and new sections are adopted under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation.

§80.108. Executive Director Party Status in Permit Hearings.

(a) Except to the extent superseded by subsection (b) of this section, the executive director shall not participate as a party in the following contested case hearings concerning permitting matters:

(1) an application concerning municipal solid waste where land use is the sole issue at hearing, including hearings held for determination of land use compatibility under Texas Health and Safety Code (THSC), §361.069;

(2) an application for an air quality standard permit to authorize a concrete batch plant under THSC, §382.05195;

(3) an application for an air quality permit to authorize emissions from facilities which solely emit the types of emissions that do not require health and welfare effects review as specified on the Toxicology and Risk Assessment (TARA) Section Emissions Screening List;

(4) an application for a permit for a municipal solid waste transfer facility under §330.4 of this title (relating to Permit Required);

(5) an application for a permit for the processing of grit and grease trap waste under §330.4 of this title;

(6) an application for a permit for composting facilities under §332.3 of this title (relating to Applicability); and

(7) an application to authorize solely the irrigation of domestic or municipal wastewater effluent meeting the requirements for secondary treatment in Chapter 309 of this title (relating to Domestic Wastewater Effluent Limitation and Plant Siting).

(b) The executive director shall participate as a party in the following contested case hearings relating to permitting matters:

(1) an application concerning water rights;

(2) an application for which the executive director has recommended denial of the permit;

(3) an involuntary amendment; and

(4) an application for which the draft permit includes provisions opposed by the applicant.

(c) For permitting matters not included in subsections (a) or (b) of this section, the executive director shall, on a case-by-case basis, consider the following criteria in the manner specified in determining whether to participate as a party.

(1) The executive director shall, as a preliminary matter, determine whether there is any issue to be presented in the hearing that merits participation of the executive director, based on the existence of one or more of the following:

(A) one or more of the issues to be presented in the hearing are new, unique, or complex, including consideration of whether an issue relates to more than one medium, and whether it is likely that construction of prior agency policy or practice will be involved;

(B) it is likely that the decision on any of the issues to be presented in the hearing will have significant implications for other agency actions or policies;

(C) it is likely that changes to proposed permit conditions could adversely affect human health or the environment; or

(D) any issue to be considered is likely to affect federal program approval or authorization.

(2) If the executive director finds that there are issues weighing in favor of participation under paragraph (1) of this subsection, the executive director may elect to participate as a party or he may also consider the following factors in the manner described:

(A) whether there is a significant disparity in the experience and resources of the parties. A significant disparity weighs in favor of executive director participation. In evaluating whether there is a significant disparity, the executive director shall consider:

(i) the legal capacity of the parties, based on whether any party is not represented by counsel and the prior contested case hearing experience of the parties at the agency;

(ii) the financial capacity of the parties, including documentation or evidence of financial disparity if offered by any party, and including whether any party is:

(I) a qualifying local governmental entity;

(II) a non-profit entity; or

(III) a small business; and

(iii) the technical capacity of the parties, including an evaluation of:

(I) the number and complexity of the administrative and technical notices of deficiency issued during the administrative and technical review of the application;

(II) the number and complexity of the technical issues raised by parties to the hearing during the comment period or at the preliminary hearing; and

(III) whether any of the parties does not have access to a technical expert; and

(B) whether there are limitations on the availability of agency staff, including specialized staff expertise on the issues to be presented at hearing, which shall weigh against executive director participation; and

(C) whether the draft permit contains any provision that has been included by the executive director to address an applicant's compliance history, which shall weigh in support of executive director participation.

(d) The executive director's participation as a party under subsection (b) or (c) of this section shall be for the sole purpose of providing information to complete the administrative record.

(e) When the executive director participates as a party in a contested case hearing concerning a permitting matter before the commission or SOAH, the executive director may not assist an applicant in meeting its burden of proof unless the applicant is eligible to receive assistance because:

(1) the applicant is a qualifying local governmental entity; or

(2) the applicant is a non-profit entity; and

(3) there is a significant public need for the permitting action to avoid adverse impact to human health or the environment.

(f) The executive director may elect to participate as a party for the purpose of assisting an applicant in meeting its burden of proof in accordance with subsection (e) of this section notwithstanding the provisions of subsections (a) - (d) of this section.

(g) The executive director must notify all parties and the SOAH judge of his intention to participate as a party to a contested case hearing concerning a permitting matter in writing or on the record as soon as practicable, but not later than one week after the end of the preliminary hearing.

(h) The executive director's decision on participation as a party in contested case hearing concerning a permitting matter and the executive director's decision on whether an applicant is eligible to receive assistance in accordance with subsection (e) of this section are not subject to review by the commission or SOAH.

(i) This section does not apply to matters in which the executive director is a party in accordance with §80.109(b)(1) of this title (relating to Designation of Parties).

(j) For purposes of this section:

(1) "qualifying local governmental entity" means a district, authority, county, or municipality that demonstrates that it lacks the technical, legal, and financial resources to support its application in the contested case hearing process; and

(2) "small business" means a small business as defined by §70.9(b)(1) and (2) of this title (relating to Installment Payment of Administrative Penalty).

(3) "non-profit entity" shall mean those entities which are defined in 26 United States Code, §501(c)(3) and (4).

(k) The executive director shall record his decision on party participation and the grounds for his decision under this section on a case-by-case basis.

(l) The executive director shall on an annual basis compile the records required by subsection (k) of this section and present this information to the commission in a written report.

§80.109. Designation of Parties.

(a) Determination by judge. All parties to a proceeding shall be determined at the preliminary hearing or when the judge otherwise designates. To be admitted as a party, a person must have a justiciable interest in the matter being considered and must, unless the person is specifically named in the matter being considered, appear at the preliminary hearing in person or by representative and seek to be admitted as a party. After parties are designated, no person other than the executive director, as provided in §80.108 of this title (relating to Executive Director Party Status in Permit Hearings), will be admitted as a party except upon a finding that good cause and extenuating circumstances exist and that the hearing in progress will not be unreasonably delayed.

(b) Parties.

(1) The executive director is a mandatory party to all commission proceedings concerning matters in which the executive director bears the burden of proof, and in the following commission proceedings:

(A) matters concerning Texas Water Code (TWC), §§11.036, 11.041, and 12.013; TWC, Chapters 13, 35, 36, and 49 - 66; and Texas Local Government Code, Chapters 375 and 395;

(B) matters arising under Texas Government Code, Chapter 2260 and Chapter 11, Subchapter D of this title (relating to Resolution of Contract Claims); and

(C) matters under TWC, Chapter 26, Subchapter I, and Chapter 334, Subchapters H and L of this title (relating to Reimbursement Program and Overpayment Prevention).

(2) In addition to subsection (b)(1) of this section, the executive director may also be a party in contested case hearings concerning permitting matters, pursuant to, and in accordance with, the provisions of §80.108 of this title.

(3) The public interest counsel of the commission is a party to all commission proceedings.

(4) The applicant is a party in a hearing on its application.

(5) Affected persons shall be parties to hearings on permit applications, based upon the standards set forth in §55.29 and §55.203 of this title (relating to Determination of Affected Person).

(6) The Texas Water Development Board shall be a party to any commission proceeding in which the board requests party status.

(7) The Texas Parks and Wildlife Department shall be a party in commission proceedings on applications for permits to store, take, or divert water if the department requests party status.

(8) The parties to a contested enforcement case include:

(A) the respondent(s);

(B) any other parties authorized by statute; and

(C) in proceedings alleging a violation of or failure to obtain an underground injection control or Texas Pollutant Discharge Elimination System permit, or a state permit for the same discharge covered by a National Pollutant Discharge Elimination System (NPDES) permit that has been assumed by the state under NPDES authorization, any other party granted permissive intervention by the judge. In exercising discretion whether to permit intervention, the judge shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(9) The parties to a hearing upon a challenge to commission rules include the person(s) challenging the rule and any other parties authorized by statute.

(10) The parties to a permit revocation action initiated by a person other than the executive director shall include the respondent and the petitioner.

(c) Alignment of participants. Participants (both party and non-party) may be aligned according to the nature of the proceeding and their relationship to it. The judge may require participants of an aligned class to select one or more persons to represent them in the proceeding. Unless otherwise ordered by the judge, each group of aligned participants shall be considered to be one party for the purposes of §80.115 of this title (relating to Rights of Parties) for all purposes except settlement.

(d) Effect of postponement. If a hearing is postponed for any reason, any person already designated as a party retains party status.

§80.118. Administrative Record.

(a) In all permit hearings, the record in a contested case includes at a minimum the following certified copies of documents:

(1) the final draft permit, including any special provisions or conditions;

(2) the executive director's preliminary decision, or the executive director's decision on the permit application, if applicable;

(3) the summary of the technical review of the permit application;

(4) the compliance summary of the applicant;

(5) copies of the public notices relating to the permit application, as well as affidavits of public notices; and

(6) any agency document determined by the executive director to be necessary to reflect the administrative and technical review of the application.

(b) For purposes of referral to SOAH under §80.5 and §80.6 of this title (Referral to SOAH), the chief clerk's case file shall contain the administrative record as described in subsection (a) of this section.

§80.127. Evidence.

(a) General admissibility of evidence.

(1) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The Texas Rules of Civil Evidence, as applied in nonjury civil cases in the district courts of this state, shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible under those rules may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent people in the conduct of their affairs. The judge shall give effect to the rules of privilege recognized by law.

(2) Testimony will be received only from witnesses called by a party or the judge. The judge may allow or request testimony from any person whose position is not adequately represented by any party, subject to cross-examination by all parties. Such testimony shall only be allowed at the judge's discretion. All parties shall have an opportunity to conduct discovery of such person.

(3) Testimony offered by any witness shall be under oath.

(4) In a contested case hearing concerning a permitting matter, the executive director shall not rehabilitate the testimony of a witness unless the witness is an agency employee testifying for the sole purpose of providing information to complete the administrative record.

(b) Stipulation. Evidence may be stipulated by agreement of all parties. The judge and commission will determine the weight, if any, to be accorded stipulated evidence.

(c) Prefiled testimony and exhibits. The judge may require or allow parties to prepare their direct testimony in written form if the judge determines that a proceeding will be expedited and that the interests of the parties will not be prejudiced substantially. The judge may require the parties to file and serve their direct testimony and exhibits before the beginning of the hearing. The prepared testimony of a witness upon direct examination, either in narrative or question and answer form, may be admitted into evidence as if read or presented orally, upon the witness' being sworn and identifying the same as a true and accurate record of what the testimony would be if given orally. The witness shall be subject to cross-examination, and the prepared testimony shall be subject to objection.

(d) Exhibits.

(1) Exhibits of a documentary character shall not exceed 8 1/2 by 11 inches unless they are folded to the required size. Maps and drawings which are offered as exhibits shall be rolled or folded so as not to unduly encumber the record. Exhibits not conforming to this rule may be excluded.

(2) Each exhibit offered shall be tendered for identification and placed in the record. Copies shall be furnished to the judge, each of the parties, and the hearings reporter, unless the judge rules otherwise.

(3) If an exhibit has been identified, objected to, and excluded, it may be withdrawn by the offering party. If withdrawn, the exhibit will be returned and the offering party waives all objections to the exclusion of the exhibit. If not withdrawn, the exhibit shall be included in the record for the purpose of preserving the objection to the exclusion of the exhibit.

(e) Official notice.

(1) The judge may take official notice of all facts judicially cognizable. In addition, the judge may take official notice of any generally recognized facts within the specialized knowledge of the commission.

(2) The judge shall notify all parties of any material officially noticed, including any memoranda or data prepared by the executive director and relied upon by the commission in prior proceedings. All parties shall be afforded an opportunity to contest any material so noticed.

(f) Public comment. In Resource Conservation and Recovery Act, underground injection control, and Texas Pollutant Discharge Elimination System permit cases for which the commission has permitting authority by authorization from the federal government, all public comment on the application received by the commission during the public comment period and the executive director's responses shall be admitted into the evidentiary record. The parties shall be allowed to respond and to present evidence on each issue raised in public comment or the executive director's responses. This subsection supersedes and controls any conflict between this subsection and §80.111 of this title (relating to Persons Not Parties) concerning the admission of public comment into the evidentiary record.

(g) Invoking the "rule." At the request of the party, and subject to the discretion of the judge, witnesses may be placed under "the rule" as provided by, and subject to the conditions of, Texas Rule of Civil Procedure 267 and Texas Rule of Evidence 613.

(h) Staff testimony and evidence. Testimony or evidence given in a contested case permit hearing by agency staff regardless of which party called the staff witness or introduced the evidence relating to the documents listed in §80.118 of this title (relating to Administrative Record) or any analysis, study, or review that the executive director is required by statute or rule to perform shall not constitute assistance to the permit applicant in meeting its burden of proof.

§80.131. Interlocutory Appeals and Certified Questions.

(a) No interlocutory appeals may be made to the commission by a party to a proceeding before a judge except that in an enforcement action a party may seek an interlocutory appeal to the commission on jurisdictional issues only.

(b) On a motion by a party or on the judge's own motion, the judge may certify a question to the commission. Certified questions may be made at any time during a proceeding, regarding commission policy, jurisdiction, or the imposition of any sanction by the judge which would substantially impair a party's ability to present its case. Policy questions for certification purposes include, but are not limited to:

(1) the commission's interpretation of its rules and applicable statutes;

(2) which rules or statutes are applicable to the proceeding; or

(3) whether commission policy should be established or clarified as to a substantive or procedural issue of significance to the proceeding.

(c) If a question is certified, the judge shall file a request to answer the certified question with the chief clerk and serve copies on the parties. In a contested case hearing concerning a permitting matter, the judge shall serve the executive director with a copy of the request. Within five days after the request is filed, the executive director and all parties to the proceeding may file briefs or replies. Copies of all briefs and replies shall be served on the executive director as provided in §1.11 of this title (relating to Service on Judge, Parties, and Interested Persons). The executive director shall be allowed to file briefs and replies within the prescribed time frames. The chief clerk shall provide copies of the request and any briefs or replies to the general counsel and commission. Upon the request of the general counsel or a commissioner to the general counsel, the request will be scheduled for consideration during a commission meeting. The chief clerk shall give the judge, the executive director, and all parties notice of the meeting. The judge may abate the hearing until the commission answers the certified question, or continue with the hearing if the judge determines that no party will be substantially harmed. If the chief clerk does not receive a request from the general counsel to set the question for consideration within 15 days after filing, the request is denied by operation of law.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 26, 2001.

TRD-200106509
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 15, 2001
Proposal publication date: August 24, 2001
For further information, please call: (512) 239-4712

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SUBCHAPTER D. DISCOVERY

30 TAC §80.153

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.228, which establishes the executive director's authority to participate in contested case permit hearings.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; and §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency.

Additionally, the amendment is adopted under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation.

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 October 26, 2001.

TRD-200106510

Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 15, 2001
Proposal publication date: August 24, 2001
For further information, please call: (512) 239-4712

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SUBCHAPTER F. POST HEARING PROCEDURES

30 TAC §§80.251, 80.252, 80.257, 80.261

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.228, which establishes the executive director's authority to participate in contested case permit hearings.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; and §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency.

Additionally, the amendments are adopted under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation.

§80.257. Pleadings Following Proposal for Decision.

(a) Pleadings. Unless right of review has been waived, any party may within 20 days after the date of issuance of the proposal for decision, file exceptions or briefs. For permit hearings in which the executive director has not participated as a party, the commission or general counsel may request in writing that the executive director file briefs concerning legal or policy issues. The request shall be served on the parties and the judge, shall specify the issues to be briefed and shall set reasonable deadlines for the executive director's response and the parties replies to that response, avoiding delay of the matter to the extent practicable. Proposed findings of fact may be filed when permitted or requested by the commission. Any replies to exceptions, briefs, or proposed findings of fact shall be filed within 30 days after the date of issuance on the proposal of decision.

(b) Change of filing deadlines. On his own motion or at the request of a party, the general counsel may change the deadlines to file pleadings following the proposal for decision. A party requesting a change must file a written request with the chief clerk, and must serve a copy on the general counsel, the judge, and the other parties. The request must explain that the party requesting the change has contacted the other parties, and whether the request is opposed by any party. The request must include proposed dates (preferably a range of dates) and must indicate whether the judge and the parties agree on the proposed dates.

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 October 26, 2001.

TRD-200106511
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 15, 2001
Proposal publication date: August 24, 2001
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CHAPTER 305. CONSOLIDATED PERMITS

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §305.2, Definitions; §305.69, Solid Waste Permit Modification at the Request of the Permittee; §305.122, Characteristics of Permits; §305.150, Incorporation of References; and §305.571, Applicability. The commission also adopts a new §305.175, Conditional Exemption for Demonstrating Compliance with Certain Air Standards. Section 305.69 is adopted *with changes* to the proposed text as published in the June 22, 2001 issue of the *Texas Register* (26 TexReg 4596). The remaining sections are adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The primary purpose of the rulemaking is to revise the commission rules to conform to certain federal regulations, either by incorporating the federal regulations by reference or by introducing language into the commission rules which corresponds to the federal regulations. Establishing equivalency with federal regulations will enable the State of Texas to increase its level of authorization to operate aspects of the federal hazardous waste program in lieu of the United States Environmental Protection Agency (EPA). The federal regulations being addressed in this adoption were promulgated by the EPA in issues of the *Federal Register* from the years 1994, 1998, and 1999. The adopted amendments also make editorial and administrative corrections to improve the readability of Chapter 305.

SECTION BY SECTION DISCUSSION AND RESPONSE TO COMMENTS

This discussion provides an explanation of changes made to the proposed text since publication in the June 22, 2001 issue of the *Texas Register* (26 TexReg 4596). One minor change to the proposal is made in response to comments provided by the Dow Chemical Company. Adopted §305.69(i)(1) is changed from proposal by correcting the date of the *Federal Register* citation for Notice of Intent to Comply requirements from July 7, 2000 to July 10, 2000. The only other changes made to the proposed text are punctuation and minor grammatical changes to conform to *Texas Register* formatting and style requirements.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. The adoption does not adversely affect, in a material way, the economy, a section of the economy, productivity, competition, jobs, the environment, or the public health and safety of the

state or a sector of the state. The adopted amendments update the commission's consolidated permits rules to incorporate certain federal regulations regarding air emission requirements and make administrative changes and corrections. The adopted amendments do not meet the definition of a major environmental rule as defined in the Texas Government Code, because §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The commission concludes that a regulatory analysis is not required in this instance because the adopted rules do not trigger any of the four criteria in Texas Government Code, §2001.0225.

TAKINGS IMPACT ASSESSMENT

The commission performed a preliminary assessment of these rules in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rulemaking is to ensure that the commission's consolidated permits hazardous waste rules on air emissions and remediation waste are equivalent to the federal regulations after which they are patterned. The adopted rules will substantially advance this stated purpose by adopting language intended to ensure that state rules are equivalent to the corresponding federal regulations. The commission's preliminary assessment indicates that Texas Government Code, Chapter 2007 does not apply to this rulemaking because this is an action that is reasonably taken to fulfill an obligation mandated by federal law.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the adoption is a rulemaking 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 and/or 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 prepared a consistency determination for the adopted rules in accordance with 31 TAC §505.22 and found the rulemaking is consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goal applicable to the rulemaking is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs). Applicable policies are construction and operation of solid waste treatment, storage, and disposal facilities, such that new solid waste facilities and areal expansions of existing solid waste facilities shall be sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and, at a minimum, comply with standards established under the Solid Waste Disposal Act, 42 United States Code, §§6901 et seq. Promulgation and enforcement of these rules are consistent with the applicable CMP goals and policies because the adopted rule amendments will update and enhance commission rules concerning consolidated permits for certain hazardous and industrial solid waste facilities. In addition, the adopted rules do not violate any applicable provisions of the CMP's stated goals and policies.

HEARING AND COMMENTERS

The commission did not hold public hearings on the proposed rules. Two commenters submitted written comments during the comment period which closed at 5:00 p.m., July 23, 2001. Written comments were submitted by the Dow Chemical Company and the Texas Department of Transportation. The Dow Chemical Company's comments are addressed in the SECTION BY SECTION DISCUSSION AND RESPONSE TO COMMENTS section of this preamble. The Texas Department of Transportation commented that they had reviewed the proposed amendments, but had no comments or suggestions to offer on the proposal.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §305.2

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the Act.

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 October 26, 2001.

TRD-200106536
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Effective date: November 15, 2001
Proposal publication date: June 22, 2001
For further information, please call: (512) 239-4712

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SUBCHAPTER D. AMENDMENTS, RENEWALS, TRANSFERS, CORRECTIONS, REVOCATION, AND SUSPENSION OF PERMITS

30 TAC §305.69

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under THSC, Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the Act.

§305.69. Solid Waste Permit Modification at the Request of the Permittee.

(a) This section applies only to modifications to industrial and hazardous solid waste permits. Modifications to municipal solid waste permits are covered in §305.70 of this title (relating to Municipal Solid Waste Class I Modifications).

(b) Class I modifications of solid waste permits.

(1) Except as provided in paragraph (2) of this subsection, the permittee may put into effect Class 1 modifications listed in Appendix I of this subchapter under the following conditions:

(A) the permittee must notify the executive director concerning the modification by certified mail or other means that establish proof of delivery within seven calendar days after the change is put into effect. This notification must specify the changes being made to permit conditions or supporting documents referenced by the permit and must explain why they are necessary. Along with the notification, the permittee must provide the applicable information in the form and manner specified in §1.5(d) of this title (relating to Records of the Agency), §§305.41-305.45 and 305.47 - 305.53 of this title (relating to Applicability; Application Required; Who Applies; Signatories to Applications; Contents of Application for Permit; Retention of Application Data; Additional Contents of Applications for Wastewater Discharge Permits; Additional Contents of Application for an Injection Well Permit; Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit; Revision of Applications for Hazardous Waste Permits; Waste Containing Radioactive Materials; and Application Fee), Subchapter I of this chapter (relating to Hazardous Waste Incinerator Permits), and Subchapter J of this chapter (relating to Permits for Land Treatment Demonstrations Using Field Tests or Laboratory Analyses);

(B) the permittee must send notice of the modification request by first-class mail to all persons listed in §39.13 of this title (relating to Mailed Notice). This notification must be made within 90 calendar days after the change is put into effect. For the Class 1 modifications that require prior executive director approval, the notification must be made within 90 calendar days after the executive director approves the request; and

(C) any person may request the executive director to review, and the executive director may for cause reject, any Class 1 modification. The executive director must inform the permittee by certified mail that a Class 1 modification has been rejected, explaining the reasons for the rejection. If a Class 1 modification has been rejected, the permittee must comply with the original permit conditions.

(2) Class 1 permit modifications identified in Appendix I by a superscript 1 may be made only with the prior written approval of the executive director.

(3) For a Class 1 permit modification, the permittee may elect to follow the procedures in subsection (c) of this section for Class 2 modifications instead of the Class 1 procedures. The permittee must inform the executive director of this decision in the notification required in subsection (c) (1) of this section.

(c) Class 2 modifications of solid waste permits.

(1) For Class 2 modifications, which are listed in Appendix I of this subchapter, the permittee must submit a modification request to the executive director that:

(A) describes the exact change to be made to the permit conditions and supporting documents referenced by the permit;

(B) identifies the modification as a Class 2 modification;

(C) explains why the modification is needed; and

(D) provides the applicable information in the form and manner specified in §1.5(d) of this title (relating to Records of the Agency), §§305.41 - 305.45 and 305.47 - 305.53 of this title (relating to Applicability; Application Required; Who Applies; Signatories to Applications; Contents of Application for Permit; Retention of Application Data; Additional Contents of Applications for Wastewater Discharge Permits; Additional Contents of Application for an Injection Well Permit; Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit; Revision of Applications for Hazardous Waste Permits; Waste Containing Radioactive Materials; and Application Fee), Subchapter I of this chapter (relating to Hazardous Waste Incinerator Permits), and Subchapter J of this chapter (relating to Permits for Land Treatment Demonstrations Using Field Tests or Laboratory Analyses);

(2) The permittee must send a notice of the modification request by first-class mail to all persons listed in §39.13 of this title (relating to Mailed Notice) and must cause this notice to be published in a major local newspaper of general circulation. This notice must be mailed and published within seven days before or after the date of submission of the modification request, and the permittee must provide to the executive director evidence of the mailing and publication. The notice must include:

(A) announcement of a 60-day comment period, in accordance with paragraph (5) of this subsection, and the name and address of an agency contact to whom comments must be sent;

(B) announcement of the date, time, and place for a public meeting to be held in accordance with paragraph (4) of this subsection;

(C) name and telephone number of the permittee's contact person;

(D) name and telephone number of an agency contact person;

(E) location where copies of the modification request and any supporting documents can be viewed and copied;

(F) the following statement: "The permittee's compliance history during the life of the permit being modified is available from the agency contact person."

(3) The permittee must place a copy of the permit modification request and supporting documents in a location accessible to the public in the vicinity of the permitted facility.

(4) The permittee must hold a public meeting no earlier than 15 days after the publication of the notice required in paragraph (2) of this subsection and no later than 15 days before the close of the 60-day comment period. The meeting must be held to the extent practicable in the vicinity of the permitted facility.

(5) The public shall be provided at least 60 days to comment on the modification request. The comment period will begin on the date the permittee publishes the notice in the local newspaper. Comments should be submitted to the agency contact identified in the public notice.

(6) No later than 90 days after receipt of the modification request, subparagraphs (A), (B), (C), (D), or (E) of this paragraph must be met, subject to §50.33 of this title (relating to Executive Director Action on Application), as follows:

(A) the executive director or the commission must approve the modification request, with or without changes, and modify the permit accordingly;

(B) the commission must deny the request;

(C) the commission or the executive director must determine that the modification request must follow the procedures in subsection (d) of this section for Class 3 modifications for either of the following reasons:

(i) there is significant public concern about the proposed modification; or

(ii) the complex nature of the change requires the more extensive procedures of a Class 3 modification; or

(D) the commission must approve the modification request, with or without changes, as a temporary authorization having a term of up to 180 days, in accordance with the following public notice requirements:

(i) notice of a hearing on the temporary authorization shall be given not later than the 20th day before the hearing on the authorization; and

(ii) this notice of hearing shall provide that an affected person may request an evidentiary hearing on issuance of the temporary authorization; or

(E) the executive director must notify the permittee that the executive director or the commission will decide on the request within the next 30 days.

(7) If the executive director notifies the permittee of a 30-day extension for a decision, then no later than 120 days after receipt of the modification request, subparagraphs (A), (B), (C), or (D) of this paragraph must be met, subject to §50.33 of this title (relating to Executive Director Action on Application), as follows:

(A) the executive director or the commission must approve the modification request, with or without changes, and modify the permit accordingly;

(B) the commission must deny the request;

(C) the commission or the executive director must determine that the modification request must follow the procedures in subsection (d) of this section for Class 3 modifications for either of the following reasons:

(i) there is significant public concern about the proposed modification;

(ii) the complex nature of the change requires the more extensive procedures of a Class 3 modification; or

(D) the commission must approve the modification request, with or without changes, as a temporary authorization having a term of up to 180 days, in accordance with the following public notice requirements:

(i) notice of a hearing on the temporary authorization shall be given not later than the 20th day before the hearing on the authorization; and

(ii) this notice of hearing shall provide that an affected person may request an evidentiary hearing on issuance of the temporary authorization.

(8) If the executive director or the commission fails to make one of the decisions specified in paragraph (7) of this subsection by the 120th day after receipt of the modification request, the permittee is automatically authorized to conduct the activities described in the modification request for up to 180 days, without formal agency action. The authorized activities must be conducted as described in the permit modification request and must be in compliance with all appropriate standards of Chapter 335, Subchapter E of this title (relating to Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities). If the commission approves, with or without changes, or denies any modification request during the term of the temporary authorization issued pursuant to paragraph (6) or (7) of this subsection, such action cancels the temporary authorization. The commission is the sole authority for approving or denying the modification request during the term of the temporary authorization. If the executive director or the commission approves, with or without changes, or if the commission denies the modification request during the term of the automatic authorization provided for in this paragraph, such action cancels the automatic authorization.

(9) In the case of an automatic authorization under paragraph (8) of this subsection, or a temporary authorization under paragraph (6)(D) or (7)(D) of this subsection, if the executive director or the commission has not made a final approval or denial of the modification request by the date 50 days prior to the end of the temporary or automatic authorization, the permittee must within seven days of that time send a notification to all persons listed in §39.13 of this title (relating to Mailed Notice), and make a reasonable effort to notify other persons who submitted written comments on the modification request, that:

(A) the permittee has been authorized temporarily to conduct the activities described in the permit modification request; and

(B) unless the executive director or the commission acts to give final approval or denial of the request by the end of the authorization period, the permittee will receive authorization to conduct such activities for the life of the permit.

(10) If the owner/operator fails to notify the public by the date specified in paragraph (9) of this subsection, the effective date of the permanent authorization will be deferred until 50 days after the owner/operator notifies the public.

(11) Except as provided in paragraph (13) of this subsection, if the executive director or the commission does not finally approve or deny a modification request before the end of the automatic or temporary authorization period or reclassify the modification as Class 3 modification, the permittee is authorized to conduct the activities described in the permit modification request for the life of the permit unless amended or modified later under §305.62 of this title (relating to Amendment) or this section. The activities authorized under this paragraph must be conducted as described in the permit modification request and must be in compliance with all appropriate standards of Chapter 335, Subchapter E of this title (relating to Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities).

(12) In the processing of each Class 2 modification request which is subsequently approved or denied by the executive director or the commission in accordance with paragraph (6) or (7) of this subsection, or each Class 2 modification request for which a temporary authorization is issued in accordance with subsection (f) of this section or a reclassification to a Class 3 modification is made in accordance with paragraph (6)(C) or (7)(C) of this subsection, the executive director must consider all written comments submitted to the agency during the public comment period and must respond in writing to all significant comments.

(13) With the written consent of the permittee, the executive director may extend indefinitely or for a specified period the time periods for final approval or denial of a Class 2 modification request or for reclassifying a modification as Class 3.

(14) The commission or the executive director may change the terms of, and the commission may deny a Class 2 permit modification request under paragraphs (6) - (8) of this subsection for any of the following reasons:

(A) the modification request is incomplete;

(B) the requested modification does not comply with the appropriate requirements of Subchapter F, Chapter 335 of this title (relating to Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing or Disposal Facilities) or other applicable requirements; or

(C) the conditions of the modification fail to protect human health and the environment.

(15) The permittee may perform any construction associated with a Class 2 permit modification request beginning 60 days after the submission of the request unless the executive director establishes a later date for commencing construction and informs the permittee in writing before the 60th day.

(d) Class 3 modifications of solid waste permits.

(1) For Class 3 modifications listed in Appendix I of this subchapter, the permittee must submit a modification request to the executive director that:

(A) describes the exact change to be made to the permit conditions and supporting documents referenced by the permit;

(B) identifies that the modification is a Class 3 modification;

(C) explains why the modification is needed; and

(D) provides the applicable information in the form and manner specified in §1.5(d) of this title (relating to Records of the Agency), §§305.41-305.45 and 305.47-305.53 of this title (relating to Applicability; Application Required; Who Applies; Signatories to Applications; Contents of Application for Permit; Retention of Application Data; Additional Contents of Applications for Wastewater Discharge Permits; Additional Contents of Application for an Injection Well Permit; Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit; Revision of Applications for Hazardous Waste Permits; Waste Containing Radioactive Materials; and Application Fee), Subchapter I of this chapter (relating to Hazardous Waste Incinerator Permits), Subchapter J of this chapter (relating to Permits for Land Treatment Demonstrations Using Field Tests or Laboratory Analyses); and Subchapter Q of this chapter (relating to Permits for Boilers and Industrial Furnaces Burning Hazardous Waste).

(2) The permittee must send a notice of the modification request by first-class mail to all persons listed in §39.13 of this title (relating to Mailed Notice) and must cause this notice to be published in a major local newspaper of general circulation. This notice must be mailed and published within seven days before or after the date of submission of the modification request and evidence of the mailing and publication of the notice shall be provided to the executive director. The notice shall include the following:

(A) all information required by §39.11 of this title (relating to Text of Mailed Notice);

(B) announcement of a 60-day comment period, and the name and address of an agency contact person to whom comments must be sent;

(C) announcement of the date, time, and place for a public meeting on the modification request, to be held in accordance with paragraph (4) of this subsection;

(D) name and telephone number of the permittee's contact person;

(E) name and telephone number of an agency contact person;

(F) identification of the location where copies of the modification request and any supporting documents can be viewed and copied; and

(G) the following statement: "The permittee's compliance history during the life of the permit being modified is available from the agency contact person."

(3) The permittee must place a copy of the permit modification request and supporting documents in a location accessible to the public in the vicinity of the permitted facility.

(4) The permittee must hold a public meeting no earlier than 15 days after the publication of the notice required in paragraph (2) of this subsection and no later than 15 days before the close of the 60-day comment period. The meeting must be held to the extent practicable in the vicinity of the permitted facility.

(5) The public shall be provided at least 60 days to comment on the modification request. The comment period will begin on the date the permittee publishes the notice in the local newspaper. Comments should be submitted to the agency contact person identified in the public notice.

(6) After the conclusion of the 60-day comment period, the permit modification request shall be granted or denied in accordance with the applicable requirements of Chapter 39 of this title (relating to Public Notice), Chapter 50 of this title (relating to Action on Applications), and Chapter 55 of this title (relating to Request for Contested Case Hearing; Public Comment). When a permit is modified, only the conditions subject to modification are reopened.

(e) Other modifications.

(1) In the case of modifications not explicitly listed in Appendix I of this subchapter, the permittee may submit a Class 3 modification request to the agency, or the permittee may request a determination by the executive director that the modification should be reviewed and approved as a Class 1 or Class 2 modification. If the permittee requests that the modification be classified as a Class 1 or Class 2 modification, the permittee must provide the agency with the necessary information to support the requested classification.

(2) The executive director shall make the determination described in paragraph (1) of this subsection as promptly as practicable. In determining the appropriate class for a specific modification, the executive director shall consider the similarity of the modification to other modifications codified in Appendix I and the following criteria.

(A) Class 1 modifications apply to minor changes that keep the permit current with routine changes to the facility or its operation. These changes do not substantially alter the permit conditions or reduce the capacity of the facility to protect human health or the environment. In the case of Class 1 modifications, the executive director may require prior approval;

(B) Class 2 modifications apply to changes that are necessary to enable a permittee to respond, in a timely manner, to:

(i) common variations in the types and quantities of the wastes managed under the facility permit;

(ii) technological advancements; and

(iii) changes necessary to comply with new regulations, where these changes can be implemented without substantially

changing design specifications or management practices in the permit; and

(C) Class 3 modifications reflect a substantial alteration of the facility or its operations.

(f) Temporary authorizations.

(1) Upon request of the permittee, the commission may grant the permittee a temporary authorization having a term of up to 180 days, in accordance with this subsection, and in accordance with the following public notice requirements:

(A) notice of a hearing on the temporary authorization shall be given not later than the 20th day before the hearing on the authorization; and

(B) this notice of hearing shall provide that an affected person may request an evidentiary hearing on issuance of the temporary authorization.

(2) The permittee may request a temporary authorization for:

(A) any Class 2 modification meeting the criteria in paragraph (5)(B) of this subsection; and

(B) any Class 3 modification that meets the criteria in paragraph (5)(B)(i) or (ii) of this subsection, or that meets any of the criteria in paragraph (5)(B)(iii) - (v) of this subsection and provides improved management or treatment of a hazardous waste already listed in the facility permit.

(3) The temporary authorization request must include:

(A) a specific description of the activities to be conducted under the temporary authorization;

(B) an explanation of why the temporary authorization is necessary and reasonably unavoidable; and

(C) sufficient information to ensure compliance with the applicable standards of Chapter 335, Subchapter F of this title (relating to Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing or Disposal Facilities) and 40 Code of Federal Regulations (CFR) Part 264.

(4) The permittee must send a notice about the temporary authorization request by first-class mail to all persons listed in §39.13 of this title (relating to Mailed Notice). This notification must be made within seven days of submission of the authorization request.

(5) The commission shall approve or deny the temporary authorization as quickly as practicable. To issue a temporary authorization, the commission must find:

(A) the authorized activities are in compliance with the applicable standards of Chapter 335, Subchapter F of this title (relating to Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing or Disposal Facilities) and 40 CFR Part 264; and

(B) the temporary authorization is necessary to achieve one of the following objectives before action is likely to be taken on a modification request:

(i) to facilitate timely implementation of closure or corrective action activities;

(ii) to allow treatment or storage in tanks, containers, or containment buildings, of restricted wastes in accordance with Chapter 335, Subchapter O of this title (relating to Land Disposal Restrictions), 40 CFR Part 268, or RCRA §3004;

(iii) to prevent disruption of ongoing waste management activities;

(iv) to enable the permittee to respond to sudden changes in the types or quantities of the wastes managed under the facility permit; or

(v) to facilitate other changes to protect human health and the environment.

(6) A temporary authorization may be reissued for one additional term of up to 180 days provided that the permittee has requested a Class 2 or 3 permit modification for the activity covered in the temporary authorization, and:

(A) the reissued temporary authorization constitutes the commission's decision on a Class 2 permit modification in accordance with subsection (c)(6)(D) or (7)(D) of this section; or

(B) the commission determines that the reissued temporary authorization involving a Class 3 permit modification request is warranted to allow the authorized activities to continue while the modification procedures of subsection (d) of this section are conducted.

(g) Public notice and appeals of permit modification decisions.

(1) The commission shall notify all persons listed in §39.13 of this title (relating to Mailed Notice) within ten working days of any decision under this section to grant or deny a Class 2 or 3 permit modification request. The commission shall also notify such persons within ten working days after an automatic authorization for a Class 2 modification goes into effect under subsection (c)(8) or (11) of this section.

(2) The executive director's or the commission's decision to grant or deny a Class 3 permit modification request under this section may be appealed under the appropriate procedures set forth in the commission's rules and in the Administrative Procedure Act, the Government Code, Chapter 2002.

(h) Newly regulated wastes and units.

(1) The permittee is authorized to continue to manage wastes listed or identified as hazardous under 40 CFR, Part 261, or to continue to manage hazardous waste in units newly regulated as hazardous waste management units if:

(A) the unit was in existence as a hazardous waste facility unit with respect to the newly listed or characteristic waste or newly regulated waste management unit on the effective date of the final rule listing or identifying the waste or regulating the unit;

(B) the permittee submits a Class 1 modification request on or before the date on which the waste or unit becomes subject to the new requirements;

(C) the permittee is in substantial compliance with the applicable standards of Chapter 335, Subchapter E of this title (relating to Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities), Chapter 335, Subchapter H, Divisions 1 through 4 (relating to Standards for the Management of Specific Wastes and Specific Types of Facilities), and 40 CFR Part 265 and Part 266;

(D) the permittee also submits a complete Class 2 or 3 modification request within 180 days after the effective date of the final rule listing or identifying the waste or subjecting the unit to RCRA Subtitle C management standards; and

(E) in the case of land disposal units, the permittee certifies that each such unit is in compliance with all applicable 40 CFR, Part 265 groundwater monitoring requirements and with Chapter 37 of this title (relating to Financial Assurance) on the date 12 months after

the effective date of the final rule identifying or listing the waste as hazardous, or regulating the unit as a hazardous waste management unit. If the owner or operator fails to certify compliance with these requirements, the owner or operator shall lose authority to operate under this section.

(2) New wastes or units added to a facility's permit under this subsection do not constitute expansions for the purpose of the 25% capacity expansion limit for Class 2 modifications.

(i) Combustion facility changes to meet Title 40 Code of Federal Regulations (CFR) Part 63 Maximum Achievable Control Technology (MACT) standards. The following procedures apply to hazardous waste combustion facility permit modifications requested under L.9. of Appendix I of this subchapter.

(1) Facility owners or operators must comply with the Notification of Intent to Comply (NIC) requirements of 40 CFR §63.1210(b) and (c), as amended through July 10, 2000 (65 FR 42292), before a permit modification can be requested under this section.

(2) If the executive director does not approve or deny the request within 90 days of receiving it, the request shall be deemed approved. The executive director may, at his or her discretion, extend this 90- day deadline one time for up to 30 days by notifying the facility owner or operator.

(j) Military hazardous waste munitions storage, processing, and disposal. The permittee is authorized to continue to accept waste military munitions notwithstanding any permit conditions barring the permittee from accepting off-site wastes, if:

(1) the facility is in existence as a hazardous waste facility, and the facility is already permitted to handle waste military munitions, on the date when waste military munitions become subject to hazardous waste regulatory requirements;

(2) on or before the date when waste military munitions become subject to hazardous waste regulatory requirements, the permittee submits a Class 1 modification request to remove or revise the permit provision restricting the receipt of off-site waste munitions; and

(3) the permittee submits a Class 2 modification request within 180 days of the date when the waste military munitions become subject to hazardous waste regulatory requirements.

(k) Appendix I. The following appendix will be used for the purposes of this subchapter which relates to industrial and hazardous solid waste permit modification at the request of the permittee.
Figure: 30 TAC §305.69(k)

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 October 26, 2001.

TRD-200106537
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 15, 2001
Proposal publication date: June 22, 2001
For further information, please call: (512) 239-4712

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SUBCHAPTER F. PERMIT CHARACTERISTICS AND CONDITIONS

30 TAC §305.122

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under THSC, Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the Act.

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 October 26, 2001.

TRD-200106538
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 15, 2001
Proposal publication date: June 22, 2001
For further information, please call: (512) 239-4712

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SUBCHAPTER G. ADDITIONAL CONDITIONS FOR HAZARDOUS AND INDUSTRIAL SOLID WASTE STORAGE, PROCESSING, OR DISPOSAL PERMITS

30 TAC §305.150

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under THSC, Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the Act.

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 October 26, 2001.

TRD-200106539
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 15, 2001
Proposal publication date: June 22, 2001
For further information, please call: (512) 239-4712

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SUBCHAPTER I. HAZARDOUS WASTE INCINERATOR PERMITS

30 TAC §305.175

STATUTORY AUTHORITY

The new section is adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under THSC, Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the Act.

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 October 26, 2001.

TRD-200106540
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 15, 2001
Proposal publication date: June 22, 2001
For further information, please call: (512) 239-4712

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SUBCHAPTER Q. PERMITS FOR BOILERS AND INDUSTRIAL FURNACES BURNING HAZARDOUS WASTE

30 TAC §305.571

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under THSC, Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the Act.

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 October 26, 2001.

TRD-200106541
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 15, 2001
Proposal publication date: June 22, 2001
For further information, please call: (512) 239-4712

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CHAPTER 305. CONSOLIDATED PERMITS
SUBCHAPTER C. APPLICATION FOR PERMIT

30 TAC §305.50

The Texas Natural Resource Conservation Commission (commission) adopts an amendment to §305.50, Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit. Section 305.50 is adopted *with changes* to the proposed text as published in the August 24, 2001 issue of the *Texas Register* (26 TexReg 6264).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The primary purpose of the adopted amendments is to revise the commission's rules to conform to certain federal regulations by incorporating the federal regulations by reference. Establishing equivalency with federal regulations will enable the State of Texas to increase its level of authorization to operate aspects of the federal hazardous waste program in lieu of the United States Environmental Protection Agency (EPA). These adopted amendments also incorporate administrative corrections.

SECTION DISCUSSION AND RESPONSE TO COMMENT

Adopted §305.50(4) is amended to conform to federal regulations promulgated in the November 25, 1996 issue of the *Federal Register* (61 FR 59932). This amendment incorporates information requirements for Part B of a hazardous waste permit application found in 40 Code of Federal Regulations, §270.27 for air emission controls for tanks, surface impoundments, and containers. The adopted section contains punctuation and minor grammatical changes to conform with *Texas Register* formatting and style requirements.

Comment

Dupont commented that any corporation or business entity managed, owned, or otherwise closely related to the applicant should reflect ownership of 50% or greater (bright line) as a standard for determining whether an entity is closely related. Dupont commented that using the proposed 20% standard assumes that an investor has the ability to exercise significant influence, which would mean that they would be technologically and managerially in control.

Response

The commission neither disagrees nor agrees with this comment. The commission notes that proposed §305.50(2) contained only an administrative correction of the word "subsection," and that no change to the aforementioned 20% standard was proposed. Therefore, any change to the existing rule language concerning the 20% standard cannot be made under this adoption. The commission has made no change to the proposed text in response to this comment.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. Furthermore, it does not meet any of the four applicability

requirements listed in §2001.0225(a). Although this rule is adopted to protect the environment and reduce the risk to human health from environmental exposure, this is not a major environmental rule because it does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. There is no adverse effect in a material way on the economy, a sector of the economy, productivity, competition, or jobs of the state or a sector of the state because 42 United States Code (USC), §6926(g), immediately imposes on the regulated community any new requirements and prohibitions under the Hazardous and Solid Waste Amendments of 1984 that are more stringent than state rules, on the effective date of the federal regulation. In other words, under federal law, the regulated community must comply with such new requirements and prohibitions that are more stringent, beginning on the effective date of the federal regulation. Since these more stringent rules are the ones which could have an adverse effect in a material way on the economy, a sector of the economy, productivity, competition, or jobs of the state or a sector of the state; since the portions of this adoption which are more stringent than previously existing rules are imposed by the Hazardous and Solid Waste Amendments of 1984; and since the regulated community is already required to comply with these more stringent rules, there is no such adverse effect caused by the adoption of the state rule. The reason there is no adverse effect in a material way on the environment, or the public health and safety of the state or a sector of the state is because the adopted rule is designed to protect the environment, the public health, and the public safety of the state and all sectors of the state. In addition, the rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopt a rule solely under the general powers of the agency.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for the adopted rule in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the adopted rule is to ensure that Texas' state hazardous waste rules are equivalent to the federal regulations after which they are patterned, thus enabling the state to retain authorization to operate its own hazardous waste program in lieu of the corresponding federal program. The rule will substantially advance this stated purpose by adopting federal regulations by reference. Promulgation and enforcement of the rule will not affect private real property which is the subject of the rule because the rule language consists of technical corrections and updates to bring certain state hazardous waste regulations into equivalence with more recent federal regulations. There is no burden on private real property because 42 USC, §6926(g), immediately imposes on the regulated community any new requirements and prohibitions under the Hazardous and Solid Waste Amendments of 1984 that are more stringent than state rules, on the effective date of the federal regulation. In other words, under federal law, the regulated community must comply with such new requirements and prohibitions that are more stringent, beginning on the effective date of the federal regulation. Since these more stringent rules are the ones which could present a burden on private real property; since the portions of this adoption which are more stringent than previously existing rules are imposed by the Hazardous and Solid Waste Amendments of 1984; and since the regulated community is already required to comply with these more stringent rules, there is no such burden. The subject regulations do not affect a landowner's rights in private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that it is a rulemaking identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), or will affect an action and/or 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 prepared a consistency determination for the adopted rule in accordance with 31 TAC §505.22 and found the rulemaking is consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goal applicable to the rulemaking is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs). Applicable policies are construction and operation of solid waste treatment, storage, and disposal facilities, such that new solid waste facilities and areal expansions of existing solid waste facilities shall be sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and, at a minimum, comply with standards established under the Solid Waste Disposal Act, 42 USC, §§6901 et seq. Promulgation and enforcement of these rules are consistent with the applicable CMP goals and policies because the adopted rule amendment will update and enhance the commission's rules concerning hazardous and industrial solid waste facilities. In addition, the rule does not violate any applicable provisions of the CMP's stated goals and policies.

HEARING AND COMMENTERS

The commission did not hold a public hearing on the proposed rulemaking. One commenter submitted a written comment during the comment period which closed at 5:00 p.m. on September 24, 2001. Written comment was submitted by DuPont, whose comment is addressed in the SECTION DISCUSSION AND RESPONSE TO COMMENT section of this preamble.

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

§305.50. Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit.

Unless otherwise stated, an application for a permit to store, process, or dispose of solid waste shall meet the following requirements.

(1) One original and three copies of the permit application 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.

(2) Plans and specifications for the construction and operation of the facility and the staffing pattern for the facility shall be submitted, including the qualifications of all key operating personnel.

Also to be submitted is the closing plan for the solid waste storage, processing, or disposal facility. The information provided shall be sufficiently detailed and complete to allow the executive director to ascertain whether the facility will be constructed and operated in compliance with all pertinent state and local air, water, public health and solid waste statutes. Also to be submitted are listings of sites owned, operated, or controlled by the applicant in the State of Texas. For purposes of this section, the terms "permit holder" and "applicant" include each member of a partnership or association and, with respect to a corporation, each officer and the owner or owners of a majority of the corporate stock, provided such partner or owner controls at least 20% of the permit holder or applicant and at least 20% of another business which operates a solid waste management facility.

(3) 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 (relating to Industrial Solid Waste and Municipal Hazardous Waste), shall be included, including, but not limited to, the information set forth in the Texas Solid Waste Disposal Act, §4(e)(13).

(4) An application for a permit, permit amendment, or permit modification to store, process, or dispose of hazardous waste shall be subject to the following requirements, as applicable.

(A) In the case of an application for a permit to store, process, or dispose of hazardous waste, the application shall also contain any additional information required by 40 Code of Federal Regulations (CFR) §§270.13 - 270.27, 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 of this title (relating to Annual Inflation Adjustments to Closure Cost Estimates), §37.141 of this title (relating to Increase in Current Cost Estimate), and §335.178 of this title (relating to Cost Estimate for Closure).

(B) An application for a permit to store, process, or dispose of hazardous waste 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 permit and all applicable rules, including, but not limited to, how an applicant intends to obtain financing for construction of the facility, and to close the facility properly. Financial information submitted to satisfy this subparagraph shall meet the requirements of subparagraph (C) or (D) of this paragraph.

(C) For applicants possessing a resolution from a governing body approving or agreeing to approve the issuance of bonds for the purpose of satisfying the financial assurance requirements of subparagraph (B) of this paragraph, submission of the following information will be an adequate demonstration:

(i) a statement signed by an authorized signatory in accordance with §305.44(a) of this title (relating to Signatories to Applications) explaining in detail how the applicant demonstrates sufficient financial resources to construct, safely operate, properly close, and provide adequate liability coverage for the facility. This statement shall also address how the applicant intends to comply with the financial assurance requirements for closure, post closure, corrective action, and liability coverage in accordance with Chapter 37, Subchapter P of this title (relating to Financial Assurance for Hazardous and Nonhazardous Industrial Solid Waste Facilities);

(ii) a certified copy of the resolution; and

(iii) certification by the governing body of passage of the resolution.

(D) For all applicants not meeting the requirements of subparagraph (C) of this paragraph, financial information submitted to satisfy the requirements of subparagraph (B) of this paragraph shall include the applicable items listed under clauses (i) - (vii) of this subparagraph. Financial statements required under clauses (ii) and (iii) of this subparagraph shall be prepared in accordance with generally accepted accounting principles and include a balance sheet, income statement, cash flow statement, notes to the financial statements, and accountant's opinion letter:

(i) a statement signed by an authorized signatory in accordance with §305.44(a) of this title explaining in detail how the applicant demonstrates sufficient financial resources to construct, safely operate, properly close, and provide adequate liability coverage for the facility. This statement shall also address how the applicant intends to comply with the financial assurance requirements for closure, post closure, corrective action, and liability coverage in accordance with Chapter 37, Subchapter P of this title;

(ii) for applicants for which audited financial statements have been prepared the previous two or more years, the following financial statements:

(I) audited financial statements for the previous two years; and

(II) the most current quarterly financial statement prepared according to generally accepted accounting principles;

(iii) for applicants for which audited financial statements have not been prepared the previous two or more years, the following copies of tax returns and financial statements:

(I) copies of tax returns for the previous two years, each certified by original signature of an authorized signatory as being a "true and correct copy of the return filed with the Internal Revenue Service";

(II) financial statements for the previous two years; and

(III) additionally, an audited financial statement for the most recent fiscal year;

(iv) for publicly traded companies, copies of Securities and Exchange Commission Form 10-K for the previous two years and the most current Form 10-Q;

(v) for privately-held companies, written disclosure of the information that would normally be found in Securities and Exchange Commission Form 10-K including, but not limited to, the following:

(I) descriptions of the business and its operations;

(II) identification of any affiliated relationships;

(III) credit agreements and terms;

(IV) any legal proceedings involving the applicant;

(V) contingent liabilities; and

(VI) significant accounting policies;

(vi) for applications encompassing facility expansion, capacity expansion, or new construction, estimates of capital costs for expansion and/or construction;

(vii) if an applicant cannot or chooses not to demonstrate sufficient financial resources through submittal of the financial

documentation specified in clauses (i) - (v) of this subparagraph and who must or chooses to obtain additional financing through a new stock offering or new debt issuance for facility expansion, capacity expansion, or new construction; and for safe operation, proper closure, and adequate liability coverage, the following information:

(I) a financial plan sufficiently detailed to clearly demonstrate that the applicant will be in a position to readily secure financing for construction, operation, and closure if the permit is issued. The submitted financial plan must be accompanied by original letters of opinion from two financial experts, not otherwise employed by the applicant, who have the demonstrated ability to either finance the facility or place the required financing. The opinion letters must certify that the financial plan is reasonable; certify that financing is obtainable within 180 days of final administrative and judicial disposition of the permit application; and include the time schedule contingent upon permit finality for securing the financing. Only one opinion letter from a financial expert, not otherwise employed by the applicant, is required if the letter renders a firm commitment to provide all the necessary financing; and

(II) written detail of the annual operating costs of the facility and a projected cash flow statement including the period of construction and first two years of operation. The cash flow statement must demonstrate the financial resources to meet operating costs, debt service, and financial assurance for closure, post-closure care, and liability coverage requirements. A list of the assumptions made to forecast cash flow shall also be provided.

(E) If any of the information required to be disclosed under subparagraph (D) of this paragraph would be considered confidential under applicable law, the information shall be protected accordingly. During hearings on contested applications, disclosure of confidential information may be allowed only under an appropriate protective order.

(F) An application for a modification or amendment of a permit which includes a capacity expansion of an existing hazardous waste management facility shall also contain information delineating all faults within 3,000 feet of the facility, together with a demonstration, unless previously demonstrated to the commission or the EPA, that:

(i) the fault has not experienced displacement within Holocene time, or if faults have experienced displacement within Holocene time, that no such faults pass within 200 feet of the portion of the surface facility where treatment, storage, or disposal of hazardous wastes will be conducted; and

(ii) the fault will not result in structural instability of the surface facility or provide for groundwater movement to the extent that there is endangerment to human health or the environment.

(G) At any time after the effective date of the requirements contained in Chapter 335, Subchapter F of this title (relating to Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities), the executive director may require the owner or operator of an existing hazardous waste management facility to submit that portion of his application containing the information specified in 40 CFR §§270.14 - 270.27. Any owner or operator shall be allowed a reasonable period of time from the date of the request to submit the information. An application for a new hazardous waste management facility must be submitted at least 180 days before physical construction of the facility is expected to commence.

(5) An application for a new hazardous waste landfill which is filed after January 1, 1986, must include an engineering report which evaluates the benefits, if any, associated with the construction of the landfill above existing grade at the proposed site, the costs associated with the above-grade construction, and the potential adverse effects, if any, which would be associated with the above-grade construction.

(6) An application for a new hazardous waste landfill, land treatment facility, or surface impoundment which is filed after January 1, 1986, which is to be located in the apparent recharge zone of a regional aquifer must include a hydrogeologic report documenting the potential effects, if any, on the regional aquifer in the event of a release from the waste containment system.

(7) Engineering plans and specifications submitted as part of the permit application shall be prepared and sealed by a registered professional engineer who is currently registered as required by the Texas Engineering Practice Act.

(8) After August 8, 1985, any Part B permit application submitted by an owner or operator of a facility that stores, processes, or disposes of hazardous waste in a surface impoundment or a landfill must be accompanied by information, reasonably ascertainable by the owner or operator, on the potential for the public to be exposed to hazardous wastes or hazardous constituents through releases related to the unit. By August 8, 1985, owners and operators of a landfill or a surface impoundment who have already submitted a Part B application must submit the exposure information required by this paragraph. At a minimum, such information must address:

(A) reasonably foreseeable potential releases from both normal operations and accidents at the unit, including releases associated with transportation to or from the unit;

(B) the potential pathways of human exposure to hazardous wastes or constituents resulting from documented releases; and

(C) the potential magnitude and nature of the human exposure resulting from such releases.

(9) In the case of an application for a permit to store, process, or dispose of hazardous waste at a new hazardous waste management facility, or an application for amendment or modification of a solid waste management facility permit to provide for capacity expansion, the application shall also identify the nature of any known specific and potential sources, types, and volumes of waste to be stored, processed, or disposed of by the facility and shall identify any other related information the executive director may require.

(10) In the case of an application for a permit to store, process, or dispose of hazardous waste at a new hazardous waste management facility, the application shall also contain the following:

(A) copies of any relevant land use plans, adopted in accordance with the Texas Local Government Code, Chapter 211 (Vernon's Supplement 1991), which were in existence before publication of the notice of intent to file a solid waste permit application or, if no notice of intent is filed, at the time the permit application is filed;

(B) identification of the names and locations of industrial and other waste-generating facilities within 1/2 mile of the facility in the case of an application for a permit for a new on-site hazardous waste management facility, and within one mile of the facility in the case of an application for a permit for a new commercial hazardous waste management facility;

(C) the approximate quantity of hazardous waste generated or received annually at those facilities described under subparagraph (B) of this paragraph;

(D) descriptions of the major routes of travel in the vicinity of the facility to be used for the transportation of hazardous waste to and from the facility, together with a map showing the

land-use patterns, covering at least a five-mile radius from the boundaries of the facility; and

(E) the information and demonstrations concerning faults described under paragraph (4)(F) of this section.

(11) In the case of an application for a permit to store, process, or dispose of hazardous waste, the application shall also contain information sufficient to demonstrate to the satisfaction of the commission that a proposed hazardous waste landfill, areal expansion of such landfill, or new commercial hazardous waste land disposal unit is not subject to inundation as a result of a 100-year flood event. An applicant or any other party may not rely solely on floodplain maps prepared by the Federal Emergency Management Agency or a successor agency to determine whether a hazardous waste landfill, areal expansion of such landfill, or commercial hazardous waste land disposal unit is subject to such an inundation.

(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) information sufficient to demonstrate whether a burden will be imposed on public roadways by vehicles traveling to and from the facility, including, at a minimum:

(i) the average gross weight of the various types and sizes of such vehicles to be used for transportation of hazardous waste;

(ii) the average number of such vehicles which would travel the public roadways; and

(iii) identification of the roads to be used by vehicles traveling to and from the facility within a minimum radius of 2 1/2 miles from the facility. Such identification must include the major highways nearest the facility, even if they are located outside the 2 1/2 mile radius;

(B) in addition to the requirements of subparagraph (A) of this paragraph, an applicant may submit a letter from the relevant agency of the state, county, or municipality which has the authority to regulate and maintain roads which states unequivocally that the roads to and from the facility are adequate for the loads to be placed on them by the proposed facility. Such letter will serve as prima facie evidence that the additional loads placed on the roadways caused by the operation of the facility would not constitute a burden and thus would not require that improvements be made to such roadways. Such letter does not, however, obviate the need to submit the information required under subparagraph (A) of this paragraph;

(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) in addition to the contingency plan required under 40 CFR §270.14(b)(7), provisions specifying procedures and timing of practice facility evacuation drills, where there is a possibility that evacuation of the facility could be necessary;

(II) contracts with any private corporation, municipality, or county to provide emergency response;

(III) weather data which might tend to affect emergency response;

(IV) a definition of worst-case emergencies, e.g., fires, explosions, the Texas Design Hurricane, or the Standard Project Hurricane;

(V) a training program for personnel for response to such emergencies;

(VI) identification of first-responders;

(VII) identification of local or regional emergency medical services and hospitals which have had hazardous materials training;

(VIII) a pre-disaster plan, including drills;

(IX) a mechanism for notifying all applicable government agencies when an incident occurs (i.e., Texas Natural Resource Conservation Commission, Texas Parks and Wildlife, General Land Office, Texas Department of Health, and Texas Railroad Commission);

(X) a showing of coordination with the local emergency planning committee and any local comprehensive emergency management plan; and

(XI) any medical response capability which may be available on the facility property; or

(ii) the applicant has secured bonding of sufficient financial assurance to fund the emergency response personnel and equipment determined to be necessary by the executive director to manage a reasonable worst-case emergency condition associated with the facility; such financial assurance may be demonstrated by providing information which may include, but is not limited to, the following:

(I) long-term studies using an environmental model which provide the amount of damages for which the facility is responsible; and

(II) costs involved in supplying any of the information included in or satisfying any of the requirements of clause (i)(I) - (XI) of this subparagraph;

(D) if an applicant does not elect to provide its own facilities or secure bonding to ensure sufficient emergency response capabilities in accordance with §335.183 of this title (relating to Emergency Response Capabilities Required for New Commercial Hazardous Waste Management Facilities), the applicant must provide prior to the time the facility first receives waste:

(i) documentation showing agreements with the county and/or municipality in which the facility is located, or documentation showing agreements with an adjoining county, municipality, mutual aid association, or other appropriate entity such as professional organizations regularly doing business in the area of emergency and/or disaster response; or

(ii) demonstration that a financial assurance mechanism in the form of a negotiable instrument, such as a letter of credit, fully paid in trust fund, or an insurance policy, with the limitation that the funds can only be used for emergency response personnel and equipment and made payable to and for the benefit of the county government and/or municipal government in the county in which the facility is located or proposed to be located; and

(E) a written statement signed by an authorized signatory in accordance with §305.44(a) of this title explaining how the applicant intends to provide emergency response financial assurance to meet the requirements of subparagraph (C) or (D) of this paragraph; and

(F) a summary of the applicant's experience in hazardous waste management and in particular the hazardous waste management technology proposed for the application location, and, for any applicant without experience in the particular hazardous waste management technology, a conspicuous statement of that lack of experience.

(13) An application for a boiler or industrial furnace burning hazardous waste at a facility at which the owner or operator uses direct transfer operations to feed hazardous waste from transport vehicles (containers, as defined in 40 CFR §266.111) directly to the boiler or industrial furnace shall submit information supporting conformance with the standards for direct transfer provided by 40 CFR §266.111 and §335.225 of this title (relating to Additional Standards for Direct Transfer).

(14) The executive director may require a permittee or an applicant to submit information in order to establish permit conditions under §305.127(4)(A) and (1)(B)(iii) of this title (relating to Conditions to be Determined for Individual Permits).

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 October 29, 2001.

TRD-200106613
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 18, 2001
Proposal publication date: August 24, 2001
For further information, please call: (512) 239-0348

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CHAPTER 335. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE

The Texas Natural Resource Conservation Commission (commission) adopts the amendments to Subchapter A, Industrial Solid Waste and Municipal Hazardous Waste in General, §§335.1, 335.3, 335.4, 335.6, 335.9 - 335.14, 335.17, 335.24, 335.28, 335.29, and 335.31; Subchapter B, Hazardous Waste Management General Provisions, §§335.41 and 335.43 - 335.47; Subchapter C, Standards Applicable to Generators of Hazardous Waste, §§335.61, 335.67, 335.69, 335.76, and 335.78; Subchapter D, Standards Applicable to Transporters of Hazardous Waste, §§335.91, 335.93, and 335.94; Subchapter E, Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities, §§335.111, 335.115, 335.117 - 335.119, 335.123, 335.125, and 335.127; Subchapter F, Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities, §§335.155, 335.164, 335.165, 335.168 - 335.169, 335.172, 335.177, 335.178, and 335.181; Subchapter G, Location Standards for Hazardous Waste Storage, Processing, or Disposal, §§335.201, 335.202, 335.205, and 335.206; Subchapter H, Standards for the Management of Specific Wastes and Specific Types of Facilities, Division 2, Hazardous Waste Burned for Energy Recovery, §§335.221, 335.222, 335.224, and 335.225; Division 3, Recyclable Materials Utilized For Precious Metal Recovery, §335.241; and Division 5, Universal Waste Rule, §335.262; Subchapter I, Prohibition of Open Dumps, §§335.303 - 335.305 and 335.307; Subchapter J, Hazardous Waste Generation, Facility and Disposal Fee System, §§335.321 - 335.323, 335.325, 335.326, 335.328, and 335.329; Subchapter K, Hazardous Substance Facilities Assessment and Remediation, §§335.341, 335.342, and 335.346; Subchapter N, Household Materials Which Could be Classified as Hazardous Wastes, §§335.401 - 335.403, 335.406, 335.407, 335.409, 335.411, and 335.412; Subchapter O, Land Disposal Restrictions, §335.431; Subchapter Q, Pollution Prevention: Source Reduction and Waste Minimization, §§335.471, 335.473 - 335.478, and 335.480; Subchapter R, Waste Classification, §§335.501 - 335.504, 335.507 - 335.509, 335.511 - 335.514, and 335.521; and Subchapter S, Risk Reduction Standards, §§335.559, 335.563, and 335.569.

Sections 335.1 and 335.431 are adopted *with changes* to the proposed text as published in the June 22, 2001 issue of the *Texas Register* (26 TexReg 4602). The remaining sections are adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The primary purpose of the adopted amendments is to revise the commission's rules to conform to certain federal regulations, either by incorporating the federal regulations by reference or by introducing language into the commission's rules which corresponds to the federal regulations. Establishing equivalency with federal regulations will enable the State of Texas to increase its level of authorization to operate aspects of the federal hazardous waste program in lieu of the United States Environmental Protection Agency (EPA). Most of the federal regulations being addressed in this adoption were promulgated by the EPA in issues of the *Federal Register* from November 1996 through June 2000. In addition, requirements from an earlier federal regulation promulgated in the December 6, 1994 *Federal Register* are also adopted.

The commission's previous review of Chapter 335, adopted by the commission on June 29, 2000 and published in the July 14, 2000 issue of the *Texas Register* (25 TexReg 6820), revealed a number of inconsistencies and incorrect references and citations, which are now being addressed in this adoption. For example, the statutory citations involving the Solid Waste Disposal Act are made consistent throughout Chapter 335, as "Texas Health and Safety Code, Chapter 361." Such amendments simplify the language and make the rules more readable. The commission also adopts corrections or deletions of out-of-date references to the Texas Water Commission and the Texas Department of Health, and corrections to rule references and other administrative corrections, where appropriate.

SECTION BY SECTION DISCUSSION AND RESPONSE TO COMMENTS

This discussion provides an explanation of changes made to the proposed text since publication in the June 22, 2001 issue of the *Texas Register* (26 TexReg 4602). In addition to changes made to conform to *Texas Register* formatting and style requirements, several minor changes were made in response to comments provided by the Dow Chemical company.

Comment

The Dow Chemical Company commented that the proposed definition of solid waste at §335.1(129)(A)(iv) included the incorrect date of July 7, 2000 in the Federal Register citation for adoption

by reference of amendments to 40 CFR §261.38, and stated that the correct date is July 10, 2000.

Response

The commission agrees with this comment. Adopted §335.1(129)(A)(iv) is amended to state that 40 Code of Federal Regulations (CFR) §261.38 is adopted by reference as amended through July 10, 2000 (65 FR 42292).

Comment

The Dow Chemical Company commented that the update to the regulatory citation under §335.431 regarding the adoption by reference of certain appendices to 40 CFR Part 268 should be a more recent date, and suggested June 8, 2000.

Response

The commission agrees in part and disagrees in part with this comment. The commission believes that the regulatory citation should be more recent than the one that was proposed, but does not agree that the June 8, 2000 *Federal Register* promulgation should be included in this adoption.

The commission does not adopt the June 8, 2000 amendment to Appendix VII of 40 CFR Part 268 promulgated in (65 FR 36365) which incorrectly removed the entry for U048 from Table 1. This error appears to be a typographical error, because U408, an organobromine waste, is the waste entry which needs to be deleted from the EPA regulations due to court order. The commission adopts by reference federal amendments to Appendix VIII of 40 CFR Part 268, relating to land disposal restrictions (LDR) through May 26, 1998 (63 FR 28705). This results in the additional adoption by reference of an amendment to Appendix VIII of 40 CFR Part 268, which added a national capacity LDR variance for certain underground injection control wastes.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a). Although these rules are adopted to protect the environment and reduce the risk to human health from environmental exposure, this is not a major environmental rule because it does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. There is no adverse effect in a material way on the economy, a sector of the economy, productivity, competition, or jobs of the state or a sector of the state because 42 United States Code (USC) §6926(g) immediately imposes on the regulated community any new requirements and prohibitions under the Hazardous and Solid Waste Amendments of 1984 that are more stringent than state rules, on the effective date of the federal regulation. In other words, under federal law, the regulated community must comply with such new requirements and prohibitions that are more stringent, beginning on the effective date of the federal regulation. Since these more stringent rules are the ones which could have an adverse effect in a material way on the economy, a sector of the economy, productivity, competition, or jobs of the state or a sector of the state; since the portions of this adoption which are more stringent than previously existing rules are imposed by the Hazardous and Solid Waste Amendments of 1984; and since the regulated community is already required to comply with these more stringent rules, there is no such adverse effect caused by the adoption of these state rules. The reason there is no adverse effect in a material way on the environment, or the public health and safety of the state or a sector of the state is because these adopted rules are designed to protect the environment, the public health, and the public safety of the state and all sectors of the state. In addition, these rules will not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopt a rule solely under the general powers of the agency.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of these rules is to ensure that Texas' state hazardous waste rules are equivalent to the federal regulations after which they are patterned, thus enabling the state to retain authorization to operate its own hazardous waste program in lieu of the corresponding federal program; to provide streamlining and regulatory reform provisions; and to make typographical and other administrative corrections designed to clarify certain rule language, to correct references to the CFR, and to correct other technical errors within the rules, including reinstating rule language which was previously inadvertently deleted and correcting cross-references. The adopted rules will substantially advance this stated purpose by adopting federal regulations by reference or by introducing language intended to ensure that state rules are equivalent to the corresponding federal regulations; by incorporating certain streamlining and regulatory reform elements; and by making technical corrections, including reinstatement of rule language and cross-reference corrections. Promulgation and enforcement of these rules will not affect private real property which is the subject of the rules because the rule language consists of technical corrections and updates to bring certain state hazardous waste regulations into equivalence with more recent federal regulations, as well as language which represents rule reform or streamlining of certain requirements. There is no burden on private real property because 42 USC §6926(g) immediately imposes on the regulated community any new requirements and prohibitions under the Hazardous and Solid Waste Amendments of 1984 that are more stringent than state rules, on the effective date of the federal regulation. In other words, under federal law, the regulated community must comply with such new requirements and prohibitions that are more stringent, beginning on the effective date of the federal regulation. Since these more stringent rules are the ones which could present a burden on private real property; since the portions of this adoption which are more stringent than previously existing rules are imposed by the Hazardous and Solid Waste Amendments of 1984; and since the regulated community is already required to comply with these more stringent rules, there is no such burden. The subject regulations do not affect a landowner's rights in private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the adoption and found that the rulemaking is 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 and/or authorization identified in 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 adopted rules pursuant to 31 TAC §505.22 and has found the adoption is consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goal applicable to the rulemaking is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs). Applicable policies are construction and operation of solid waste treatment, storage, and disposal facilities, such that new solid waste facilities and areal expansions of existing solid waste facilities shall be sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and, at a minimum, comply with standards established under the Solid Waste Disposal Act, 42 USC, §§6901 et seq. Promulgation and enforcement of these rules are consistent with the applicable CMP goals and policies because the rule amendments will update and enhance the commission's rules concerning hazardous and industrial solid waste facilities. In addition, the adopted rules do not violate any applicable provisions of the CMP's stated goals and policies.

HEARING AND COMMENTERS

The commission did not hold a public hearing on the proposed rules. Two commenters submitted written comments during the comment period which closed at 5:00 p.m., July 23, 2001. Written comments were submitted by the Dow Chemical Company and the Texas Department of Transportation. The Dow Chemical Company's comments are addressed in the SECTION BY SECTION DISCUSSION AND RESPONSE TO COMMENTS section of this preamble. The Texas Department of Transportation commented only that they had no comment to the proposal.

SUBCHAPTER A. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE IN GENERAL

30 TAC §§335.1, 335.3, 335.4, 335.6, 335.9 - 335.14, 335.17, 335.24, 335.28, 335.29, 335.31

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

§335.1. Definitions.

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

(1) Aboveground tank--A device meeting the definition of tank in this section and that is situated in such a way that the entire surface area of the tank is completely above the plane of the adjacent surrounding surface and the entire surface area of the tank (including the tank bottom) is able to be visually inspected.

(2) Act--Texas Health and Safety Code, Chapter 361.

(3) Active life--The period from the initial receipt of hazardous waste at the facility until the executive director receives certification of final closure.

(4) Active portion--That portion of a facility where processing, storage, or disposal operations are being or have been conducted after November 19, 1980, and which is not a closed portion. (See also "closed portion" and "inactive portion.")

(5) Activities associated with the exploration, development, and protection of oil or gas or geothermal resources--Activities associated with:

(A) the drilling of exploratory wells, oil wells, gas wells, or geothermal resource wells;

(B) the production of oil or gas or geothermal resources, including:

(i) activities associated with the drilling of injection water source wells that penetrate the base of usable quality water;

(ii) activities associated with the drilling of cathodic protection holes associated with the cathodic protection of wells and pipelines subject to the jurisdiction of the commission to regulate the production of oil or gas or geothermal resources;

(iii) activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants;

(iv) activities associated with any underground natural gas storage facility, provided the terms "natural gas" and "storage facility" shall have the meanings set out in the Texas Natural Resources Code, §91.173;

(v) activities associated with any underground hydrocarbon storage facility, provided the terms "hydrocarbons" and "underground hydrocarbon storage facility" shall have the meanings set out in the Texas Natural Resources Code, §91.173; and

(vi) activities associated with the storage, handling, reclamation, gathering, transportation, or distribution of oil or gas prior to the refining of such oil or prior to the use of such gas in any manufacturing process or as a residential or industrial fuel;

(C) the operation, abandonment, and proper plugging of wells subject to the jurisdiction of the commission to regulate the exploration, development, and production of oil or gas or geothermal resources; and

(D) the discharge, storage, handling, transportation, reclamation, or disposal of waste or any other substance or material associated with any activity listed in subparagraphs (A) - (C) of this paragraph, except for waste generated in connection with activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants if that waste is a hazardous waste as defined by the administrator of the United States Environmental Protection Agency (EPA) pursuant to the Federal Solid Waste Disposal Act, as amended (42 United States Code, §§6901 et seq.).

(6) Administrator--The administrator of the United States Environmental Protection Agency or his designee.

(7) Ancillary equipment--Any device that is used to distribute, meter, or control the flow of solid waste or hazardous waste from its point of generation to a storage or processing tank(s), between solid waste or hazardous waste storage and processing tanks to a point of disposal on-site, or to a point of shipment for disposal off-site. Such

devices include, but are not limited to, piping, fittings, flanges, valves, and pumps.

(8) Aquifer--A geologic formation, group of formations, or part of a formation capable of yielding a significant amount of groundwater to wells or springs.

(9) Authorized representative--The person responsible for the overall operation of a facility or an operation unit (i.e., part of a facility), e.g., the plant manager, superintendent, or person of equivalent responsibility.

(10) Battery--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(11) Boiler--An enclosed device using controlled flame combustion and having the following characteristics:

(A) the unit must have physical provisions for recovering and exporting thermal energy in the form of steam, heated fluids, or heated gases;

(B) the 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).

(12) Carbon regeneration unit--Any enclosed thermal treatment device used to regenerate spent activated carbon.

(13) Certification--A statement of professional opinion based upon knowledge and belief.

(14) Class 1 wastes--Any industrial solid waste or mixture of industrial solid wastes which because of its concentration, or physical or chemical characteristics, is toxic, corrosive, flammable, a strong sensitizer or irritant, a generator of sudden pressure by decomposition, heat, or other means, or may pose a substantial present or potential danger to human health or the environment when improperly processed, stored, transported, or disposed of or otherwise managed, as further defined in §335.505 of this title (relating to Class 1 Waste Determination).

(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).

(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).

(17) Closed portion--That portion of a facility which an owner or operator has closed in accordance with the approved facility closure plan and all applicable closure requirements. (See also "active portion" and "inactive portion.")

(18) Closure--The act of permanently taking a waste management unit or facility out of service.

(19) Commercial hazardous waste management facility--Any hazardous waste management facility that accepts hazardous waste or PCBs for a charge, except a captured facility or a facility that accepts waste only from other facilities owned or effectively controlled by the same person, where "captured facility" means a manufacturing or production facility that generates an industrial solid waste or hazardous waste that is routinely stored, processed, or disposed of on a shared basis in an integrated waste management unit owned, operated by, and located within a contiguous manufacturing complex.

(20) Component--Either the tank or ancillary equipment of a tank system.

(21) Confined aquifer--An aquifer bounded above and below by impermeable beds or by beds of distinctly lower permeability than that of the aquifer itself; an aquifer containing confined groundwater.

(22) Consignee--The ultimate treatment, storage, or disposal facility in a receiving country to which the hazardous waste will be sent.

(23) Container--Any portable device in which a material is stored, transported, processed, or disposed of, or otherwise handled.

(24) Containment building--A hazardous waste management unit that is used to store or treat hazardous waste under the provisions of §335.152(a)(19) or §335.112(a)(21) of this title (relating to Standards).

(25) Contaminant--Includes, but is not limited to, "solid waste," "hazardous waste," and "hazardous waste constituent" as defined in this subchapter, "pollutant" as defined in the Texas Water Code, §26.001, and Texas Health and Safety Code, §361.431, "hazardous substance" as defined in the Texas Health and Safety Code, §361.003, and other substances that are subject to the Texas Hazardous Substances Spill Prevention and Control Act, Texas Water Code, §§26.261 - 26.268.

(26) Contaminated medium/media--A portion or portions of the physical environment to include soil, sediment, surface water, ground water or air, that contain contaminants at levels that pose a substantial present or future threat to human health and the environment.

(27) Contingency plan--A document setting out an organized, planned, and coordinated course of action to be followed in case of a fire, explosion, or release of hazardous waste or hazardous waste constituents which could threaten human health or the environment.

(28) Control--To apply engineering measures such as capping or reversible treatment methods and/or institutional measures such as deed restrictions to facilities or areas with wastes or contaminated

media which result in remedies that are protective of human health and the environment when combined with appropriate maintenance, monitoring, and any necessary further corrective action.

(29) Corrective action management unit (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 pursuant to implementing such corrective action requirements at the facility.

(30) Corrosion expert--A person who, by reason of his knowledge of the physical sciences and the principles of engineering and mathematics, acquired by a professional education and related practical experience, is qualified to engage in the practice of corrosion control on buried or submerged metal piping systems and metal tanks. Such a person must be certified as being qualified by the National Association of Corrosion Engineers (NACE) or be a registered professional engineer who has certification or licensing that includes education and experience in corrosion control on buried or submerged metal piping systems and metal tanks.

(31) Decontaminate--To apply a treatment process(es) to wastes or contaminated media whereby the substantial present or future threat to human health and the environment is eliminated.

(32) Designated facility--A Class 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 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 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.

(33) Destination facility--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(34) Dike--An embankment or ridge of either natural or man-made materials used to prevent the movement of liquids, sludges, solids, or other materials.

(35) Dioxins and furans (D/F)--Tetra, penta, hexa, hepta, and octa-chlorinated dibenzo dioxins and furans.

(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.

(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.

(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.

(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.

(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 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.

(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.

(42) Environmental Protection Agency hazardous waste number--The number assigned by the EPA to each hazardous waste listed in 40 CFR Part 26l, Subpart D and to each characteristic identified in 40 CFR Part 26l, Subpart C.

(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.

(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.

(45) Equivalent method--Any testing or analytical method approved by the administrator under 40 CFR §260.20 and §260.21.

(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.

(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.

(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.

(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.

(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.

(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.

(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).

(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).

(54) Food-chain crops--Tobacco, crops grown for human consumption, and crops grown for feed for animals whose products are consumed by humans.

(55) Freeboard--The vertical distance between the top of a tank or surface impoundment dike, and the surface of the waste contained therein.

(56) Free liquids--Liquids which readily separate from the solid portion of a waste under ambient temperature and pressure.

(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.

(58) Groundwater--Water below the land surface in a zone of saturation.

(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 pursuant to the Resource Conservation and Recovery Act of 1976, §3001. The administrator has identified the characteristics of hazardous wastes and listed certain wastes as hazardous in 40 CFR Part 26l. The executive director will maintain in the offices of the commission a current list of hazardous wastes, a current set of characteristics of hazardous waste, and applicable appendices, as promulgated by the administrator.

(60) Hazardous substance--Any substance designated as a hazardous substance under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 40 CFR Part 302.

(61) Hazardous waste--Any solid waste identified or listed as a hazardous waste by the administrator of the EPA pursuant to the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 United States Code 6901 et seq., as amended.

(62) Hazardous waste constituent--A constituent that caused the administrator to list the hazardous waste in 40 CFR Part 261, Subpart D or a constituent listed in Table 1 of 40 CFR §261.24.

(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 or privately owned hazardous waste management facility consisting of processing, storage, or disposal operational hazardous waste management units such as one or more landfills, surface impoundments, waste piles, incinerators, boilers, and industrial furnaces, including cement kilns, injection wells, salt dome waste containment caverns, land treatment facilities, or a combination of units.

(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.

(65) In operation--Refers to a facility which is processing, storing, or disposing of solid waste or hazardous waste.

(66) Inactive portion--That portion of a facility which is not operated after November 19, 1980. (See also "active portion" and "closed portion.")

(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.

(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.

(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.

(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.

(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.

(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.

(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.

(74) Injection well--A well into which fluids are injected. (See also "underground injection.")

(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.

(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.

(77) International shipment--The transportation of hazardous waste into or out of the jurisdiction of the United States.

(78) Lamp--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(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.

(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.

(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.

(82) Leachate--Any liquid, including any suspended components in the liquid, that has percolated through or drained from solid waste or hazardous waste.

(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.

(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.

(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.

(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."

(87) Manifest document number--A number assigned to the manifest by the commission for reporting and recordkeeping purposes.

(88) Military munitions--All ammunition products and components produced or used by or for the DOD or the United States Armed Services for national defense and security, including military munitions under the control of the DOD, the United States Coast Guard, the United States Department of Energy (DOE), and National Guard personnel. The term "military munitions":

(A) includes confined gaseous, liquid, and solid propellants, explosives, pyrotechnics, chemical and riot control agents, smokes, and incendiaries used by DOD components, including bulk explosives and chemical warfare agents, chemical munitions, rockets, guided and ballistic missiles, bombs, warheads, mortar rounds, artillery ammunition, small arms ammunition, grenades, mines, torpedoes, depth charges, cluster munitions and dispensers, demolition charges, and devices and components thereof; and

(B) includes non-nuclear components of nuclear devices, managed under DOE's nuclear weapons program after all required sanitization operations under the Atomic Energy Act of 1954, as amended, have been completed; but

(C) does not include wholly inert items, improvised explosive devices, and nuclear weapons, nuclear devices, and nuclear components thereof.

(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).

(90) Movement--That solid waste or hazardous waste transported to a facility in an individual vehicle.

(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 United States Environmental Protection Agency.

(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.

(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 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 also "existing tank system.")

(94) Off-site--Property which cannot be characterized as on-site.

(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.

(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.

(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.")

(98) Operator--The person responsible for the overall operation of a facility.

(99) Owner--The person who owns a facility or part of a facility.

(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.

(101) PCBs or polychlorinated biphenyl compounds--Compounds subject to Title 40, CFR Part 761.

(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.

(103) Person--Any individual, corporation, organization, government or governmental subdivision or agency, business trust, partnership, association or any other legal entity.

(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.

(105) Pesticide--Has the definition adopted under §335.261 of this title.

(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;

(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.

(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.

(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.

(109) Poultry--Chickens or ducks being raised or kept on any premises in the state for profit.

(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.

(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.

(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 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.

(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 Environmental Protection Agency pursuant to the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 United States Code §§6901 et seq., as amended.

(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.

(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.

(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).

(117) Regional administrator--The regional administrator for the Environmental Protection Agency region in which the facility is located, or his designee.

(118) Remediation--The act of eliminating or reducing the concentration of contaminants in contaminated media.

(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 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).

(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.

(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.

(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.

(123) Run-off--Any rainwater, leachate, or other liquid that drains over land from any part of a facility.

(124) Run-on--Any rainwater, leachate, or other liquid that drains over land onto any part of a facility.

(125) Saturated zone or zone of saturation--That part of the earth's crust in which all voids are filled with water.

(126) Shipment--Any action involving the conveyance of municipal hazardous waste or industrial solid waste by any means offsite.

(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 Btu/lb of sludge treated on a wet-weight basis.

(128) Small quantity generator--A generator who generates less than 1,000 kg of hazardous waste in a calendar month.

(129) Solid Waste--

(A) Any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility, and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations, and from community and institutional activities, but does not include:

(i) solid or dissolved material in domestic sewage, or solid or dissolved material in irrigation return flows, or industrial discharges subject to regulation by permit issued pursuant to the Texas Water Code, Chapter 26 (an exclusion applicable only to the actual point source discharge that does not exclude industrial wastewaters while they are being collected, stored or processed before discharge, nor does it exclude sludges that are generated by industrial wastewater treatment);

(ii) uncontaminated soil, dirt, rock, sand and other natural or man-made inert solid materials used to fill land if the object of the fill is to make the land suitable for the construction of surface improvements. The material serving as fill may also serve as a surface improvement such as a structure foundation, a road, soil erosion control, and flood protection. Man-made materials exempted under this provision shall only be deposited at sites where the construction is in progress or imminent such that rights to the land are secured and engineering, architectural, or other necessary planning have been initiated. Waste disposal shall be considered to have occurred on any land which has been filled with man-made inert materials under this provision if the land is sold, leased, or otherwise conveyed prior to the completion of construction of the surface improvement. Under such conditions, deed recordation shall be required. The deed recordation shall include the information required under §335.5(a) of this title (relating to Deed Recordation), prior to sale or other conveyance of the property;

(iii) waste materials which result from activities associated with the exploration, development, or production of oil or gas or geothermal resources, as those activities are defined in this section, and any other substance or material regulated by the Railroad Commission of Texas pursuant to the Natural Resources Code, §91.101, unless such waste, substance, or material results from activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants and is a hazardous waste as defined by the administrator of the United States Environmental Protection Agency pursuant to the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 United States Code §§6901 et seq., as amended; or

(iv) a material excluded by 40 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), (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(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.

(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; and

(viii) notwithstanding the requirements under §335.17(a)(8) of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials):

(I) at least 75% (by weight or volume) of the annual production of the recycling material must be recycled or transferred to a different site and recycled on an annual basis; and

(II) if the recycling material is placed in protective storage, such as a silo or other protective enclosure, at least 75% (by weight or volume) of the annual production of the recycling material must be recycled or transferred to a different site and recycled on a biennial basis.

(I) Respondents in actions to enforce the industrial solid waste regulations who raise a claim that a certain material is not a solid waste, or is conditionally exempt from regulation, must demonstrate that there is a known market or disposition for the material, and that they meet the terms of the exclusion or exemption. In doing so, they must provide appropriate documentation (such as contracts showing that a second person uses the material as an ingredient in a production process) to demonstrate that the material is not a waste, or is exempt from regulation. In addition, owners or operators of facilities claiming that they actually are recycling materials must show that they have the necessary equipment to do so and that the recycling activity is legitimate and beneficial.

(J) Materials that are reclaimed from solid wastes and that are used beneficially are not solid wastes and hence are not hazardous wastes under 40 CFR §261.3(c) unless the reclaimed material is burned for energy recovery or used in a manner constituting disposal.

(K) Other portions of this chapter that relate to solid wastes that are recycled include §335.6 of this title (relating to Notification Requirements), §335.17 of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials), §335.18 of this title (relating to Variances from Classification as a Solid Waste), §335.19 of this title (relating to Standards and Criteria for Variances from Classification as a Solid Waste), §335.24 of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials), and Subchapter H of this chapter (relating to Standards for the Management of Specific Wastes and Specific Types of Materials).

(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.

(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.

(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 CFR §264.554, as adopted by reference under §335.152(a) of this title (relating to Standards).

(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.

(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.

(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.

(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.

(137) Tank system--A solid waste or hazardous waste storage or processing tank and its associated ancillary equipment and containment system.

(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.

(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.")

(140) Thermostat--Has the definition adopted under §335.261 of this title.

(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.

(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.

(143) Transit country--Any foreign country, other than a receiving country, through which a hazardous waste is transported.

(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.

(145) Transporter--Any person who conveys or transports municipal hazardous waste or industrial solid waste by truck, ship, pipeline, or other means.

(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 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.

(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.

(148) Treatment zone--A soil area of the unsaturated zone of a land treatment unit within which hazardous constituents are degraded, transferred, or immobilized.

(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.")

(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.

(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.

(152) Universal waste--Any of the hazardous wastes defined as universal waste under §335.261(b)(13)(F) of this title that are managed under the universal waste requirements of Subchapter H, Division 5 of this chapter (relating to Universal Waste Rule).

(153) Universal waste handler--Has the definition adopted under §335.261 of this title.

(154) Universal waste transporter--Has the definition adopted under §335.261 of this title.

(155) Unsaturated zone or zone of aeration--The zone between the land surface and the water table.

(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.

(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 CFR Part 279 (Standards for Management of Used Oil).

(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 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.

(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.

(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.

(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.

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 October 26, 2001.

TRD-200106518
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 15, 2001
Proposal publication date: June 22, 2001
For further information, please call: (512) 239-4712

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SUBCHAPTER B. HAZARDOUS WASTE MANAGEMENT GENERAL PROVISIONS

30 TAC §§335.41, 335.43 - 335.47

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 26, 2001.

TRD-200106519
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 15, 2001
Proposal publication date: June 22, 2001
For further information, please call: (512) 239-4712

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SUBCHAPTER C. STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE

30 TAC §§335.61, 335.67, 335.69, 335.76, 335.78

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 26, 2001.

TRD-200106520
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 15, 2001
Proposal publication date: June 22, 2001
For further information, please call: (512) 239-4712

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SUBCHAPTER D. STANDARDS APPLICABLE TO TRANSPORTERS OF HAZARDOUS WASTE

30 TAC §§335.91, 335.93, 335.94

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.017 and §361.024, which authorize

the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 26, 2001.

TRD-200106521
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 15, 2001
Proposal publication date: June 22, 2001
For further information, please call: (512) 239-4712

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SUBCHAPTER E. INTERIM STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE STORAGE, PROCESSING, OR DISPOSAL FACILITIES

30 TAC §§335.111, 335.115, 335.117 - 335.119, 335.123, 335.125, 335.127

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 26, 2001.

TRD-200106522
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 15, 2001
Proposal publication date: June 22, 2001
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 §§335.155, 335.164, 335.165, 335.168, 335.169, 335.172, 335.177, 335.178, 335.181

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 26, 2001.

TRD-200106523
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 15, 2001
Proposal publication date: June 22, 2001
For further information, please call: (512) 239-4712

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SUBCHAPTER G. LOCATION STANDARDS FOR HAZARDOUS WASTE STORAGE, PROCESSING, OR DISPOSAL

30 TAC §§335.201, 335.202, 335.205, 335.206

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 26, 2001.

TRD-200106524
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 15, 2001
Proposal publication date: June 22, 2001
For further information, please call: (512) 239-4712

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SUBCHAPTER H. STANDARDS FOR THE MANAGEMENT OF SPECIFIC WASTES AND SPECIFIC TYPES OF FACILITIES

DIVISION 2. HAZARDOUS WASTE BURNED FOR ENERGY RECOVERY

30 TAC §§335.221, 335.222, 335.224, 335.225

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 26, 2001.

TRD-200106525
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 15, 2001
Proposal publication date: June 22, 2001
For further information, please call: (512) 239-4712

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DIVISION 3. RECYCLABLE MATERIALS UTILIZED FOR PRECIOUS METAL RECOVERY

30 TAC §335.241

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 26, 2001.

TRD-200106526
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 15, 2001
Proposal publication date: June 22, 2001
For further information, please call: (512) 239-4712

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DIVISION 5. UNIVERSAL WASTE RULE

30 TAC §335.262

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 26, 2001.

TRD-200106527
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 15, 2001
Proposal publication date: June 22, 2001
For further information, please call: (512) 239-4712

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SUBCHAPTER I. PROHIBITIONS ON OPEN DUMPS

30 TAC §§335.303 - 335.305, 335.307

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 26, 2001.

TRD-200106528

Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 15, 2001
Proposal publication date: June 22, 2001
For further information, please call: (512) 239-4712

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SUBCHAPTER J. HAZARDOUS WASTE GENERATION, FACILITY AND DISPOSAL FEE SYSTEM

30 TAC §§335.321 - 335.323, 335.325, 335.326, 335.328, 335.329

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 26, 2001.

TRD-200106529
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 15, 2001
Proposal publication date: June 22, 2001
For further information, please call: (512) 239-4712

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SUBCHAPTER K. HAZARDOUS SUBSTANCE FACILITIES ASSESSMENT AND REMEDIATION

30 TAC §§335.341, 335.342, 335.346

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 26, 2001.

TRD-200106530
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 15, 2001
Proposal publication date: June 22, 2001
For further information, please call: (512) 239-4712

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SUBCHAPTER N. HOUSEHOLD MATERIALS WHICH COULD BE CLASSIFIED AS HAZARDOUS WASTES

30 TAC §§335.401 - 335.403, 335.406, 335.407, 335.409, 335.411, 335.412

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 26, 2001.

TRD-200106531
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 15, 2001
Proposal publication date: June 22, 2001
For further information, please call: (512) 239-4712

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SUBCHAPTER O. LAND DISPOSAL RESTRICTIONS

30 TAC §335.431

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

§335.431. Purpose, Scope, and Applicability.

(a) Purpose. The purpose of this subchapter is to identify hazardous wastes that are restricted from land disposal and define those limited circumstances under which an otherwise prohibited waste may continue to be land disposed.

(b) Scope and Applicability.

(1) Except as provided in paragraph (2) of this subsection, the requirements of this subchapter apply to persons who generate or transport hazardous waste and owners and operators of hazardous waste treatment, storage, and disposal facilities.

(2) The requirements of this subchapter do not apply to any entity that is either specifically excluded from coverage by this subchapter or would be excluded from the coverage of 40 Code of Federal Regulations (CFR), Part 268 by 40 CFR, Part 261, if those parts applied.

(3) Universal waste handlers and universal waste transporters, as defined in and subject to regulation under Subchapter H, Division 5 of this chapter (relating to Universal Waste Rule) are exempt from 40 CFR §268.7 and §268.50.

(c) Adoption by Reference.

(1) except as provided in paragraph (2) of this subsection, and subject to the changes indicated in subsection (d) of this section, the regulations contained in 40 CFR Part 268, as amended through December 26, 2000 (65 FR 81373) are adopted by reference.

(2) The following sections of 40 CFR, Part 268 are excluded from the sections adopted in paragraph (1) of this subsection: §§268.1(f), 268.5, 268.6, 268.7(a)(10), 268.13, §268.42(b), and 268.44.

(3) Appendices IV, VI - IX, and XI of 40 CFR, Part 268 are adopted by reference as amended through May 26, 1998 (63 FR 28705).

(d) Changes to Adopted Parts. The parts of the CFR that are adopted by reference in subsection (c) of this section are changed as follows:

(1) The words "Administrator" or "Regional Administrator" are changed to "Executive Director;"

(2) The word "treatment" is changed to "processing;"

(3) The words "Federal Register," when they appear in the text of the regulation, are changed to "Texas Register;"

(4) In §268.7(a)(6) and (a)(7), the applicable definition of hazardous waste and solid waste is the one that is set out in this chapter rather than the definition of hazardous waste and solid waste that is set out in 40 CFR Part 261.

(5) In §268.50(a)(1), the citation to "§262.34" is changed to "§335.69."

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 October 26, 2001.

TRD-200106532

Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 15, 2001
Proposal publication date: June 22, 2001
For further information, please call: (512) 239-4712

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SUBCHAPTER Q. POLLUTION PREVENTION: SOURCE REDUCTION AND WASTE MINIMIZATION

30 TAC §§335.471, 335.473 - 335.478, 335.480

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 26, 2001.

TRD-200106533
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 15, 2001
Proposal publication date: June 22, 2001
For further information, please call: (512) 239-4712

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SUBCHAPTER R. WASTE CLASSIFICATION

30 TAC §§335.501 - 335.504, 335.507 - 335.509, 335.511 - 335.514, 335.521

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 26, 2001.

TRD-200106534
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 15, 2001
Proposal publication date: June 22, 2001
For further information, please call: (512) 239-4712

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SUBCHAPTER S. RISK REDUCTION STANDARDS

30 TAC §§335.559, 335.563, 335.569

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 26, 2001.

TRD-200106535
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 15, 2001
Proposal publication date: June 22, 2001
For further information, please call: (512) 239-4712

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CHAPTER 335. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §335.112, Standards, and §335.152, Standards. Sections 335.112 and 335.152 are adopted *with changes* to the proposed text as published in the August 24, 2001 issue of the *Texas Register* (26 TexReg 6270).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The primary purpose of the adopted amendments is to revise the commission's rules to conform to certain federal regulations, either by incorporating the federal regulations by reference or by introducing language into the commission's rules which corresponds to the federal regulations. Establishing equivalency with federal regulations will enable the State of Texas to increase its level of authorization to operate aspects of the federal hazardous waste program in lieu of the United States Environmental Protection Agency (EPA). The federal regulations being addressed in this adoption were promulgated by the EPA in issues of the *Federal Register* from December 1994 through September 1999. These adopted amendments also incorporate administrative corrections.

SECTION BY SECTION DISCUSSION

Adopted §335.112(a) is amended to update the adoption of EPA regulations under 40 Code of Federal Regulations (CFR) Part 265, relating to interim status standards for owners and operators of hazardous waste treatment, storage, and disposal facilities. Adopted §335.112(b) is amended by adding new citation substitutions and by rearranging the subparagraphs in ascending federal regulation citation numerical order for readability. These substitutions are necessary in order to reflect the appropriate commission rules which correspond to certain federal regulations.

Adopted §335.152(a) is amended to update the adoption of EPA regulations under 40 CFR Part 264, relating to standards for owners and operators of hazardous waste treatment, storage, and disposal facilities. Adopted §335.152(c) is amended by adding a new citation substitution and by rearranging the subparagraphs in ascending federal regulation citation numerical order for readability. This substitution is necessary in order to reflect the appropriate commission rule which corresponds to the federal regulation.

The adopted sections contain punctuation and minor grammatical changes to conform with *Texas Register* formatting and style requirements.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a). Although these rules are adopted to protect the environment and reduce the risk to human health from environmental exposure, they are not a major environmental rule because they do not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. There is no adverse effect in a material way on the economy, a sector of the economy, productivity, competition, or jobs of the state or a sector of the state because 42 United States Code (USC), §6926(g), immediately imposes on the regulated community any new requirements and prohibitions under the Hazardous and Solid Waste Amendments of 1984 that are more stringent than state rules, on the effective date of the federal regulation. In other words, under federal law, the regulated community must comply with such new requirements and prohibitions that are more stringent, beginning on the effective date of the federal regulation. Since these more stringent rules are the ones which could have an adverse effect in a material way on the economy, a sector of the economy, productivity, competition, or jobs of the state or a sector of the state; since the portions of this adoption which are more stringent than previously existing rules are imposed by the Hazardous and Solid Waste Amendments of 1984; and since the regulated community is already required to comply with these more stringent rules, there is no such

adverse effect caused by the adoption of these state rules. The reason there is no adverse effect in a material way on the environment, or the public health and safety of the state or a sector of the state is because these rules are designed to protect the environment, the public health, and the public safety of the state and all sectors of the state. In addition, these rules do not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopt a rule solely under the general powers of the agency.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these adopted rules in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of these rules is to ensure that Texas' state hazardous waste rules are equivalent to the federal regulations after which they are patterned, thus enabling the state to retain authorization to operate its own hazardous waste program in lieu of the corresponding federal program. The rules will substantially advance this stated purpose by adopting federal regulations by reference or by introducing language intended to ensure that state rules are equivalent to the corresponding federal regulations. Promulgation and enforcement of these rules will not affect private real property which is the subject of the rules because the rule language consists of technical corrections and updates to bring certain state hazardous waste regulations into equivalence with more recent federal regulations. There is no burden on private real property because 42 USC, §6926(g), immediately imposes on the regulated community any new requirements and prohibitions under the Hazardous and Solid Waste Amendments of 1984 that are more stringent than state rules, on the effective date of the federal regulation. In other words, under federal law, the regulated community must comply with such new requirements and prohibitions that are more stringent, beginning on the effective date of the federal regulation. Since these more stringent rules are the ones which could present a burden on private real property; since the portions of this adoption which are more stringent than previously existing rules are imposed by the Hazardous and Solid Waste Amendments of 1984; and since the regulated community is already required to comply with these more stringent rules, there is no such burden. The subject regulations do not affect a landowner's rights in private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that it is a rulemaking identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), or will affect an action and/or 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 prepared a consistency determination for the rules in accordance with 31 TAC §505.22 and found the rulemaking is consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goal applicable to the rulemaking is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs). Applicable policies are construction and operation of solid waste treatment, storage, and disposal facilities, such that new solid waste facilities and areal expansions of existing solid waste facilities shall be sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and, at a minimum, comply with standards established under the Solid Waste Disposal Act, 42 USC, §§6901 et seq. Promulgation and enforcement of these rules are consistent with the applicable CMP goals and policies because the adopted rule amendments will update and enhance the commission's rules concerning hazardous and industrial solid waste facilities. In addition, the adopted rules do not violate any applicable provisions of the CMP's stated goals and policies.

HEARING AND COMMENTERS

The commission did not hold a public hearing on the proposed rulemaking. No commenters submitted written comments during the comment period which closed at 5:00 p.m. on September 24, 2001.

SUBCHAPTER E. INTERIM STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE STORAGE, PROCESSING, OR DISPOSAL FACILITIES

30 TAC §335.112

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

§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) Subpart B--General Facility Standards (as amended through December 8, 1997 (62 FR 64636));

(2) Subpart C--Preparedness and Prevention;

(3) Subpart D--Contingency Plan and Emergency Procedures, except 40 CFR §265.56(d);

(4) Subpart E--Manifest System, Recordkeeping and Reporting (as amended through December 8, 1997 (62 FR 64636)), except 40 CFR §§265.71, 265.72, 265.75, 265.76, and 265.77;

(5) Subpart F--Groundwater Monitoring (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 August 18, 1992 (57 FR 37194)); except 40 CFR §265.112(d)(3) and (4) and §265.118(e) and (f);

(7) Subpart H--Financial Requirements (as amended through September 16, 1992 (57 FR 42832)); except 40 CFR §§265.140, 265.141, 265.142(a)(2), 265.142(b) - (c), 265.143(a) -

(g), 265.144(b) - (c), 265.145(a) - (g), 264.146, 265.147(a) - (d), 265.147(f) - (k), 265.148, 265.149, and 265.150;

(8) Subpart I--Use and Management of Containers (as amended through November 25, 1996 (61 FR 59932));

(9) Subpart J--Tank Systems (as amended through November 25, 1996 (61 FR 59932));

(10) Subpart K--Surface Impoundments (as amended through November 25, 1996 (61 FR 59932));

(11) Subpart L--Waste Piles (as amended through January 29, 1992 (57 FR 3493)), except 40 CFR §265.253;

(12) Subpart M--Land Treatment, except 40 CFR §§265.272, 265.279, and 265.280;

(13) Subpart N--Landfills (as amended through July 10, 1992 (57 FR 30658)), except 40 CFR §§265.301(f) - 265.301(i), 265.314, and 265.315;

(14) Subpart O--Incinerators (as amended through September 30, 1999 (64 FR 52828));

(15) Subpart P--Thermal Treatment (as amended through July 17, 1991 (56 FR 32692));

(16) Subpart Q--Chemical, Physical, and Biological Treatment;

(17) Subpart R--Underground Injection;

(18) Subpart W--Drip Pads (as amended through December 24, 1992 (57 FR 61492));

(19) Subpart AA--Air Emission Standards for Process Vents (as amended through December 8, 1997 (62 FR 64636));

(20) Subpart BB--Air Emission Standards for Equipment Leaks (as amended through December 8, 1997 (62 FR 64636));

(21) Subpart CC--Air Emission Standards for Tanks, Surface Impoundments, and Containers (as amended through January 21, 1999 (64 FR 33820));

(22) Subpart DD--Containment Buildings (as amended through August 18, 1992 (57 FR 37194));

(23) Subpart EE--Hazardous Waste Munitions and Explosives Storage (as amended through February 12, 1997 (62 FR 6622)); and

(24) the following appendices contained in 40 CFR Part 265:

(A) Appendix I--Recordkeeping Instructions (as amended through March 24, 1994 (59 FR 13891));

(B) Appendix III--EPA Interim Primary Drinking Water Standards;

(C) Appendix IV--Tests for Significance;

(D) Appendix V--Examples of Potentially Incompatible Waste; and

(E) Appendix VI--Compounds With Henry's Law Constant Less Than 0.1 Y/X.

(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 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) The term "treatment" is changed to "processing."

(3) Reference to RCRA, §3008(h) is changed to Texas Water Code, §7.031(c) - (e) (Corrective Action Relating to Hazardous Waste).

(4) Reference to:

(A) 40 CFR §260.10 is changed to §335.1 of this title (relating to Definitions);

(B) 40 CFR §264.90 is changed to §335.156 of this title (relating to Applicability of Groundwater Monitoring and Response);

(C) 40 CFR §264.101 is changed to §335.167 of this title (relating to Corrective Action for Solid Waste Management Units);

(D) 40 CFR §264.310 is changed to §335.174 of this title (relating to Closure and Post- Closure Care (Landfills));

(E) 40 CFR §265.1 is changed to §335.111 of this title (relating to Purpose, Scope, and Applicability);

(F) 40 CFR §265.90 is changed to §335.116 of this title (relating to Applicability of Groundwater Monitoring Requirements);

(G) 40 CFR §265.94 is changed to §335.117 of this title (relating to Recordkeeping and Reporting);

(H) 40 CFR §265.314 is changed to §335.125 of this title (relating to Special Requirements for Bulk and Containerized Waste);

(I) 40 CFR §270.1 is changed to §335.2 of this title (relating to Permit Required);

(J) 40 CFR §270.28 is changed to §305.50 of this title (relating to Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit);

(K) 40 CFR §270.41 is changed to §305.62 of this title (relating to Amendment); and

(L) 40 CFR §270.42 is changed to §305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee).

(5) 40 CFR Parts 260 - 270 means the commission's rules including, but not limited to, Chapters 50, 305, and 335 of this title (relating to Action on Applications and Other Authorizations; Consolidated Permits; and Industrial Solid Waste and Municipal Hazardous Waste), as applicable.

(6) Reference to 40 CFR Part 265, Subpart D (Contingency Plan and Emergency Procedures) is changed to §335.112(a)(3) of this title (relating to Standards) and §335.113 of this title (relating to Reporting of Emergency Situations by Emergency Coordinator).

(7) Reference to 40 CFR §§265.71, 265.72, 265.76, and 265.77 is changed to §335.12 of this title (relating to Shipping Requirements Applicable to Owners or Operators of Storage, Processing, or Disposal Facilities), §335.12(c)(1) and (2) of this title, §335.15(3) of this title (relating to Recordkeeping and Reporting Requirements Applicable to Owners or Operators of Storage, Processing, or Disposal Facilities), and §335.115 of this title (relating to Additional Reports), respectively.

(8) Reference to 40 CFR Part 264, Subpart F is changed to §335.156 of this title, §335.157 of this title (relating to Required

Programs), §335.158 of this title (relating to Groundwater Protection Standard), §335.159 of this title (relating to Hazardous Constituents), §335.160 of this title (relating to Concentration Limits), §335.161 of this title (relating to Point of Compliance), §335.162 of this title (relating to Compliance Period), §335.163 of this title (relating to General Groundwater Monitoring Requirements), §335.164 of this title (relating to Detection Monitoring Program), §335.165 of this title (relating to Compliance Monitoring Program), §335.166 of this title (relating to Corrective Action Program), and §335.167 of this title.

(9) Reference to 40 CFR Part 265, Subpart F is changed to include §335.116 and §335.117 of this title, in addition to the reference to 40 CFR Part 265, Subpart F, except §265.90 and §265.94.

(10) Reference to the EPA is changed to the Texas Natural Resource Conservation Commission.

(c) A copy of 40 CFR, Part 265 is available for inspection at the library of the Texas Natural Resource Conservation Commission, located on the first floor of Building A at 12100 Park 35 Circle, Austin, Texas.

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 October 29, 2001.

TRD-200106614
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 18, 2001
Proposal publication date: August 24, 2001
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 §335.152

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

§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) Subpart B--General Facility Standards (as amended through December 8, 1997 (62 FR 64636)); in addition, the facilities which are subject to 40 CFR Part 264, Subpart X, are subject to regulation under 40 CFR §264.15(b)(4) and §264.18(b)(1)(ii);

(2) Subpart C--Preparedness and Prevention;

(3) Subpart D--Contingency Plan and Emergency Procedures, except 40 CFR §264.56(d);

(4) Subpart E--Manifest System, Recordkeeping, and Reporting (as amended through December 8, 1997 (62 FR 64636)), except 40 CFR §§264.71, 264.72, 264.76 and 264.77; facilities which are subject to 40 CFR Part 264, Subpart X, are subject to 40 CFR §264.73(b)(6);

(5) Subpart G--Closure and Post-Closure (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) Subpart H--Financial Requirements (as amended through June 10, 1994 (59 FR 29958)); except 40 CFR §§264.140, 264.141, 264.142(a)(2), 264.142(b) - (c), 264.143(a) - (h), 264.144(b) - (c), 264.145(a) - (h), 264.146, 264.147(a) - (d), 264.147(f) - (k), 264.148, 264.149, 264.150, and 264.151; and subject to the following limitations: facilities which are subject to 40 CFR Part 264, Subpart X, are subject to 40 CFR §§264.142(a), 264.144(a), and 37.6031(c) of this title (relating to Financial Assurance Requirements for Liability);

(7) Subpart I--Use and Management of Containers (as amended through November 25, 1996 (61 FR 59932));

(8) Subpart J--Tank Systems (as amended through November 25, 1996 (61 FR 59932));

(9) Subpart K--Surface Impoundments (as amended through November 25, 1996 (61 FR 59932)), except 40 CFR §264.221 and §264.228:

(A) reference to 40 CFR §264.221 is changed to §335.168 of this title (relating to Design and Operating Requirements (Surface Impoundments));

(B) reference to 40 CFR §264.228 is changed to §335.169 of this title (relating to Closure and Post-Closure Care (Surface Impoundments));

(10) Subpart L--Waste Piles (as amended and adopted through January 29, 1992 (57 FR 3462)), except 40 CFR §264.251;

(11) Subpart M--Land Treatment, except 40 CFR §264.273 and §264.280;

(12) Subpart N--Landfills (as amended through November 18, 1992 (57 FR 54452)), except 40 CFR §§264.301, 264.310, 264.314, and 264.315;

(13) Subpart O--Incinerators (as amended through September 30, 1999 (64 FR 52828));

(14) Subpart S--Corrective Action for Solid Waste Management Units (as amended through February 16, 1993 (58 FR 8683)), and 40 CFR §264.554 (as amended through November 30, 1998 (63 FR 65874));

(15) Subpart W--Drip Pads (as amended through December 24, 1992 (57 FR 61492));

(16) Subpart X--Miscellaneous Units (as amended through September 30, 1999 (64 FR 52828));

(17) Subpart AA--Air Emission Standards for Process Vents (as amended through January 21, 1999 (64 FR 3382));

(18) Subpart BB--Air Emission Standards for Equipment Leaks (as amended through December 8, 1997 (62 FR 64636));

(19) Subpart CC--Air Emission Standards for Tanks, Surface Impoundments, and Containers (as amended through January 21, 1999 (64 FR 3382));

(20) Subpart DD--Containment Buildings (as amended through August 18, 1992 (57 FR 37194));

(21) Subpart EE--Hazardous Waste Munitions and Explosives Storage (as amended through February 12, 1997 (62 FR 6622)); and

(22) the following appendices contained in 40 CFR Part 264:

(A) Appendix I--Recordkeeping Instructions (as amended through March 24, 1994 (59 FR 13891));

(B) Appendix IV--Cochron's Approximation to the Behrens-Fisher Students' T-Test;

(C) Appendix V--Examples of Potentially Incompatible Waste;

(D) Appendix VI--Political Jurisdictions in Which Compliance With §264.18(a) Must Be Demonstrated; and

(E) Appendix IX--Ground-Water Monitoring List (as amended through June 13, 1997 (62 FR 32451)).

(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 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 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) The term "treatment" is changed to "processing."

(3) Reference to RCRA, §3008(h) is changed to Texas Water Code, §7.031(c) - (e) (relating to Corrective Action Relating to Hazardous Waste).

(4) Reference to:

(A) 40 CFR §260.10 is changed to §335.1 of this title (relating to Definitions);

(B) 40 CFR §264.1 is changed to §335.151 of this title (relating to Purpose, Scope, and Applicability);

(C) 40 CFR §264.280 is changed to §335.172 of this title (relating to Closure and Post- Closure Care (Land Treatment Units));

(D) 40 CFR §264.90 is changed to §335.156 of this title (relating to Applicability of Groundwater Monitoring and Response);

(E) 40 CFR §264.101 is changed to §335.167 of this title (relating to Corrective Action for Solid Waste Management Units);

(F) 40 CFR §264.310 is changed to §335.174 of this title (relating to Closure and Post- Closure Care (Landfills));

(G) 40 CFR §270.41 is changed to §305.62 of this title (relating to Amendment); and

(H) 40 CFR §270.42 is changed to §305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee).

(5) 40 CFR Parts 260 - 270 means the commission's rules including, but not limited to, Chapters 50, 305, and 335 of this title (relating to Action on Applications and Other Authorizations; Consolidated Permits; and Industrial Solid Waste and Municipal Hazardous Waste), as applicable.

(6) Reference to 40 CFR Part 264, Subpart D is changed to §335.152(a)(3) of this title (relating to Standards) and §335.153 of this title (relating to Reporting of Emergency Situations by Emergency Coordinator).

(7) Reference to 40 CFR §§264.71, 264.72, 264.76, and 264.77 is changed to §335.12 of this title (relating to Shipping Requirements Applicable to Owners or Operators of Storage, Processing, or Disposal Facilities), §335.12(c)(1) and (2) of this title, §335.15(3) of this title (relating to Recordkeeping and Reporting Requirements Applicable to Owners or Operators of Storage, Processing, or Disposal Facilities), and §335.155 of this title (relating to Additional Reports), respectively.

(8) Reference to 40 CFR Part 264, Subpart F is changed to §335.156 of this title, §335.157 of this title (relating to Required Programs), §335.158 of this title (relating to Groundwater Protection Standard), §335.159 of this title (relating to Hazardous Constituents), §335.160 of this title (relating to Concentration Limits), §335.161 of this title (relating to Point of Compliance), §335.162 of this title (relating to Compliance Period), §335.163 of this title (relating to General Groundwater Monitoring Requirements), §335.164 of this title (relating to Detection Monitoring Program), §335.165 of this title (relating to Compliance Monitoring Program), §335.166 of this title (relating to Corrective Action Program), and §335.167 of this title.

(9) Reference to 40 CFR Part 265, Subpart F is changed to include §335.116 of this title (relating Applicability of Groundwater Monitoring Requirements) and §335.117 of this title (relating to Recordkeeping and Reporting), in addition to the reference to 40 CFR Part 265, Subpart F, except §265.90 and §265.94.

(10) Reference to the EPA is changed to the Texas Natural Resource Conservation Commission.

(d) A copy of 40 CFR Part 264 is available for inspection at the library of the Texas Natural Resource Conservation Commission, located on the first floor of Building A at 12100 Park 35 Circle, Austin.

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 October 29, 2001.

TRD-200106615
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: November 18, 2001
Proposal publication date: August 24, 2001
For further information, please call: (512) 239-4712

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER DD. OIL FIELD CLEANUP REGULATORY FEE

34 TAC §3.732

The Comptroller of Public Accounts adopts an amendment to §3.732, without changes to the proposed text as published in the September 14, 2001, issue of the *Texas Register* (26 TexReg 7067), concerning reporting requirements for the gas fee. This section is being amended pursuant to Senate Bill 310, 77th Legislature, 2001. Senate Bill 310 increased the oil field cleanup fee for natural gas produced in the state to one-fifteenth of $.01 per 1,000 cubic feet of gas, effective September 1, 2001.

No comments were received concerning the proposed amendment.

This amendment is adopted under the Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2.

The amendment implements Natural Resources Code, §81.117.

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 October 29, 2001.

TRD-200106617
Martin Cherry
Deputy General Counsel for Tax Policy and Agency Affairs
Comptroller of Public Accounts
Effective date: November 18, 2001
Proposal publication date: September 14, 2001
For further information, please call: (512) 305-9881

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CHAPTER 5. FUNDS MANAGEMENT (FISCAL AFFAIRS)
SUBCHAPTER N. FUNDS ACCOUNTING--ACCOUNTING POLICY STATEMENTS

34 TAC §5.160

The Comptroller of Public Accounts adopts to incorporate by reference an amendment to §5.160, concerning accounting policy statements, with changes to the proposed text as published in the May 11, 2001, issue of the *Texas Register* (26 TexReg 3451).

The accounting policy statements are issued to provide procedures and guidelines to state agencies for the effective operation of the Uniform Statewide Accounting System (USAS) and for preparation of the annual financial report. Each accounting policy statement contains legal references, a background section, comptroller requirements and state agency requirements, and division contact if more information is needed. The rule as proposed is being changed to update the fiscal years during which the accounting policy statements are applicable (2002-2003), to correct the issue date of the accounting policy statements to September 1, 2001, and to correct a grammatical error.

No comments were received concerning the proposed amendment.

This amendment is adopted under the Government Code, §§403.011, 2101.012, 2101.035, and 2101.037 which provides the comptroller with the authority to prescribe rules and procedures relating to the operation of the Uniform Statewide Accounting System, the preparation of the annual financial report and supervising the state's fiscal concerns.

The amendment implements Government Code, §2101.012 and §2101.035.

§5.160. Incorporation by Reference: Accounting Policy Statements 2002-2003.

The "Accounting Policy Statements 2002-2003," issued by the Fund Accounting Division of the Comptroller of Public Accounts as of September 1, 2001, are incorporated by reference and filed with the secretary of state. All statements are published by the comptroller in Austin, and copies may be obtained from the comptroller upon request. All statements are also available on the comptroller's website *http://www.window.state.tx.us*.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 25, 2001.

TRD-200106471
Martin Cherry
Deputy General for Tax Policy and Agency Affairs
Comptroller of Public Accounts
Effective date: November 14, 2001
Proposal publication date: May 11, 2001
For further information, please call: (512) 305-9881

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 3. TEXAS WORKS

The Texas Department of Human Services (DHS) adopts amendments to §3.704 and §3.3703 without changes to the proposed text published in the August 24, 2001 issue of the *Texas Register* (26 TexReg 6284).

Justification for the amendment to §3.704 is to comply with Food and Nutrition Service regulations published November 21, 2000. Justification for the amendment to §3.3703 is to comply with the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Act of 2001, which increases the maximum excess shelter from $300 to $340.

The department received no comments regarding adoption of the amendments.

SUBCHAPTER G. RESOURCES

40 TAC §3.704

The amendment is adopted under the Human Resources Code, Title 2, Chapter 31, which authorizes DHS to administer financial assistance programs.

The amendment implements the Human Resources Code, §§31.001- 31.030.

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 October 22, 2001.

TRD-200106402
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: November 12, 2001
Proposal publication date: August 24, 2001
For further information, please call: (512) 438-3734

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SUBCHAPTER KK. SUPPORT DOCUMENTS

40 TAC §3.3703

The amendment is adopted under the Human Resources Code, Title 2, Chapter 31, which authorizes DHS to administer financial assistance programs.

The amendment implements the Human Resources Code, §§31.001- 31.030.

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 October 22, 2001.

TRD-200106403
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: November 12, 2001
Proposal publication date: August 24, 2001
For further information, please call: (512) 438-3734

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CHAPTER 97. LICENSING STANDARDS FOR HOME AND COMMUNITY SUPPORT SERVICES AGENCIES

The Texas Department of Human Services (DHS) adopts amendments to §§97.1 - 97.3 (Subchapter A, General Provisions), §97.11 and §§97.13 - 97.16 (Subchapter B, Application and Issuance of a License); the repeal of §§97.21 - 97.28 (Subchapter C, Service Standards), §§97.51 - 97.54 (Subchapter D, Enforcement), §97.61 and §97.62 (Subchapter E, Home Health Aides and Medication Aides), and §97.71 and §97.72 (Subchapter F, Advisory Committees); and adopts new §97.201 (new Subchapter C, Minimum Standards for All Home and Community Support Services Agencies (HCSSAs), General Provisions), §§97.211 - 97.222 (new Subchapter C, Minimum Standards for All HCSSAs, Conditions of License), §§97.241 - 97.257 (new Subchapter C, Minimum Standards for All HCSSAs, Agency Administration), §§97.281 - 97.303 (new Subchapter C, Minimum Standards for All HCSSAs, Provision and Coordination of Treatment and Services), and §97.321 and §97.322 (new Subchapter C, Minimum Standards for All HCSSAs, Branch Offices and Alternate Delivery Sites), §§97.401 - 97.407 (new Subchapter D, Additional Standards Specific to License Category and Specific to Special Services), §97.501 and §97.502 (new Subchapter E, Surveys), §§97.601 - 97.604 (new Subchapter F, Enforcement), and §97.701 (new Subchapter G, Home Health Aides), in its Licensing Standards for Home and Community Support Services Agencies chapter. Sections 97.1, 97.2, 97.11, 97.15, 97.201, 97.214, 97.215, 97.217, 97.219, 97.220, 97.241, 97.243 - 97.245, 97.247 - 97.249, 97.256, 97.257, 97.281-97.285, 97.287, 97.289 - 97.293, 97.295, 97.296, 97.300, 97.301, 97.303, 97.321, 97.322, 97.401 - 97.407, 97.501, 97.502, 97.601, 97.602, and 97.701 are adopted with changes to the proposed text published in the April 27, 2001, issue of the *Texas Register* (26 TexReg 3159). Sections 97.3, 97.13, 97.14, 97.16, 97.211 - 97.213, 97.216, 97.218, 97.221, 97.222, 97.242, 97.246, 97.250 - 97.255, 97.286, 97.288, 97.294, 97.297- 97.299, 97.302, 97.603, and 97.604 are adopted without changes and will not be republished. The phrase "Licensing Standards for" is added to the chapter title to identify the rules as licensing rules.

The department's justification for proposing and adopting the amendments, repeals, and new sections is set forth below, except for changes made in response to comments received, which are indicated in the individual responses to comments contained further on in this preamble. Justification for the amendments, repeals, and new sections is to reorganize the rule base, clarify ambiguous wording, eliminate duplication, strengthen the licensure standards where needed, and to reformat the end product to make it more consumer friendly. DHS has been reviewing Chapter 97 since the HCSSA program was transferred to this agency in September 1999. This rule package is the second part of a three-part review of Chapter 97. The second part of the review concentrated on Subchapter C, Service Standards.

To accommodate the reorganization of Subchapters C - F, all of existing Subchapters C - F are repealed and adopted as new rules under Chapter 97, Subchapters C - G, with the exception of §§97.62, 97.71, and 97.72. Section 97.62, concerning home health medication aides, was repealed and readopted under 40 TAC §95.128 in the June 1, 2001, issue of the *Texas Register* (26 TexReg 3944). Section 97.71, concerning the HCSSA Advisory Council, and §97.72, concerning the DHS/Board of Nurse Examiners Memorandum of Understanding Advisory Committee, was repealed and readopted under 40 TAC §79.403(f) and (g) in the June 22, 2001, issue of the *Texas Register* (26 TexReg 4734).

New Subchapter C contains the minimum standards that are applicable to all HCSSAs.

New Subchapter D contains additional standards specific to special services an agency may provide. The license categories covered under Subchapter D include licensed home health services, licensed and certified home health services, hospice services, personal assistance services, home dialysis services, psychoactive services, and home intravenous therapy.

New Subchapters E - G contain the procedures for survey and complaint investigation and enforcement, and requirements for home health aides. Existing §97.54, concerning criminal history checks for unlicensed personnel was inappropriately located in the rule base under enforcement and has been repealed and adopted as new §97.247 under agency responsibilities in new Subchapter C. These subchapters and the criminal history check procedures have not yet been subject to review to reorganize the rule base, clarify ambiguous wording, eliminate duplication, and to reformat the end product to make it more consumer friendly; however, certain revisions were made to address concerns in the rules in need of immediate attention.

New Subchapters E - G, as well as rule language covering the HCSSA Advisory Council, the DHS/Board of Nurse Examiners MOU Advisory Committee, and criminal history check procedures will undergo a complete review by DHS during the third and final part of the a three-part schedule for review of Chapter 97 rules.

References to the Health Care Financing Administration (HCFA) were changed to the Centers for Medicare & Medicaid Services (CMS) throughout the rules. The U.S. Department of Health and Human Services changed the name of the agency that runs the Medicare and joint federal-state Medicaid programs in June 2001.

A summary of the major proposed rule changes follows.

New definitions were proposed and existing definitions were amended for clarification, to remove regulatory language, and to comply with statutory changes.

Under conditions of a license, language was proposed to require an agency to post notice of any changes in the agency license so the public is made aware of any changes in an agency's license. Language that required DHS's approval prior to an agency transfer was proposed to be deleted, because it was determined to exceed statutory authority. An agency would still provide notification to DHS 30 calendar days before the intended relocation. Notification requirements for certain agency changes were proposed to provide notification to DHS before the changes rather than after the changes occur. Language was also proposed to require criminal history checks for a new administrator and a new chief financial officer. Additionally, language was proposed to require an agency to provide written notice 30 days prior to the expansion of its service area, instead of 30 days after the effective date of the expansion. This includes parent agencies, branch offices, and administrative support sites. This will allow DHS time to amend the license to reflect the new licensed service areas. An exemption was proposed for emergencies.

New requirements were proposed for policies governing client conduct and responsibility and client rights applicable to all agencies, peer review to ensure that all professional disciplines comply with their respective professional practice act, and drug testing of an agency's employees if testing is performed by an agency. A new policy requirement was proposed to ensure that clients are educated in how to access care from another health care provider after regular business hours. Another new policy requirement was proposed that requires an agency to ensure that all employees are fully informed and understand all of the agency's policies.

Statutory language specific to advance directives policy requirements was proposed. Rules had only reference the statutory language. Minimum standards for infection control were proposed. Language had only required a policy for infection control.

Minimum standards were proposed for a Quality Assurance (QA) Program, QA committee membership, and frequency of QA committee meetings. Existing rules were determined to be too vague.

New language was proposed and existing language was amended to require that the steps taken to coordinate services be documented in the client record, to clarify existing client record requirements, and to establish a time limit of 14 days for incorporating clinical and progress notes into the clinical record. Rules had not specified a time limit.

New language was proposed to strengthen the use of volunteers.

Two new agency disclosure requirements were proposed for reporting abuse, neglect, or exploitation of a client, and for an agreement to and acknowledgement of services by home health medication aides.

New language was proposed to require that lists of clients be maintained for each category of service licensed and specific information be included on the list. This will enable DHS surveyors to survey an agency based on category of service provided.

Language was proposed to allow physician orders to be received via facsimile and to require an agency to adopt a policy for protocols to follow when accepting physician orders via facsimile.

Management and ownership responsibilities were proposed in accordance with statutory requirements. The rules make the licensee more accountable for the operations of the agency. New language requires an agency to have a written organizational structure in a chart or narrative format. The language clarifies DHS's expectations for the written organizational structure. New language was proposed to require the licensee to appoint the administrator as well as an alternate to act in the administrator's absence. Rules had assigned responsibility for the appointment of an alternate to the administrator.

The following additional job responsibilities were proposed for the administrator: to ensure adequate staff education and evaluations, and to supervise and evaluate client satisfaction survey reports. Health and Safety Code, §142.0011, added in 1999, requires rules to address client satisfaction. Additional qualifications for the administrator, including the alternate or other designee, were proposed. An administrator who qualifies under the training and experience qualification also must have a high school diploma or a general equivalency degree (GED). This also is added to the qualifications for the administrator of an agency licensed to deliver personal assistance services only. Continuing education (CE) requirements are added as a condition of employment for the administrator. The administrator must have documented completion of a minimum of six clock hours per year at a health service administration seminar.

New language was proposed to allow the supervising nurse to be available in person or via telecommunication, so the supervising nurse can be located at all times. A proposed amendment to the qualification that requires the supervising nurse to "be a registered nurse (RN)" clarifies that the registered nurse must to be "licensed in the state of Texas or in accordance with the Board of Nurse Examiners rules for Nurse Licensure Compact (NLC)."

A proposed amendment to the qualification that establishes the experience requirements for the supervising nurse requires at least two years of current experience as a registered nurse in a health care setting that provides care for children, adults, or geriatric clients. For experience to be considered current, it must have been obtained within three years before assuming

the role of supervising nurse. One year of experience working as a consultant or in some other capacity that entailed administering home health care standards may be substituted for one year of the required nursing experience. DHS is concerned that many agencies were filling these positions with individuals without any real experience in the area of a home or health care setting that provides for children, adults, or geriatric clients. There was real concern that individuals may be reentering the nursing field after a period of time and are not current on the latest information or best practices. This area is changing so rapidly that it is important that professionals, who are acting in the role of a supervising nurse and are directing other staff, be well-informed and knowledgeable about the most recent medical and social advances. DHS believes that increasing the experience requirements for the supervising nurse helps ensure higher quality of care and service. DHS also believes many of the current quality-of-care and service concerns that are occurring at agencies will decrease by requiring a more experienced supervising nurse.

Under standards specific to licensed home health agencies, the following changes were proposed. Language relating to the qualifications for the social worker when performing medical social services is added. The qualifications were inappropriately located in the definitions section. A requirement is been added that unlicensed personnel used by an agency to provide home health services be required to demonstrate competency in the task assigned when competency cannot be determined through education, license or certification, or experience.

Under standards specific to agencies licensed to provide hospice services, the following changes were proposed. The term "drug profile" changed to "medication list" and the definition of "medication list" is modified to reflect the change in the definition section. An agency must keep a medication list, and a pharmacy keeps a drug profile. Language is added to require the hospice physician or registered nurse to contact the client within 24 hours before the start of care to determine the immediate care and support needs of the client. Language that prohibited a hospice from discontinuing care provided to or discharging a client because of the client's inability to pay for that care is removed because the rule was determined to exceed DHS's authority to impose as a licensing standard. In addition, the administrative penalty for violation of that rule was removed as well. Some of the language relating to volunteers and client rights moved to Subchapter C to apply to all licensed categories of agencies.

Under standards specific to agencies licensed to provide personal assistance services (PAS), the following changes were proposed. Requirements were added for including the "planned date of service initiation" in the individualized service plan. Gastrostomy tube (g-tube) feedings or medication administration are no longer limited to short-term respite care. The proposal also clarifies language relating to the qualified trainer of a training and competency program for the performance of g-tube feedings.

Under standards specific to agencies licensed to provide home dialysis services, the following changes were proposed. Client rights specific to home dialysis were moved to Subchapter C and made applicable to all agencies. Requirements were added for having emergency drugs available as specified by the medical director. Standards for performing home dialysis were updated to reflect current standards.

Under DHS's survey procedures, language was added to state that immediate enforcement action will be taken for failure to grant access to all books, records, or other documents maintained by or on behalf of the agency to the extent necessary to ensure compliance with the statute, rules, an order of the commissioner, a court order granting injunctive relief, or other enforcement action. Additionally, the proposal clarifies that, if Medicare certification for a licensed and certified agency is denied by CMS or the agency withdraws from the Medicare program, the agency may operate only under the category remaining on the current license.

Under DHS's procedures for license denial, suspension, or revocation, if DHS takes enforcement action against an agency, its owner(s), or its affiliate(s), the agency may not apply for an agency license "or make any requests to change categories of license for one year" following the effective date of the enforcement action. The language "or make any requests to change categories of a license for one year" is new. DHS has had agencies that are licensed with the categories of "licensed and certified" and "personal assistance services," when their licensed and certified (Medicare) category is terminated for poor quality of care and they want to add the category of licensed home health services. A year's wait allows the home health agency to regroup and educate the staff to provide skilled services.

The schedules of administrative penalties were amended to reflect the reorganization of the new rules. In instances where a rule previously applied only to one category of license but now applies to all categories of licenses and where a penalty was already established for violation of that rule, the penalty will be applied to all categories of licenses for failure to comply. The schedule of penalties are more streamlined to reflect the elimination of duplication and the reorganization of the rule base.

Additional minor changes were made throughout the rules for the purpose of updating and clarifying language.

DHS received more than 130 written comments from American Habilitation Services, Longview; Christus Santa Rosa HomeCare, San Antonio; Calvert Home Health Care Inc., Lubbock; Quality Infusion Care Inc., Houston; Home and Community Support Services Agencies Advisory Council members; Nurses Today Inc., Dallas; Interim HealthCare, San Antonio, and Interim HealthCare, Corpus Christi; Austin Home Health Care Agency, Austin; Villa Visiting Nurses Home Care, Mt. Pleasant; Doctors Home HealthCare, Fort Worth; Associated Home Care, Terrell; Advanced Patient Care Inc., Beaumont; Texas Children's Home Health Services, Houston; Wilson Memorial Home Health, Floresville; Christus Health, Houston; Allstar Healthcare Inc., Arlington; Texas Association for Home Care, Austin; Allied Primary Home Care, San Antonio; Visiting Nurse Association, Dallas; Concepts of Care, McKinney; and Foundation Management Services Inc., Denton (submitted in conjunction with Covenant Health System). The Covenant Health System includes: Covenant Home Health Care--Lubbock, Covenant Home Health Care--Plainview, Denton Home Health Care--Denton, StarCare Home Health--San Antonio, StarCare Home Nursing--San Antonio, Covenant Home Nursing--Lubbock, Hospice of Lubbock and a number of branches across West and Central Texas. DHS gave all comments serious consideration and responded accordingly. Many comments resulted in changes to the proposed rules.

Most of the commenters were generally against specific sections of the proposed rules as demonstrated in the summary of comments. However, the commenters expressed concerns, offered suggestions, and requested clarification for certain areas of the

rules. DHS considered whether the proposal was overly restrictive, and if it would promote the desired outcome and enhance quality of care.

Several parties expressed similar concerns. Comments are combined where appropriate with one response. A summary of the comments and DHS's responses follows.

Comment: In regard to §97.1(2), Purpose. A commenter suggested deleting the following phrase in the first sentence: ". including a health care facility licensed under the Health and Safety Code, Chapter 142." The commenter stated, "Chapter 142 of the Health and Safety Code is the HCSSA statute and does not pertain to facilities. Facilities of various types are regulated by other HSC statutes." The commenter also suggested deleting the language "A certified HCSSA must have a license to provide certified home health services," from the last sentence of this paragraph because this is addressed elsewhere in the regulations (see §97.402).

Response: The language suggested for deletion is statutory language taken directly from the HCSSA statute, Health and Safety Code, Chapter 142, §142.002(a). However, the reference to Chapter 142 was inadvertently added and has been removed. The language now reads ". including a health care facility licensed under the Health and Safety Code, .."

Comment: In regard to §97.2(10), Definitions, Assistance with medication. A commenter stated, "The last sentence is vague, particularly in consideration of the intent of the nurse delegation rules relating to delegation of certain medication administration to an unlicensed person by an RN (See §218.8 of the Nurse Practice Act)." The commenter suggested rewording the last sentence for clarity as follows: "Such ancillary aid includes administration of any medication when the client has the cognitive ability to direct the administration of their medication and would self-administer if not for a functional limitation."

Response: DHS agrees and has made the change.

Comment: In regard to §97.2(22), Definitions, Complaint. Two commenters expressed opposition to the definition for complaint. The commenters believe the way the language is written an agency would be required to include human resources (HR) issues that are not client-related, such as inappropriate sexual behavior among staff members and other employment issues that are meant to be confidential. The commenters believe that placing these types of complaints in the Complaint Log contradicts requirements of HR and employment laws. One commenter stated, "The federal OIG's compliance program requirements for certified home care agencies, for example, call for the agency's compliance policies and procedures to provide protection and confidentiality in its reported (i.e., complaints of) or suspected cases of fraud and/or abuse." One commenter requested that the definition be limited to those involving clients and care issues. Another commenter suggested limiting this definition to the issues now covered and discussed under §97.250, which sets forth how an agency must handle all "complaints" subject to the stated definition. One commenter believes that the language in this section limits the agency's complaint investigation responsibilities to those complaints made by a client or the client's family or guardian or the client's health care provider regarding treatment or care that is (or fails to be) furnished or regarding the lack of respect for the client's property by anyone furnishing services on behalf of the agency. This commenter suggested using the following language from §97.250 as the definition for complaint: "An allegation made by a client or the family or guardian or the client's health care provider regarding treatment or care that is (or fails to be) furnished or regarding the lack of respect for the client's property by anyone furnishing services on behalf of the agency." The commenter suggested that the language then could be deleted from §97.250.

Response: DHS understands the commenters' concerns. The HCSSA Program receives complaints relating to financial insolvency such as the inability to pay the HCSSA staff and suppliers; behavior of staff, such as being rude, abusive, neglectful and exploitive; staff competency; and criminal history checks not being performed. DHS has received an increased number of complaints of abuse, neglect, and exploitation (ANE), especially with the unlicensed personnel. DHS agrees that clarification is needed and has changed the definition to reinforce that complaints are about infractions of the standards set forth under Chapter 97.

DHS and all state agencies are subject to the Public Information Act, Government Code, Chapter 552. Information in DHS files is subject to public release unless the information falls within one of the exemptions listed in the act. Health and Safety Code, Chapter 142, does provide that certain information concerning home health agencies is confidential. Also, the Human Resources Code and federal law provides that information concerning applicants and recipients in the Medicaid program is confidential. In accordance with the Public Information Act, DHS does request an open records decision from the attorney general when necessary to exempt information from public release.

Comment: In regard to §97.2(37)(B), Definitions, Hospice services. A commenter stated, "The Medicare Conditions of Participation for hospice require an 'interdisciplinary group is responsible' and the 'hospice must designate a registered nurse to coordinate the implementation of the plan of care ..' To have the State of Texas require that the hospice services be provided by a medically (physician) directed team is contrary to the Medicare Conditions of Participation for hospice and would add a financial burden to hospice providers." The commenter further stated, "Currently the physician is required to be part of the team, but not direct it. This standard as written would require a greater investment of time by the physician and greater compensation by the agency."

Response: These rules are state licensing rules, not federal Medicare Conditions of Participation. The term "hospice services" is defined by the HCSSA licensing statute, Health and Safety Code, §142.001, and requires hospice services be provided by a medically directed interdisciplinary team. The statutory definition for "interdisciplinary team" requires that the interdisciplinary team include a physician. These are not new definitions and are current licensing requirements. No change was made.

Comment: In regard to §97.2(37)(C), Definitions, Hospice services. Two commenters requested the phrase "independent living environment" be retained in the definition, because "hospice patients can be seen in independent living environments, and that being 'homebound' is not a requirement." One commenter suggested "changing the term 'home' back to 'residence' as in previous language; there is no definition for 'home' under this section, but there is one for 'residence,' which is the standard term used throughout the regulations."

Response: DHS agrees that hospice patients can be cared for in independent living environments. The rule definition is limited by the statutory definition; therefore, the term "home" cannot be changed to "residence." However, for clarification purposes, DHS has added the following sentence to the definition: "For the purpose of this definition, the word 'home' includes a person's 'residence" as defined under this section."

Comment: In regard to §97.2(41), Definitions, Interdisciplinary team. A commenter suggested that since this term is specific only to the hospice category, and because it is already described under §97.403(e) relating to standards for hospice services, the definition should be removed from §97.2(41). The dialysis-related definition for interdisciplinary team has already been stricken from this definition and moved to the dialysis section.

Response: DHS agrees with the commenter and has deleted the definition. Subsequent definitions have been renumbered.

Comment: In regard to §97.2(43), Definitions, Long-term program. A commenter suggested that since the language "is specific to the dialysis regulations found in §97.405(n)," the verbiage in this definition should be deleted from §97.2(43) and moved to/combined with the language in §97.405(n) to complement the meaning of "client long-term program."

Response: DHS agrees and has deleted the definition for long-term program in §97.2 and moved the language to §97.405(n) as suggested. Subsequent definitions have been renumbered.

Comment: In regard to §97.2(46), Definitions, Medication list. A commenter expressed concern regarding the proposed term "recommended dosage." The commenter stated, "The medication list should have the physician-ordered dosage for each medication on the list. Many agencies provide the patient with a copy of this list to clarify what medications the client is to take, how much, and how often. The physician orders a specific dosage for the patient, for example 10 milligrams. The recommended dosage for that medication may be a range of 10-50 milligrams. Other times the physician-ordered dosage is not in the range of 'recommended' dosage because the physician is aware of client-specific circumstances."

Response: DHS agrees that the language needs clarification. The definition (now §97.2(44) has been changed to say, "A list of a client's medications that includes the physician orders relating to dosage and the frequency and method of administration."

Comment: In regard to §97.2(70), Definitions, Residence. Two commenters suggested that the term "independent living environment" be reinstated to maintain consistency in terminology and to support situations identified in the nurse delegation rules under 22 TAC §218.8.

Response: DHS disagrees with the suggestion, because the word "residence" is defined by statute and, therefore, the term "independent living environment" cannot be added to the definition. No change was made as a result of the comment, however, as a result of deleting two of the definitions, the definition for "residence" is now at §97.2(68).

Comment: In regard to §97.2(73), Definitions, Respite services. Two commenters asked that the phrase "Respite services may be provided under home health, hospice, or personal assistance services depending on the needs of the client" not be removed. One commenter stated, "this was an issue before and was added to clarify that respite could be provided in any category of service, not just in PAS as some thought. The commenters expressed concern that the first sentence implies there are only two situations in which respite services can be provided. "Many persons have care needs who are not 'disabled' or at risk of abuse or neglect," and "limiting respite to caregivers for those with disabilities or at risk of abuse or neglect excludes those caretakers of the terminally ill or those just acutely ill who are exhausted and need some extra assistance." One commenter suggested deleting the language "with disabilities" to broaden the definition. One commenter stated, "Respite services are directly referred to under the hospice and PAS regulations, but may also be provided under licensed home health or licensed and certified home health categories."

Response: The term "respite services" is defined by statute and limits these services to primary caregivers providing care to individuals of all ages with disabilities or at risk of abuse or neglect. No change was made as a result of the comments, however, as a result of deleting two of the definitions, the definition for "respite services" is now at §97.2(71).

Comment: In regard to §97.2(76)(C), Definitions, Skilled services. A commenter suggested listing physical, occupational, and respiratory therapies separately to acknowledge the respective individual disciplines and to be in agreement with the services listed under §97.401(c) (Standards Specific to Licensed Home Health Services). A commenter requested clarification regarding the use of certified occupational therapy assistants, physical therapy assistants, and speech therapy assistants because they are used by some agencies when supervised by qualified occupational therapists (OTs), physical therapists (PTs) and speech language pathologists or speech therapists (STs). Another commenter suggested including licensed physical therapy assistants and certified occupational therapy assistants under this definition.

Response: DHS disagrees that licensed physical therapy assistants, certified occupational therapy assistants, and speech therapy assistants should be added under the definition of skilled services. The decision to use these assistants is a business decision of the physical therapists, occupational therapists, and speech therapists. Any skilled services provided by therapy assistants would be provided under the provisions of the applicable occupations act and rules adopted thereunder. No change was made as a result of the comment, however, as a result of deleting two of the definitions, the definition for "skilled services" is now at §97.2(74).

Comment: In regard to §97.2(77), Definitions, Social worker. A commenter requested clarification regarding the use of social worker assistants, as there are some social work associates with bachelor degrees that can be used as assistants in the certified category.

Response: The decision to use social worker assistants is a business decision of the social worker. Any skilled services provided by a social worker assistant would be provided under the provisions of the applicable occupations act and rules adopted thereunder. No change was made as a result of the comment, however, as a result of deleting two of the definitions, the definition for "social worker" is now at §97.2(75).

Comment: In regard to §97.11(g)(3)(K)(v), Application and Issuance of Initial License. Regarding the agency administrators' resume or curriculum vitae, a commenter suggested changing the regulatory reference from §97.244(a) to §97.244(a)(1), because referencing subsection (a) would include both paragraph

(1), relating to qualifications, and paragraph (2), relating to conditions. The commenter reasoned that resumes or curriculum vitae normally include qualifications, not those other items listed under conditions.

Response: DHS understands the commenter's reasoning for the requested change, however, DHS needs to ensure that the administrator meets both the qualifications and the conditions required for the administrator. To clarify this, the language in §97.11(g)(3)(K)(v) has been changed as follows: "The resume or curriculum vitae must reflect that the administrator meets the qualifications and conditions described in §97.244(a) .."

Comment: In regard to §97.214, Telephone Number Change. A commenter suggested changing the requirement for "prior notification" to allow an agency to notify DHS "as soon as possible" of a change in telephone number. The commenter stated, "There are times when an agency obtains or is assigned a new phone number and is unaware of the new number until the effective date of the change, thereby making prior notification impossible."

Response: DHS agrees with the commenter's suggestion and has changed the language as follows: "An agency must notify the Texas Department of Human Services in writing within seven days of a change in the agency's telephone number."

Comment: In regard to §97.216, Change in Agency Certification or Accreditation Status. A commenter asked why there is a need for requiring an agency to notify DHS of change or loss of Medicare certification status. The commenter stated, "DHS is the survey authority for both state licensure and Medicare certification and should have direct involvement in, as well as knowledge of, any agency's Medicare decertification/termination or other adverse action. Unless an agency voluntarily withdraws its Medicare certification, there should not be a need for notification to DHS. Furthermore, if an agency is voluntarily withdrawing its certification, there would be no formal written notice to provide to DHS." The commenter suggested changing the language to delete this requirement and only require notification of loss of JCAHO or CHAP accreditation.

Response: As the contracted state agency to conduct Medicare certifications, DHS needs to be notified of any and all decertifications. DHS has also found that some agencies would drop certification when they were found to be out of compliance so they could not be sanctioned. DHS not only needs to know the loss of the accreditation status; DHS needs to know when the agency acquired the accreditation status that is deemed versus non-deemed. No change was made.

Comment: In regard to §97.218, Agency Organizational Changes. A commenter expressed concern with regard to the proposed change that requires home health agencies to immediately notify DHS in writing of a change in the administrator, controlling person, or chief financial officer of that agency so that DHS may conduct a criminal history check on the new individual. The commenter believes the proposed language is ambiguous in defining an agency's responsibility for notification. The commenter believes it is unclear as to whether the agency must notify DHS upon a candidate's selection to fill one of these positions, or when the candidate is actually formally approved for that position by the agency, such as by a vote of the agency's board. Moreover, it is unclear as to what the agency's or DHS's responsibilities are, if any, after the notification of the change to DHS. The commenter recommends DHS maintain the current rule that clearly outlines the agency's responsibility for notification within 15 calendar days of a change in the administrator or chief financial officer."

Response: DHS does not believe the language is ambiguous. The language clearly states that an agency must notify DHS immediately of any change in its agency administrator, controlling person, or chief financial officer. The language does not say that the agency must obtain approval from DHS before offering a candidate the position. If the criminal history check reveals something that would preclude the new administrator from qualifying, the agency clearly would have to reappoint the administrator. No change was made.

Comment: In regard to §97.219, Procedures for Adding or Deleting a Category to the License. A commenter believes that it was understandable to require 30 days advance notice of the addition of a category, however the commenter questioned the need for an agency to provide 30 days advance notice of "deletion" of a category and suggested deleting this requirement. The commenter believes that in many cases, it may not be feasible for agency to provide 30 days advance notice of deletion of category, especially if the reason is loss of all staff or director, etc. Cessation of category provision might occur in an unanticipated, abrupt manner.

Response: As previously mentioned, DHS found that some agencies would drop a category for which they were found to be out of compliance so they could not be sanctioned, then add the category back immediately after the surveyor left. If there are extreme situations that would prevent the 30-day notice, DHS will be attuned to them. No change was made.

Comment: In regard to §97.219(1)(B), Procedures for Adding or Deleting a Category to the License. A commenter requested clarification with regard to the language that prohibits an agency from providing the added category of service until written notice of approval has been received from DHS. The commenter stated that the section relates to addition and deletion of categories (i.e., licensed, personal assistance services, hospice, etc.), not services (i.e., nursing, home health aide services, physical therapy, etc.). The commenter suggests changing the word "service" to "category" or "services under the category being added."

Response: DHS agrees with the commenter and has changed the language to: "An agency may not provide the services under the category being added until written notice of approval has been received from DHS.

Comment: In regard to §97.220(c) and (c)(1), Service Areas. A commenter believes the language in subsection (c), "An agency may expand its service area at any time during the licensure period" is in contradiction with the language in §97.220(c)(1), which requires "a written notice 30 days prior to the expansion .." The commenter believes this should be a notice requirement, not an approval process. The commenter questioned the statement in paragraph (10) of the preamble relating to the requirement that an HCSSA agency give 30 days advance notice of service area expansions, including branch additions, to allow DHS time to review compliance history." The commenter asked if this means "compliance history" will be a new determining factor for such expansion, and, if so, such language is not included under §97.220(c). The commenter suggested "30 days" be deleted and that (c)(2) be deleted. Another commenter also expressed opposition to the 30-day advance notice.

Response: The language requires written notice 30 days prior to the expansion. The licensed service area is a condition of the

license. An expansion of the service area changes the condition of the license. Compliance history is not a determining factor for an expansion. The 30-day notice requirement is not an approval process. Compliance review is an ongoing process. The actual purpose of the requirement is to allow time for DHS to change the license to reflect the expanded service area. No change was made.

Comment: In regard to §97.221, Changing Ownership. A commenter suggested §97.221 be deleted and its content moved to §97.13 with other change of ownership requirements.

Response: DHS disagrees with the suggestion. Sections 97.201 - 97.222 cover the conditions that impact the license. Section 97.221, relating to changing ownership, is a condition that would affect a license. Therefore, DHS believes the section is appropriately located. Many agencies did not understand that a change in ownership voids a license. No change was made.

Comment: In regard to §97.222, Compliance. A commenter believes this section is redundant since compliance with the statute is implied throughout these regulations. The commenter suggested deleting this section. The commenter asked, "If DHS decides to retain the section, what is meant by 'satisfactory compliance?' Will this definition or determination be at the discretion of the surveyors or their respective DHS Regional Office Program Administrator? Will the decision be made by the DHS Central Office staff, such as the Enforcement Committee? Clarification is needed."

Response: DHS disagrees with the suggestion. Sections 97.201 - 97.222 cover the conditions that impact the license. Section 97.222 is a condition of licensure and therefore is appropriately located. The questions do not pertain to the purpose of this section, they pertain to survey procedures that will be addressed in the third and final review of Chapter 97. Surveys, complaint investigations, and the annual renewal application process have always determined satisfactory compliance. No change was made.

Comment: In regard to §97.241, Management and Ownership. A commenter suggested adding "adherence to" after the word "monitoring." Two commenters suggested deletion of the closing phrase, "and are administered to provide safe, professional, quality health care." The commenters believe this language is too subjective to be in rules. One commenter stated, "PAS category services, for example, are personal care in nature and may be non-medical in scope, thus are not considered technically to be 'professional,' as compared with nursing, physical therapy, occupational therapy, occupational therapy, etc." One commenter stated, "the section already requires the agency to adopt, implement, enforce and monitor the policies and ensure that the policies comply with the act."

Response: DHS agrees with the suggestion to add the words "adherence to" after "monitoring," and has made the change. With regard to the comment relating to the use of the word "professional," Health and Safety Code, §142.0011, states the purpose of the act is to ensure that HCSSAs in Texas deliver the highest possible quality of care. The statute lists "professionalism of service providers" as one of the components of quality of care. Personal care services may be non-medical in scope, but should always be provided in a professional, businesslike manner. The language "and are administered to provide safe, professional, quality health care" emphasizes the purpose of the rules. The language has been retained.

Comment: In regard to §97.243(a)(1), Management Responsibilities. Several commenters expressed opposition to the language "supervising the provision of all services." The commenters believe the language implies that the agency administrator must be the supervising nurse, when also considering the definition of supervising nurse and supervision. The commenters suggested inserting the word "administratively" before the phrase "supervising the provision of all services."

Response: DHS agrees with the commenters and has added the word "administratively" before the phrase "supervising the provision of all services."

Comment: In regard to §97.243(a)(1)(F), Management Responsibilities. With regard to the responsibility to "implement an effective budgeting and accounting system," a commenter objected to the word "effective." The commenter believes it creates subjectivity in the compliance determination process.

Response: DHS disagrees that the language is subjective in the compliance determination process. This is not new language. No change was made.

Comment: In regard to §97.243(a)(1)(G), Management Responsibilities. A commenter suggested the proposed language be replaced with, "ensure implementation of the agency's quality assessment and performance improvement program in accordance with §97.287."

Response: DHS disagrees with the suggestion. The supervision and evaluation of client satisfaction survey reports will be a direct responsibility of the administrator. The QA Program must include an analysis of the client satisfaction survey data that will be provided by the administrator. No change was made.

Comment: In regard to §97.243(a)(2), Management Responsibilities. A commenter suggested that "Since the term 'operating hours' is used in other sections of these regulations, and since the term 'usual working hours' is subjective, the language be revised to read as follows: The administrator or designee must be available during the agency's operating hours."

Response: DHS agrees with the commenter and has made the change.

Comment: In regard to §97.243(b)(5), Management Responsibilities. A commenter stated, "In a licensed-only agency that only provides physical therapy (PT), occupational therapy (OT), and speech therapy (ST), the verbiage in paragraph (5) would require the agency to have a supervisor for each of the services provided, not one supervisor to oversee them all, as is the practice in some therapy agencies today (e.g., a PT is the supervisor for all therapy services, PT, OT, ST, etc.)." The commenter suggested revising the language to read "Supervision of these services must be provided by an appropriate licensed professional."

Response: DHS disagrees with the comment. This requirement has been in place for several years and the intent of this rule has never been to require a different supervisor for each of the therapies provided. The language ". such as a physical therapist supervising physical therapy services" was originally included to provide an example. However, DHS sees how the example can be misinterpreted, has removed the example, and clarified the last sentence in (b)(5) as follows: "Supervision of these services must be provided by a qualified licensed professional."

Comment: In regard to §97.244(a)(1)(A) and (B), Staffing Qualifications and Conditions. Concerning §97.244(a)(1)(A), a commenter stated, "The language in this paragraph would not permit the agency administrator to be a PT, OT, ST, or a respiratory therapist (RT). Yet, there are currently agencies whose administrator is also the owner/operator who is a PT, OT, ST, or an RT, or even an LVN (who has owned and operated her own agency for 10-15 years). Additionally, if the agency is licensed-only (LHH) and is predominantly in the PT business, it makes sense that the administrator should be allowed to be a PT." The commenter suggested that the word "therapist" be added or that verbiage be changed to allow administrators to be qualified if he is the respective professional in accordance with the service(s) rendered by the agency.

Concerning §97.244(a)(1)(B), the commenter suggested revising the language to read, "have a baccalaureate or postgraduate degree in administration or in a health and human services field .." The commenter believes this change would also address the issue identified in §97.244(a)(1)(A).

Response: The language in §97.244(a)(1) says, "The administrator . must either .," which means the administrator must qualify under at least one of the qualifications listed under paragraph (1). While reviewing this section, DHS further examined the qualification in §97.244(a)(1)(B), which is an existing qualification. The qualification addresses individuals who have a baccalaureate or a postgraduate degree in administration in a health or human services field and requires the person to have at least one year of full-time administrative experience as the administrator of a facility or an agency. A qualification to be an administrator of an HCSSA should not be to have been an administrator of an HCSSA. Upon further research, the history of this qualification revealed that when qualifications for agency administrator were initially developed, existing agency administrators met various criteria. The qualification under §97.244(a)(1)(B) was developed with the intent of grandfathering those existing agency administrators who met that criterion. There is no longer a need for this qualification. DHS determined that if a person has one year of experience as an agency administrator, the person would also meet the criteria in proposed §97.244(a)(1)(C), which requires at least one year of full-time supervisory or administrative experience in a facility or agency. As a result of the comment and further review of the qualifications, DHS has updated and clarified the qualifications for the administrator as follows:

(1) Qualifications. The administrator and the alternate or other designee must either:

(A) be a licensed physician, a registered nurse, licensed social worker, licensed therapist, or licensed nursing home administrator; or

(B) have a high school diploma or a general equivalency degree (GED) (at a minimum), and have training and experience in health service administration and at least one year of supervisory or administrative experience in home health care or related health programs. Other related health programs may include a hospital, nursing facility, or hospice, etc.; or

(C) if the agency is licensed to deliver personal assistance services only, have a high school diploma or a GED and at least one year experience or training in caring for individuals with functional disabilities.

Comment: In regard to §97.244(a)(2)(D), Staffing Qualifications and Conditions. Concerning the new requirement that the administrator "have documented completion of a minimum of six clock hours per year at a health service administration seminar, the subject at which may include .," a commenter requested clarification as to whether or not the training could be provided internally in an effort to minimize the cost. The commenter believes that as long as the agency has qualified personnel, in particular at the corporate management level, this training can be adequately provided to meet the intent of the regulation. The commenter suggested the regulations specify that the training may be provided either "internally or externally." Another commenter asked that DHS define health service administration.

Response: Continuing education required under this subparagraph may be acquired from an external source or acquired internally. Health service administration experience can be obtained many ways, such as by obtaining a graduate degree in health service administration, regardless of the major interest; nursing; performing administrative work at a hospital, nursing home, or home health agency, etc. A person can obtain this experience in many ways, so DHS believes it best not to try to define a term so broad in scope. No change was made.

Comment: In regard to §97.244(a)(2)(D), Staffing Qualifications and Conditions. A commenter expressed concern regarding the new requirement that the agency administrator must complete six clock hours of a health service administration seminar per year. The commenter stated that the proposed language does not adapt to the common mechanisms used to document continuing education. The commenter stated, "Most continuing education seminars offer credits that are measured in different units (e.g., CEUs (continuing education unit), CPEs (continuing professional education), etc.), each of which have definitions according to the profession's credentialing bodies. These units do not necessarily correlate to clock hours, so the documentation agency administrators will receive will not match the DHS definition. In addition, the proposed rules do not adequately define the year to be reviewed (e.g., calendar year or year coinciding with the agency's license). Currently, administrators submit documentation of continuing education during the agency's license renewal process." The commenter recommends further consideration of the mechanisms of documentation before changing the current language.

Response: DHS realizes continuing education credit may be calculated in different ways. If the administrator receives one CEU, this would be converted to 8 clock hours and will meet the continuing education requirements. Continuing professional units (CPUs) are required for various professional licenses and may or may not cover duties of the administrator. Agencies currently are not submitting proof of continuing education for administrators on the HCSSA license renewal; agencies submit a plan of continued education for the management team. Beginning on January 1, 2002, and each calendar year thereafter, administrators should begin collecting the clock hours. One year from the effective date of this rule, compliance will be verified at the time of survey. No change was made.

Comment: In regard to §97.244(a)(2)(D), Staffing Qualifications and Conditions. Two commenters stated the language at the beginning of this paragraph implies the administrator must obtain all six clock hours at a single "health service seminar." The commenters believe the administrator should be able to obtain the required training in any form or fashion, including, but not limited to, concurrent sessions at home care workshops and seminars, video educational offerings that are now available on most of the topics listed, and on-line educational offerings, such as teleconferences conducted by professional health care educational

companies and home care associations. One commenter suggested changing the language to read "have documented completion of a minimum of six clock hours of continuing education per year, the subject of which may include, but is not limited to .." The other commenter stated the rule is not clear as to whether or not the agency's appointed alternate administrator has to meet the continuing education requirements.

Response: DHS agrees that clarification is needed and has changed the language to read "complete a minimum of six clock hours per year of continuing education in subjects related to the duties of the administrator." In response to whether or not the agency's appointed alternate administrator must meet the continuing education requirements, the answer is yes. Language has been added in §97.244(a)(1) and (2) to include the alternate or other designee to be consistent with §97.244(a).

Comment: In regard to §97.244(a)(2)(D), Staffing Qualifications and Conditions. A commenter stated the regulation that requires the administrator and the alternate or other designee to document completion of a minimum of six clock hours per year is a positive step. However, she believes the areas of training and in-service are too limited. The commenter stated, "Many of the best seminars for administrators are not health care related. Supervision and management seminars are also usually not health care related but general in nature. The local university offers many training courses in management, finance, budget, supervision, quality assurance methods, statistics, mediation methods, and project development/planning, which are all generic in nature but have great value." The commenter said "mangers and administrators should be required to complete six hours of continuing education in areas that affect their duties and not just those areas presented by health service presenters. This keeps the field of home health narrow in scope and does not allow for the cross training of other industries to offer valuable ideas and strategies to the home health care field." The commenter requested DHS to consider offering a broader selection of training for administrators to allow for the exchange of ideas among all industry leaders.

Response: See immediately preceding response.

Comment: In regard to §97.244(b)(2), Staffing Qualifications and Conditions. Several commenters expressed opposition to the requirement that the supervising nurse have two years current experience as an RN (obtained within the last three years and prior to assuming the role of supervising nurse). Most commenters believed the proposed qualifications are too stringent and restrictive, which makes compliance impossible. Many requested DHS retain existing experience requirements of at least one year of experience in nursing, obtained within the last 24 months. A summary of the individual comments follows.

(1) The current nursing shortage is a major factor nationwide, and home health agencies in the state are finding it increasingly difficult to recruit qualified candidates for all nursing positions. Current rules define a minimum requirement that generally can be met in today's tight labor market. Increasing the current experience requirement by one year and limiting the consulting experience to one of the two years will dramatically decrease the pool of available candidates and may possibly provide no candidates in some labor markets in the state, thereby creating a tremendous difficulty for agencies to provide appropriate patient care and comply with requirements.

(2) The proposed qualifications are too stringent and restrictive in that they limit a registered nurse the right to practice under a valid license that is within the scope of practice.

(3) The proposed qualifications are too stringent and restrictive in that they discourage "fast tracking."

(4) Nurses who have been in home health in the past are reluctant to re-enter the field due to the massive layoffs that occurred in 1997 and 1998 due to the changes in home health reimbursement.

(5) No provision in the proposed language allows current personnel in these positions, who are adequately performing the outlined duties of the supervising nurse, to be 'grandfathered's in." Retaining the current requirements for supervising nurse qualifications is recommended.

(6) Low reimbursement rates in the community care service arena pose unique challenges for an organization to maintain competitive wages with other health care providers. Unlike the Medicare Part A program, which operates under the Conditions of Participation, established by HCFA, community care requires program-specific training to nurses. These services are contracted with the state of Texas, which has developed unique, complex rules for participation in each of its programs (e.g., Community Based Alternatives, Primary Home Care/Family Care, Adult Protective Services, etc.). In addition, some HMOs have established their own distinct program rules. A community care agency must provide a unique orientation program for the supervising nurse. The term "home care experience" has little bearing on the qualification of the community care supervising nurse.

(7) Requiring two years experience in a health care setting within the last three years is unreasonable. Many nurses in management positions are well prepared for the supervising nurse position without "nursing experience" within the last three years. Clinical experience can be caught up; management experience is harder to come by.

(8) The experience requirement should be reduced to one year if this person has been an LVN previously, and the experience need not to be obtained within 24 months. A time limit should not be imposed as the RN may be continuing her education through workshops, reading, and network groups.

(9) The agency should have the full rights in regard to the supervising nurse selection, as the agency is held completely responsible for selections. Should the agency employ an individual who has poor judgement, the agency is held liable.

(10) Requiring current experience does not guaranty competence. Agencies should be given the responsibility and rights in the selection process, and the state should not interfere in this process.

(11) A commenter understands the need for experience in the health care field, but now has three employees who would not qualify under the proposed new experience requirements. The commenter stated, "Each one had been a LVN in our agency for several years and we encouraged them to continue their education to become a registered nurse. Under this regulation, each one would not qualify to continue with our agency since they could not meet the requirement of "have at least two years of current experience as a registered nurse in a health care setting." We believe in education and want our LVNs to become RNs. This would certainly mean they would not have jobs in home health settings and would have to spend two years in a nursing home or hospital setting to qualify to come back to our agency. We have a critical shortage of nurses in this country and certainly in our regional area. We also have an investment in these nurses and do

not want to lose good nurses. We would have to stop the practice of providing flex time for nursing school and not encourage this educational enhancement to their careers. Please consider using the LVN experience as meeting the standard since in small agencies the number of RNs remains small. At any given time one of these RNs may have to be the alternate to the Supervising Nurse in the case of a resignation or extended leave of absence.

(12) Current language requiring an RN with one year of experience in nursing obtained within the last 24 months should be retained. An LVN, who has worked in home care for 10 years, goes back to school, while still working in home care, completes his/her ADN or BSN, passes his/her RN exam, and receives an RN license, from a home care experience and knowledge perspective, has much more experience than an RN with only two years of hospital experience.

(13) The administrator has the responsibility to hire qualified staff, and those qualifications will vary based upon the agency's size and case mix. The outcomes should determine whether or not the supervising nurse is qualified.

(14) The two-year experience as an RN limits choices when selecting a nurse for the supervising nurse position. DHS should reconsider its position with regard to this requirement based on the current "nursing shortage." Presently, preceptorships and mentoring are excellent tools in employee development, these processes would be ideal and would allow the agency to be selective, not restrictive!

(15) Requiring experience in home care should be a requirement of the supervising nurse but not the alternate-supervising nurse. The proposed change is a "Catch 22." How can an experienced manager break into the industry if the requirement is that they've had experience managing in the industry? We all have to start somewhere. The proposed rule will prevent anyone new from entering the management field in home care in the future. An alternate supervising nurse may be learning the home care industry but need to be in charge when the supervising nurse is in a meeting. Requiring the alternate supervising nurse to have the same credentials as the supervising nurse is unrealistic and will pose an undue burden on home care agencies who are already having trouble getting qualified staff during this nursing shortage.

(16) With the health care cost rising for both the provider and the consumer and with the influx of the elderly and baby boomers into the health care industry, home health care will grow tremendously. Our country is experiencing a nursing shortage. There are not enough nursing schools and institutions available to provide enough nurses to care for our country's sick and disabled. We in the home health care industry are experiencing difficulty in recruiting nurses both in the field and administratively. The requirement is too stringent.

(17) One commenter agrees the supervising nurse must have two years current experience as an RN before employment in a supervising nurse position.

Response: DHS has the responsibility to set minimum standards to ensure that home and community support services agencies in this state deliver the highest possible quality of care. In proposing the more stringent qualification for the supervising nurse, DHS was attempting to address quality of care issues that have plagued the home health industry in recent years. However, as the commenters stated, the current nursing shortage has limited the number of individuals with experience in various areas of health care, as have the lack of competitive wages, rising health care costs, and recruiting difficulties. As one commenter pointed out, with the influx of the elderly and baby boomers into the health care industry, home health care will grow tremendously and there are not enough nursing schools and institutions available to provide enough nurses to care for our country's sick and disabled. These are all serious issues that must be addressed in order to ensure the highest possible quality of care. There are no immediate solutions.

Given the nursing shortage and other related issues, DHS has changed §97.244(b)(2) as follows: "have at least one year of experience as an RN obtained within the last 36 months." The alternate supervising nurse also must meet this qualification. LVNs who have received their RN license must obtain experience working as an RN for one year before assuming the role of the supervising nurse. DHS understands that experience does not guarantee competence, but DHS believes very strongly that the minimum standard for both the supervising nurse and the alternate include experience working as an RN. Section 97.243(a)(1)(C) requires the administrator "to employ qualified, competent personnel." This not only means the staff must meet certain qualifications, the administrator must ensure staff competency. Each agency is responsible for hiring qualified employees, just as RNs are required to have the training and qualifications for any position they accept.

In response to opposition expressed toward requiring supervising nurses and their alternates to have the same qualifications, DHS disagrees. It was never the intent that only one or the other meet the qualifications listed for supervising nurse.

DHS would like to compliment those agencies that invest in their nurses by providing flex time for nursing school and encouraging educational enhancement to their nursing careers.

Comment: In regard to §97.244(b)(2), Staffing Qualifications and Conditions. A commenter agrees the supervising nurse must have two years current experience as an RN before employment in a supervising nurse position.

Response: DHS appreciates the support, however, in response to the numerous comments received in opposition, DHS is changing qualifications for the supervising nurse and the alternate as mentioned in the previous response.

Comment: In regard to §97.245(3), Staffing Policies. A commenter disagrees that an agency's policies should include job descriptions and job qualifications for each position within the agency.

Response: DHS believes it is essential for staffing policies to include statements that list the functions and responsibilities that constitute job requirements for each position. Policies should state specific education and training necessary to perform each job. No change was made.

Comment: In regard to §97.245(9), Staffing Policies. Several commenters expressed concern with the language that requires all direct-care staff who have direct contact with clients (employed by or under contract with the facility) sign a statement that they have read, understand and will comply with agency policies. The commenters were concerned that staff would be required to read and understand all agency policy completely, including policies that were not applicable to certain staff. For example, as one commenter stated, "a home health aide should not be expected to read, understand, and comply with agency policies on skilled nursing, therapy services, etc. Likewise, field

nurses need not read, understand, and comply with agency policies on therapy modalities to be used by the physical therapist." Another commenter stated, "staff is apprised of changes in policies at staff meetings and other educational meetings. This new requirement would increase the staff's unproductive time if they are required to read the policies and sign statements every time there is an update."

Response: DHS agrees that clarification is needed and has added "all applicable" before "agency policies" to clarify the original intent of the requirement.

Comment: In regard to §97.245(9), Staffing Policies. A commenter expressed concern with the language that requires "All personnel who are direct care staff and who have direct contact with clients sign a statement that they have read, understand and will comply with agency policies," and requested "personnel and direct care staff" be defined. The commenter believes this requirement should not include any independent contractors, such as physical therapists who do not work directly for the agency, because this would put an undo burden on contractors who would have to read and comply with personnel policies when they are not employees.

Response: DHS disagrees. Independent contractors are required to conform to all applicable agency policies, including personnel policies. This is not a new requirement. Other requirements for using independent contractors are found in §97.289. To further clarify the language in §97.245(9), DHS added "all applicable" before "agency policies."

Comment: In regard to §97.245(9), Staffing Policies. A commenter suggested changing the word "facility" to "agency." Use of the term "facility" seems to refer to a long-term care facility or assisted-living rather than an HCSSA agency.

Response: DHS agrees and has corrected the language.

Comment: In regard to §97.246(a)(3), Personnel Records. A commenter stated, "It is becoming increasingly difficult to verify references. The agency cannot be held accountable for the non-response of companies to this request. The regulation can hold the agency accountable for requesting verification and to send the second request to at least two previous employers or personal references, but the agency cannot go to these individuals or companies and demand that they comply with our regulation. The employee would have to be terminated if the references were not obtained. This information is usually received at least 30 to 45 days post-hire. Training, orientation and commitment to a patient has taken place." The commenter believes this requirement is not practical in today's business climate.

Response: DHS understands that verifying references may be difficult at times. DHS does not expect the agency to go to these individuals or companies and demand the references, nor does it expect an agency to terminate an employee if the references were not obtainable. An agency's good faith attempt to comply with this particular regulation is satisfactory. No change was made.

Comment: In regard to §97.247, Criminal History Checks for Unlicensed Personnel. A commenter suggested amending §97.247 to include legislative changes made by Senate Bill 1245 and House Bill 1418, 77th Legislature, relating to the employee misconduct registry and criminal history checks of unlicensed employees and applicants for employment in an HCSSA.

Response: DHS agrees and has rewritten §97.247 to implement the legislative changes. 1) Responsibility for obtaining criminal history checks for unlicensed applicants and employees was transferred from DHS to the agencies. 2) Effective September 1, 2001, felony theft convictions that are less than five years old result in an automatic bar to employment in an agency. 3) An agency may not employ an applicant and must immediately discharge an employee, if the agency becomes aware of a person's conviction under the laws of another state, federal law, or the Uniform Code of Military Justice for an offense containing elements that are substantially similar to the elements of an offense listed in the rule that bars employment with the agency. 4) Prior to making an offer of employment, agencies will now be required to search the employee misconduct registry and nurse aide registry for certain acts of misconduct that bar employment by an agency. 5) The section title has been changed to "Verification of Employability of Unlicensed Persons."

Comment: In regard to §97.247, Criminal History Checks for Unlicensed Personnel. A commenter stated, "The regulation is for unlicensed personnel, not licensed personnel not working within the scope of their practice. I hold a license with the state of Texas and meet all the requirements of that license each year. I am subject to a higher standard than unlicensed individuals in the state of Texas. The fact that I do not practice audiology any longer does not prevent me from being sanctioned under the state regulations of my license for unethical practices or any other regulation violation. The license is the standard and not the practice of the profession. I see that this just adds to the cost of the agency and to the record keeping of the agency. The practice of one's profession is not limited to the day-to-day operations. The practice of one's profession includes compliance with the licensure code of ethics, continuing education requirements, and the disclosure of criminal activities to the board/committee, which would violate the license regulations."

Response: DHS agrees that the rule pertains to unlicensed personnel as indicated in the section title. The rule, as rewritten, has been clarified to address the comment.

Comment: In regard to §97.247(b), Criminal History Checks for Unlicensed Personnel. A commenter suggested adding the word "unlicensed" to the first sentence ("An agency may not employ an unlicensed person"). Although the title for this section refers to unlicensed personnel, the language in the actual section does not. Also, as worded, this section would not allow an agency to employ a person "unless the agency has applied for a criminal history check and unless there is an emergency." It should be revised to read, "unless the agency has applied for a criminal history check or unless there is an emergency."

Response: DHS agrees. The rule, as rewritten, has been clarified to address the comment.

Comment: In regard to §97.247(b)(4), Criminal History Checks for Unlicensed Personnel. The requirement of the parent office to notify the branch office of the criminal history check findings is too vague. This is confidential, sensitive information and should be handled in a highly confidential manner. The branch office is not entitled to the information, only the administrator of the branch office should receive the information. Once this information leaves the parent office the information is compromised. We go to extraordinary lengths to protect the employee's right to privacy with regard to this information. Please change the regulation to ensure the protection of this information at the branch level and to allow the parent office to use discretion in notifying the branch of the findings. Only those findings that are listed in

the Health and Safety Code, Chapter 259, are of concern to the branch. Not all findings should be disclosed. This is a major problem with the regulation as stated.

Response: The language denotes: "If the agency is a parent agency, the parent agency must submit a request for a criminal history check on behalf of a branch office or alternate delivery site." This is not a new requirement. The intent is not to disclose. All unlicensed personnel who have direct contact with the client either at the parent, branch, or alternate delivery site will have a criminal history check performed before hire. No change was made to the language. The rule as rewritten now falls under subsection (m) of §97.247.

Comment: In regard to §97.247(b)(5), Criminal History Checks for Unlicensed Personnel. A commenter suggested deleting proposed subsection (b)(5) because the language is redundant with the language in subsection (b).

Response: DHS agrees and has clarified the rule to address the comment.

Comment: In regard to §97.247(c)(1), Criminal History Checks for Unlicensed Personnel. A commenter suggested changing the word "facility" to "agency" to promote consistency.

Response: DHS agrees and has deleted subsection (c)(1) because the language was determined to be unnecessary.

Comment: In regard to §97.247(i), Criminal History Checks for Unlicensed Personnel. A commenter suggested deleting the language in this subsection. It is unnecessary since subsection (a) of this section already addresses Health and Safety Code, Chapter 250.

Response: DHS agrees, however the rule was rewritten to include language in Health and Safety Code, Chapter 250 and no longer references the statute.

Comment: In regard to §97.251, Peer Review. A commenter expressed concern with the language that requires an agency to adopt and enforce a written policy to ensure that all professional disciplines comply with their respective professional practice acts or title acts relating to reporting and peer review. The commenter stated, "Our company does not believe that our professional nursing staff should be responsible nor are they qualified to conduct peer review of contracted therapists, i.e., PT, OT, ST, etc. (If indeed the interpretation of this requirement is similar to that of nursing peer review.) We do believe that the organization should maintain copies of the practice acts and report known violations to their respective licensing board, supervisor, etc."

Response: The rule does not require the professional nursing staff to be responsible for conducting peer review for the contracted therapists. The rules do require agencies to ensure contracted therapists are complying with their respective practice acts. Agencies request documentation of their compliance. No change was made.

Comment: In regard to §97.281, Client Care Policies. This section mentions clinical procedures, transfers, and discharges, but does not mention admission policies, emergency treatment policies, etc. Are these assumed to be included under clinical procedures?

Response: Admission policies and emergency treatment policies are included in policies that cover clinical procedures. The clinical procedures should include the scope of the services the HCSSA delivers. The proposed list was not all-inclusive, and was meant to provide examples. Client care policies should include anything that pertains to client care. To add clarification, DHS expanded the list of examples to include: initial assessment, reassessment; start of care, transfer, discharge; intravenous services; care of the pediatric client; triaging clients in the event of disaster; how to handle emergencies in the home; safety of staff; procedures the staff will perform for clients, such as dressing changes, Foley catheter changes, wound irrigation, administration of medication; psychiatric nursing procedures; patient and caregiver teaching relating to disease process/procedures; care planning; care of the dying patient/client; receiving physician orders; performing waived testing; medication monitoring; and anything else pertaining to client care.

Comment: In regard to §97.282, Client Rights. A commenter requested further clarification regarding how DHS will define "client conduct" and how the rules and regulations govern such conduct.

Response: This rule requires an agency to adopt a policy governing its expectation for client conduct and responsibility and client rights. Along with each right the client has, the client must observe certain responsibilities, such as furnishing accurate and true statements rating the health problems, treating all staff with respect, and participating in the planning of their care. The policy should cover procedures that caregivers should follow when clients fail to comply with the client conduct policy.

Comment: In regard to §97.282, Client Rights. A commenter asked if these client rights are in addition to the Rights of the Elderly and the Conditions of Participation? Will we be required to give the clients these rights as written? Commenters believe this is yet another administrative burden that results in scaring home care clients with mounds of paperwork.

Response: The Rights of the Elderly are mandated by Human Resource Code, Chapter 102 and apply to those 60 years of age and older. The requirement to comply with the Rights of the Elderly is located in paragraph (12) of the client rights rule. Clients who receive services under the Medicare benefits receive the client rights established under the Omnibus Reconciliation Act (OBRA). The current rules do not specify rights for clients receiving services in the LHHS and PAS category under the age of 60. Section 97.282 applies to all clients. Agencies must give client rights as specified in §97.282. Client conduct and responsibility policies and client rights should only consist of a couple of pages at most. DHS believes clients want to know what their rights are as a client of an HCSSA and would not be overwhelmed by the additional paperwork.

Comment: In regard to §97.282(2), Client Rights. A commenter stated the language appears to be mandating the use of a given form, "an informed consent form." The commenter believes the language is prescriptive in nature, and suggested the reference to the form be deleted and replaced with the following language: "The agency must ensure that written informed consent that specifies the type .." The commenter also suggested deleting the verbiage that refers to the ". course of the illness" as there are situations, particularly in a PAS agency, in which clients (i.e., paraplegics, mentally handicapped persons, etc.) are not "ill," but are being assisted with activities of daily living.

Response: DHS agrees and has made the suggested changes.

Comment: In regard to §97.282 (4) and (6), Client Rights. A commenter believes that the language in paragraph (4) is redundant with the language in paragraph (6).

Response: DHS disagrees that the language is redundant. Section 97.282(4) requires an agency to protect and promote client rights, such as educating staff regarding client rights and ensuring that staff comply with client rights. Section 97.282(6) provides a client the right to exercise his rights as a client. Failure to allow a client to exercise his rights, however would mean that an agency is in violation of §97.282(4).

Comment: In regard to §97.285(3), Infection Control. A commenter expressed concern with the new requirement that specifically delineates documentation elements for client infections. The commenter believes the proposed language is unclear as to whether the agency's policy must require documentation in the client record or in another manner. The commenter stated, "The current rules require documentation of clinical and progress notes (§97.21(b)(6)(I)(v)) and documentation of communication and coordination of care (§97.21(b)(6)(I)(viii)) in the medical record which would include the documentation of infections. Home health agency staff is reliant upon the client reports to learn of these events. In many situations, the elements required in the proposed rules (e.g., pathogens identified) are not obtained by the agency, such as in diagnoses of pneumonia. If the proposed language will require documentation in another manner, the language is unclear as to the purpose of the documentation and it does not consider the current definitions of infection surveillance. In addition, there are currently no nationally defined standards from the Centers for Disease Control for classifying and monitoring nosohusial infections." The commenter recommends further consideration of the documentation requirements before implementing this portion of the infection control section.

Response: The purpose of surveillance is to collect data about infections to detect any changes in infection trends. There are three primary types of surveillance: total surveillance, priority-directed or targeted surveillance, and problem-oriented or outbreak surveillance. The majority of home care organizations do targeted surveillance, which focuses on specific patient population or procedures. A well-planned infection control program includes specific processes and activities that an organization designs and implements, including: surveillance, identification, prevention, control, and reporting. If the policy were written toward this end, DHS would accept the policy and procedure. No change was made.

Comment: In regard to §97.285(3), Infection Control. A commenter expressed concern with the language that requires documentation of infections that are acquired while the client is receiving services from the agency, specifically the language that requires documentation to include, at a minimum, the date the infection was determined to be present, the client's name, primary diagnosis, signs/symptoms, type of infection, pathogens identified and treatment, etc. The commenter stated, "Because Community Based Alternatives (CBA) is the 'payer of last resort,' often the community care provider is not authorized by DHS to provide clinical services. Under these circumstances, either attendant homemaker services or the delivery of medical equipment and supplies, adaptive aids, or home modifications are provided. The admitting RN is allowed to determine the frequency of attendant supervisory visits, which may occur as infrequently as every three months, in accordance with program guidelines." The commenter believes this regulation places an undue burden on the community care provider and suggests the information gathered would be less than accurate. The commenter suggested this be a requirement only for agencies that are responsible for the provision of "clinical care/service."

Response: Agencies that provide CBA services are required to have licensed home health because there is the potential of skilled nursing services or physical therapy services to be provided and are provided. An agency's direct care staff normally provide at least one direct care need (i.e., bathing, transferring, assistance with ambulation and meal preparation). Infectious diseases frequently are transmitted through food and direct client contact. It would be in an agency's best interest to rule out an employee as the source of the infection. DHS does not anticipate many agencies that provide PAS will report many infections. No change was made.

Comment: In regard to §97.287, Quality Assurance (QA). Many commenters expressed opposition to these regulations and felt very strongly that they should not become final as proposed. A summary of QA comments and responses follow.

(1) Several commenters expressed opposition to the requirement that all agencies (of all licensure categories and all sizes) have a QA program, a mandatory QA committee comprised of a professional representative of every discipline provided by the agency, and meet on a quarterly basis.

(2) Several commenters believe the proposed QA rules are too prescriptive.

(3) Several commenters said "current trends in QA are based on performance improvement and quality assessment and most agencies follow this trend. The home health industry is over regulated and monitored closely by state and federal governments." Commenters said the proposed QA rules are not in keeping with current trends in quality assessment and performance improvement.

(4) There should not be a requirement for a QA Committee to meet. The agency's plan will dictate to whom it will report results from the QA Program. The agency will determine the details of its program, and this will be done on an ongoing basis. This plus the annual review should be sufficient for regulations and anything further is too prescriptive on the part of DHS.

(5) While many of the proposed rule changes only serve to further quality in writing the expectations on which the agency has been held accountable for some time, this proposed rule change will significantly alter these expectations. It is this agency's belief that these rule changes will directly effect our ability to provide quality services in compliance with community based service standards.

(6) The proposed QA rules negatively move toward a prescriptive collection of data, which may or may not represent performance issues for the agency, and review of data and activities without clarity of focus and outcome.

(7) The proposed QA rules represent a negative move away from quality improvement that is based on a systematic approach, specifically relevant to agency-specific patient care and administrative issues, ongoing review of key processes rather than 'traditional' data, and sensitivity to the need for agencies to prioritize based on the limited clinical and administrative resources that characterize most home care agencies today.

(8) The specific requirements outlined in this section warrant significant challenges for home health agencies and we request that DHS give them serious reconsideration prior to their adoption.

(9) Proposed QA rules will add a tremendous additional administrative burden to agencies already complying with Medicare Conditions of Participation (CoP) and with accreditation standards and they conflict with those requirements.

(10) The proposed QA rules are a reiteration of the clinical record review required for Medicare certified agencies; that the draft CoPs will allow agencies to design their own Quality Assurance Performance Improvement programs that will focus on processes of particular importance within organizational and patient care functions.

(11) Large chain organizations usually have one PI program for the entire organization. The proposed rule will decentralize this process and cause a duplication of work.

(12) The requirements set out within the prospective payment system to utilize the Outcome Based Quality Monitoring and data driven quality monitoring is meant to enhance an agency's QA efforts. This proposed rule would place an undue hardship on agencies already overwhelmed with the increased paperwork and monitoring requirements.

(13) The term "Quality Assurance" is outdated. Suggest using the modern term "Quality Assessment and Performance Improvement (QAPI)" instead.

Response: The proposed rules reflect several months of negotiations with industry representatives. DHS incorporated some of their suggested language for QA. The purpose of this rule is to have a formalized meeting so the agency can perform a periodic self-assessment. DHS does not believe that category or size of an agency should make any difference.

DHS agrees that "Quality Assurance" is an outdated term and has changed it to "Quality Assessment and Performance Improvement (QAPI)" as suggested.

DHS's response to "proposed QA rules will add a tremendous additional administrative burden to agencies already complying with Medicare Conditions of Participation and with accreditation standards and they conflict with those rules," is that these are licensing rules, and agencies choose to participate in Medicare and other accredited programs. The commenter did not provide information pertaining to any areas of conflict.

Comment: In regard to §97.287(a)(1)(A), Quality Assessment and Performance Improvement. Differences between the QA and PI program are not stated. There is confusing wording that implies that the QA program measures should include essential parts of the QA program. Also, it is unclear as to what is meant by "essential parts."

Response: DHS agrees that the language as proposed is a bit confusing and has removed the confusing language. Section 97.287(a)(1)(A) now reads: "a system of measures that captures significant outcomes that are essential to optimal care and are used in the care planning and coordination of services and events. The measures must include at a minimum ."

Comment: In regard to §97.287(a)(1)(A)(ii), Quality Assessment and Performance Improvement. The following comments were received.

(1) The proposed regulations contain prescriptive requirements for agencies to collect data regardless of whether or not that data represents performance issues for the agencies. In addition, although the factors surrounding medications are usually high-risk, a sound quality program proactively monitors many processes related to medication use rather than just medication errors, which is not always conclusive for identifying all problems. It is suggested that this language be revised to include a broader measure than just medication errors.

(2) The proposed elements to be required for review by the QA committee appear appropriate. However, DHS licensing should not mandate areas for performance improvement. The requirements proposed closely follow those mandated by JCAHO and CHAP. Community care agencies provide unique service delivery, which uses far fewer licensed professionals. Thus, the scope of service is vastly different than that of the traditional Medicare HHA.

(3) Proposed QA rules focus only on client outcomes. Suggest they apply to all agency functions, services or activities.

(4) The responsibility for determining an appropriate system of measure should be left up to the local agency/center.

Response: DHS agrees with the suggestion that the language be revised to include a broader measure than just medication errors. Section 97.287(a)(1)(A)(ii)(IV) has been changed to read "medication administration and errors." DHS has included a list of minimum requirements for the QA Program. An agency may add to the list as appropriate for that agency. Once again, the purpose of this rule is to have a formalized meeting so the agency can perform a periodic self-assessment. For clarification, DHS has changed the language in §97.287(a)(1)(A) to: "The measures must include at a minimum and as appropriate the following:"

DHS agrees with the suggestion that the QA rules should apply to all agency functions, services, and activities. However, DHS wants to limit the role of QA in the beginning so as not to overwhelm an agencies. An agency should add quality measures as appropriate for that agency.

Comment: In regard to §97.287(a)(1)(A)(ii)(II), Quality Assessment and Performance Improvement. It is not appropriate for the QA committee to review issues of unprofessional conduct by staff. The requirements for peer review are different.

Response: The rules require an agency to ensure that agency staff and contracted staff are complying with their respective practice acts with regard to peer review. The QA committee's role will be to review a report from the administrator regarding the number of referrals being made by the agency. Language also has been added to address "issues of misconduct by unlicensed staff."

Comment: In regard to §97.287(a)(1)(B), Quality Assessment and Performance Improvement. The following comments were received.

(1) This requirement is vague and does not outline specific focus or criteria for such an evaluation (e.g., appropriateness, utilization, budget, etc.). A lack of specificity creates ambiguity during the survey process by surveyors and agency staff, and also encourages inappropriate utilization of resources toward completion of an evaluation.

(2) In consideration of current trends in QAPI, suggest changing the requirement for an annual evaluation of total operation to "annual review of the agency's QAPI plan and findings." Delete "The findings are to be used by the agency to correct identified problems and to revise policies, if necessary." The agency identifies problems and revises policies as necessary on an ongoing basis as a part of its operations and QAPI findings.

(3) This requirement is too restrictive. Federal regulations under the OASIS and Adverse Event reporting already require burdensome reporting and another reporting tool will duplicate and over burden an already over regulated system.

(4) The requirement of an annual agency evaluation is a punitive measure to those agencies that provide only primary home care and CBA care.

Response: DHS disagrees that the requirement is vague. An annual evaluation of the total operation includes an evaluation of every function of the agency. If everything is functioning properly, there will be no negative finding. For example, problems with direct-care staff not showing up for client visits is a negative finding that needs to be corrected. DHS disagrees that the language needs to be more specific, and that a lack of specificity creates ambiguity during the survey process. DHS disagrees that the rule will encourage inappropriate utilization of resources toward completion of an evaluation. An annual evaluation should guide the agency in reviewing its total operations, both business and clinical. The QA committee's goal should be to recognize areas for improvement that are cost effective.

Comment: In regard to §97.287(b), Quality Assessment and Performance Improvement. The following comments were received:

(1) Most employees are contract employees and as such are usually employed by multiple agencies or other entities. To have a representative from each discipline attend a quarterly meeting is not possible. Would suggest having a representative from 75% of the disciplines offered attend the meeting with mandatory attendance by a skilled nurse and a home care aide.

(2) It is very difficult to get all disciplines together at one meeting time when they are out in the field taking care of patients.

(3) A small- to moderate-size agency uses contract therapists for physical therapy, occupation therapy and speech therapy. In a small community, the contract therapists usually are very busy with patient visits and are not able to attend the meetings required by this regulation. To meet this requirement will add costs to the agency to pay these individuals annually.

(4) The disciplines referred to include respiratory, therapy, dietitian, speech therapy, social work, pastoral counseling and pharmacist, who may be used on an infrequent basis, but would be required and expect payment to attend any agency meetings.

(5) An agency would likely have to pay extra for each contracted professional for his/her time in attending the required quarterly committee meetings in order to maintain compliance, thereby making it cost-prohibitive.

(6) Current processes are already overwhelming at the present time and to add a mandatory QA committee is overkill when you consider the overwhelming QA processes related to Oasis, Oryx and State and Federal requirements. Requiring a professional representative of each discipline to meet quarterly is unrealistic. Home health employees are burdened with a multitude of paperwork now. We do not believe that DHS is considering the financial burden on the agency. Not all employees are salaried. How would we compensate contract employees, such as PT, OT, ST, and Medical Social Workers (MSW)? Please take into consideration that all agencies are not alike and do not operate in the same manner.

(7) In many of the community-based programs, services in a wide array of what would be considered "unskilled disciplines" are provided on a regular basis. These disciplines might include aromatherapy, massage therapy, equestrian therapy, music therapy, computer training services, recreational therapy, aqua therapy, etc. It would be physically impossible to bring a representative from each of these disciplines to a quarterly meeting. The requirement would pose insurmountable obstacles to providers of waiver-based services programs. Scheduling would be impossible; logistics would be a nightmare.

There is no administrative reimbursement that is available to provide for the additional costs of using vendors/contractors in this manner. This is also true of skilled service providers such as occupational therapists, speech therapists, physical therapists, psychologists, etc. Rules governing the operation of community based programs require that no collateral contact be billed. Proposed rule changes would now require this type of collateral contact with no possibility of acquiring DHS reimbursement. Without rule changes in community based program billing standards, the agency would be fiscally unable to provide this.

While many of the proposed rule changes only serve to further quality in writing the expectations on which the agency has been held accountable for some time, the rule changes proposed relating to QA membership will significantly alter these expectations. It is this agency's belief that this rule change will directly affect our ability to provide quality services in compliance with community based service standards.

(8) The QA committee membership is inappropriate. The membership should consist of an interdisciplinary group representing the services within the organization.

(9) The responsibility for determining "who" is on the QA committee should be left up to the local agency/center.

(10) The committee would consist of PTs who are mainly independent contractors who do not have the experience or knowledge about how to improve the quality of the agency. The administrators/directors of the agency should be involved in devising QA measures. Internal QA should be ongoing via patient outcomes, not an unconcerned mandated committee.

(11) If language is retained, it will be difficult and costly for agencies to comply with this requirement, particularly if using contracts or arrangements for professional services (i.e., PT, OT, ST, etc.).

(12) The proposed language focuses on the process of quality programs rather than outcomes. Quality committees are very effective if given the flexibility to conduct the work of improving the performance of the agency by defining committee membership according the priorities identified by the agency.

Response: DHS agrees clarification is needed and has changed the language in §97.287(b)(3) to read "representation from skilled and unskilled disciplines providing services." This will allow the individual who supervises all therapy services to provide representation for all therapies instead of having a representative from each individual type of therapy present.

Comment: In regard to §97.287(c), Quality Assessment and Performance Improvement. The following comments were received.

(1) I am in support of a QA program. However, I am opposed to the mandatory quarterly meetings, but would support mandatory semi-annual meetings.

(2) The responsibility for determining "frequency" of meetings should be left up to the local agency/center.

(3) Agencies are struggling under the burden of paperwork required under PPS and the time required to complete that process. A good QA program identifies problem areas and then makes corrections/improvements in processes to address the problem area, all of which take time to implement. A mandatory quarterly meeting would take away valuable time from patient care and would also not be sufficient time for new processes to take effect. Six months may not be enough time, but it would be twice as long as 90 days.

(4) The proposed QA rules are not in keeping with current trends in quality assessment and performance improvement.

(5) The proposed language focuses on the process of quality programs rather than outcomes. Quality committees are very effective if given the flexibility to conduct the work of improving the performance of the agency by defining meeting frequency according the priorities identified by the agency.

(6) The requirements for quality assurance including a QA committee that meets quarterly is a punitive measure to those agencies that provide only primary home care/and Community Based Alternative care.

(7) The requirement should have provisions for a quorum or absences.

(8) These representatives must attend case conferences and consult with the staff on a regular basis and this would add another meeting to their already tight schedules.

(9) These requirements would be cost prohibitive for small agencies. In order to perform an annual agency review and have a committee meeting on a quarterly basis would require almost a full-time person devoted to QA. Currently, the director of clinical services and the administrator handle this function in many agencies with assistance from all members of the staff.

(10) To require a representative from every discipline would impose a financial hardship to the agency, such as having to make a quarterly payment to a representative of a discipline that is rarely used for attendance of this mandatory meeting.

Response: In response to the comments, DHS has changed the requirement for frequency of QA committee meetings from "quarterly" to "twice a year or more often if needed." DHS does not believe the new requirements for QA will require a full-time person devoted to QA. Agencies should already have a QA mechanism in place. The new requirements, as adopted, should not be cost prohibitive for small agencies.

Comment: In regard to §97.289(a), Independent Contractors and Arranged Services. Contracts with individuals and/or arranged services might be for services other than "per-visit per-hour basis," especially in the licensed home health category or personal assistance services (PAS) category in which services may be per diem, per-shift, etc. (Or, does this language mean that if an individual or entity provides services to the agency on other than a per-hour or per-visit basis, then no contract is required?) We suggest the language be revised to encompass any form of provision of contract services.

Response: DHS agrees clarification is needed and has clarified the wording in §97.289(a) and (a)(2).

Comment: In regard to §97.290(a), Backup Services and After Hours Care. The issue of "backup services" has, in the past, been interpreted and applied by surveyors in varying ways. Some surveyors require agencies to have a contract with another home care agency to provide such backup services, while others allow the agency to have contract individuals willing to take care of patients when an employee or another contractor is unable to deliver services. There are also other variations on this requirement by surveyors. We suggest the following language be added: "This may include, but is not limited to, agency staff, contractors, or the client's family members or friends."

Response: DHS agrees with the suggestion and added the suggested language.

Comment: In regard to §97.290(b), Backup Services and After Hours Care. A commenter believes the intent of this standard is for the client to know how to access care 24 hours a day. Many agencies provide after-hours services themselves. The client should be told how to access those services. In this case, the agency should not have to explain how the client might access care from another provider for after-hours care. If the agency does not provide after-hours care, the client should be told how to access care from another provider. Another commenter suggested changing the language to read ". in how to access care from the agency or another health care provider .."

Response: DHS agrees that clarification is needed and has changed the language to read "An agency must adopt and enforce a policy to ensure that clients are educated in how to access care from the agency or another health care provider after regular business hours."

Comment: In regard to §97.292(a)(2), Agency and Client Agreement and Disclosure. A commenter suggested changing the term "durable power of attorney for health care" to "medical power of attorney" so as not to conflict with current statutory law.

Response: DHS agrees and has changed the term to "medical power of attorney."

Comment: In regard to §97.292(a)(6), Agency and Client Agreement and Disclosure. A commenter does not believe the agreement for services should contain the policy relating to the reporting of abuse, neglect, or exploitation of a client. It should only contain acknowledgement of receipt of the policy or a summary of the policy.

Response: DHS agrees that clarification is needed and has changed the language to read: "a written statement containing procedures for filing a complaint in accordance with §97.282(11) .." Language proposed under §97.502(a) was moved to final §97.282(11).

Comment: In regard to §97.293, Client List and Services. A commenter expressed concern with the proposed changes that requires not only new data elements, but also requires data to be compiled differently. The commenter stated, "In order to comply with these new requirements, agencies will need to modify current software programs, which may entail a truly burdensome cost to the agency. We have not found the current required data elements set forth in current §97.21(b)(4)(H) of lists of clients and services to be provided to hinder the survey process, in that records reviewed and other survey activities are selected randomly from the client list." The commenter recommends maintaining the current language related to the client list.

Response: A surveyor must survey all categories on a license. If an agency provides one list with all the clients listed, the surveyor has to spend a lot of time trying to determine the license category under which the client is receiving services. If agencies provide surveyors with client lists by category of services, surveyors will know which standards to apply. This also will ease

the tension up front for the agency if there is a list for each category. Agencies are expected to keep up with modern business practices. Software costs, if any, should be minimal. No change was made.

Comment: In regard to §97.293(2), Client List and Services. A commenter suggested adding the words "if applicable" after "diagnosis(es)" near the end of the sentence. The commenter stated that for PAS clients, there may be no "diagnosis," as there may be no specific illness or medical condition. Another commenter does not believe each community care provider should have to list the disciplines that are providing services.

Response: DHS agrees clarification is needed and has changed the language in §97.293(2) to read ". diagnosis(es) or functional assessment (as appropriate) .." DHS disagrees with the second comment. Many Community Living Assistance and Support Services (CLASS) and Community Based Alternative (CBA) clients receive multiple services, not just personal assistance services.

Comment: In regard to §97.296(a)(1), Physician Delegation and Performance of Physician-Delegated Tasks. A commenter made the following point: "The agency is responsible for the actions and care provided by its employees. Physicians have more latitude in delegating tasks than nurses and may or may not delegate tasks in keeping with agency policies. If the agency accepts physician delegation, the agency is responsible to the employee performing the physician-delegated tasks. DHS should not tell an agency it must comply with physician delegation. An agency should have a policy to say whether or not physician delegation will be honored by the agency. If the agency chooses to honor physician delegation, the agency must comply with the physician delegation rules."

Response: DHS agrees with the comment. The language in §97.296(a) has been changed to read: "An agency must adopt and enforce a written policy that states whether or not physician delegation will be honored by the agency. If an agency accepts physician delegation, the agency must comply with the Medical Practice Act, Occupations Code, Chapter 157, concerning physician delegation." Paragraphs (1) and (2) under §97.296(a) have been deleted.

Comment: In regard to §97.300, Medication Administration. A commenter stated this section is located under standards applicable to all agencies, "and would also pertain to the PAS category. Yet, it refers to orders by a 'practitioner.' In some PAS settings, particularly in the case of stable clients, medications are administered or assisted with on the instruction of the family/caregiver (client-directed care)." The commenter suggested deleting the language "Administration of medication must be ordered by the client's practitioner."

Response: DHS agrees that clarification is needed and has changed the sentence to say, "The client's practitioner must order administration of medication, unless it can be considered assistance with medications as that term is defined in §97.2(10)."

Comment: In regard to §97.300, Medication Administration. A commenter believes the language "Any adverse reaction must be reported to a supervisor and documented in the client record on the day of occurrence" should be changed to allow time for recording in the client record on the next business day. The commenter stated, "If the adverse reaction occurs after normal business hours, i.e., the evening or on the weekend, documentation in the client record on the day of occurrence is unrealistic."

Response: DHS believes this would depend on the seriousness of the adverse reaction. If it occurs after business hours or on the weekend, the client would have access to emergency care. In this case, the adverse reaction should be recorded on the client's record as soon as it is disclosed to the individual delivering care. DHS added language to §97.300 to clarify this.

Comment: In regard to §97.301(a)(9)(D), Client Records. A commenter believes it will be difficult to achieve compliance with the proposed timeframe that requires clinical and progress notes to be filed within 14 days. The commenter stated, "Agency personnel must have adequate time to submit accurate notes and process the documents for accurate billing and payroll." The commenter suggests "a more reasonable and appropriate timeframe would be 14 business days from date of service, which would allow for these business processes to occur."

Response: DHS agrees clarification is needed with regard to business vs. calendar day and has added the word "business" before the word "days."

Comment: In regard to §97.301(a)(9)(D), Client Records. A commenter stated, "DHS Contracting must pre-approve time sheets utilized by community care providers. In many instances, the timesheet is also used to document service delivery to the client. DHS Contracting has approved a timesheet that covers a two-week timeframe. A similar timesheet is utilized by many community care providers due to the large volume of clients served. Because the timesheet/care delivery record covers a two-week timeframe, we recommend that the filing timeframe for community care providers be extended to 30 days, which would allow approximately two weeks for filing the document once received by the local office. In addition, there is no allowance by DHS licensing for electronic service delivery records. Our company is considering the use of telephony to assist in the accurate recording of service delivery times, to identify potential 'breaks in client care,' and to document care provided." The commenter recommended a notation in the rules allowing the storage of electronic service delivery records to be printed upon request of the payer of DHS surveyor/auditor.

Response: The proposed rule, §97.301(a)(9) states "as applicable." Clinical notes are defined as "a dated and signed written notation by agency personnel of a contact with a client containing a description of signs and symptoms, treatment and medication given, the client's reaction, other health services provided, and any changes in physical and emotional condition." This indicates applicability for skilled or health-related services where the health status of the client is being monitored, treatment is being provided or medication given. This would not include the basic documentation that activities of daily living and household tasks have been performed in accordance with the ISP, care plan or plan of care. A "progress note" is defined as "a dated and signed written notation by agency personnel summarizing facts about care and the client's response during a given period of time." Time sheets required by DHS contracting are not covered under this rule.

Comment: In regard to §97.301, Client Records. The proposed rule change would require that all progress notes be incorporated into the consumer's clinical record within 14 days. As a service provider agency, the waiver-based program uses a wide array of vendors in the community. In many of these programs, the agency works as a fiscal intermediary in providing payment to the contractor or vendor based on a dollar-for-dollar reimbursement by DHS for vendor services. Progress notes and service documentation is provided to the agency on a monthly basis

along with billing invoices. Many of the vendors involved are small businesses or individuals (self-employed). They would be unable to provide the information for the clinical record to meet the proposed deadline. Many vendors contract with other firms or agencies to process and transcribe progress notes or service delivery records and to complete their billing processes. Our agency does not receive this information within the 14-day proposed timeframe. In addition, time is needed to review the information once received to ensure accuracy prior to incorporation of the material into the clinical record.

It is this agency's belief that this rule change will directly effect our ability to provide quality services in compliance with community based service standards.

Response: Progress notes are a summary of a period of time and therefore would be appropriate for monthly reporting. However, clinical notes should be based on each skilled or therapeutic visit. The HCSSA is only a fiscal intermediary for medical supplies and equipment and documentation of delivery would not be categorized under the clinical or progress notes. The agency is responsible for all care provided, whether directly or through contract, and therefore must be apprised on a timely basis of information in the clinical and progress notes. DHS has not found that this rule conflicts with community care standards.

Comment: In regard to §97.301, Client Records. A commenter expressed concern with the implementation of this rule with regard to utilization of non-waivered resources. The commenter stated, "All programs mentioned (in the preceding comment) require the agency to seek out alternate funding sources for services called non-waivered resources. As a result, whenever possible, Medicaid is billed directly by vendors for services provided to the consumer. Our agency is unable to dictate policy to these vendors regarding the submission of clinical notes concerning these services. Under the proposed rule, the agency would also be required to obtain and file this information within a 14-day period as well. The requirement to maintain information from non-waivered resources is a part of continuity of care, and accordingly, the agency would be obligated to have this information in the clinical record within the same 14-day proposed rule as the rule does not make any distinction. Additionally, this agency works in community based programs where services are consumer-driven and controlled. Consumers are given a wide discretion in the choice of vendor as well as in the scheduling of services. Individual plans of care are written with flexibility that might allow the consumer to schedule certain services as needed throughout the month. The agency may not be made aware at the time of service provision and therefore no entry is made into the clinical record to acknowledge the date of service delivery. This information becomes available as the vendor processes notes and billing invoices. This procedure is within the scope of program rules but would be unacceptable under the proposed rule change that requires a note be placed in the clinical record at the time of service delivery and records be filed within 14 days.

While many of the proposed rule changes only serve to further quality in writing the expectations on which the agency has been held accountable for some time, the rule changes proposed relating to the timeframe for incorporation of notes into the clinical record will significantly alter these expectations. It is this agency's belief that this rule change will directly effect our ability to provide quality services in compliance with community based service standards."

Response: DHS disagrees. The time limit of 14 days was decided after negotiations with the work group before publication of the proposed rules in the *Texas Register*. DHS originally proposed seven days. This is important information on which the coordination and continuity of care depend. Fourteen days should be ample time to have information placed in a client's record. The vendor should make every effort during the initial visit to ascertain when the client will not be available for services. Situations will arise that are out of the normal schedule and we will take this into consideration. This does not apply to third-party vendors that do not have a contractual relationship with the agency. No change was made. DHS has not found that this rule conflicts with community care standards.

Comment: In regard to §97.301(a)(9)(K), Client Records. Regarding the language "client has received a copy of the agency's complaint procedures," a commenter believes the intent of this standard should be to let the client know how to register a complaint with the agency, not provide a copy of the agency's complaint procedures. The commenter stated, "Many agencies have multiple procedures related to internal processing of complaints and the clients do not need to be burdened with that information." The commenter expressed concern that surveyors will look at admission packets and cite deficiencies if these internal procedures are not included with the standard as worded. The commenter suggested the language be changed to read "that the client is informed of how to register a complaint with the agency."

Response: DHS agrees and has changed the language to read: "documentation that the client has been informed of how to register a complaint in accordance with §97.282(11) of this title (relating to Client Conduct and Responsibility and Client Rights)."

Comment: In regard to §97.303(2)(A), Standards for Possession of Sterile Water or Saline, Certain Vaccines or Tuberculin, and Certain Dangerous Drugs. A commenter requested that Pneumococcal vaccine be listed as a vaccine that an agency may have available. The commenter stated the population of the agency's clients is primarily elderly. who are at high risk for pneumonia. The Center for Disease Control recommends that pneumococcal vaccines be provided to high-risk clients.

Response: DHS agrees that the elderly population is at high risk for pneumonia, but the rules are limited to the vaccines listed under Health and Safety, §142.0062. No change was made.

Comment: In regard to §97.321(b), Standards for Branch Offices. A commenter expressed concern with the language that requires the branch to comply with the same rules that apply to the parent agency and the standards specific to the licensed category(ies) of service(s). The commenter stated, "This is not correct since a branch is not required to have an administrator and supervising nurse." The commenter suggested the language be revised to read: "The branch operates as a part of the parent agency and the parent office is responsible for ensuring the compliance of its branches with the licensing standards with which it must comply."

Response: DHS agrees that clarification is needed and has changed the language to read: "A branch office operates as a part of the parent agency and must comply with all the appropriate regulations that a parent must meet. The parent office is responsible for ensuring the compliance of its branches with the licensing standards with which it must comply."

Comment: In regard to §97.321(d), Standards for Branch Offices. A commenter suggested changing the wording to "A branch office service area must be within the parent agency's

service area." The parent controls the branch and the parent establishes the branch service area.

Response: DHS agrees that the language needs clarification. The language now reads: "The service area of a branch office(s) must be located within the parent agency's service area."

Comment: In regard to §97.321(d)(3)(A) and (B), Standards for Branch Offices. A commenter recommended the same change for the parent agency--simply require notification before expansion and delete the 30-day requirement.

Response: Same as response to comment regarding §97.220(c) and (c)(1). No change was made.

Comment: In regard to §97.403(v)(2)(A), Standards Specific to Agencies Licensed to Provide Hospice Services. The language "quality assessment and performance improvement," (QAPI) is referred to, while under the "QA" section (§97.287(a)(1)(B)), it refers to "Quality Assurance," an antiquated term. The commenter previously suggested the term "quality assurance" be replaced with "quality assessment and performance improvement" to reflect current trends in health care quality.

Response: DHS agreed with the previous suggestion and changed the term to be consistent with the language in §97.403(v)(2)(A).

Comment: In regard to §97.407(9), Standards for Agencies Providing Home Intravenous Therapy. A commenter suggested adding the word "intravenous" to the sentence after "performing" and before "therapy."

Response: DHS agrees and has added the word "intravenous" as suggested.

Comment: §97.501(a)(4) and (b), Survey Procedures. Several commenters expressed opposition to the requirement that the person in charge of an agency must be present for unannounced surveys. Many commenters believe this requirement to be a burdensome and an unrealistic expectation. Their comments follow.

(1) Small agencies can't have this person stop what they are doing so that they are available for a survey the entire day. This is too prescriptive and has negative financial consequences for the small agency.

(2) Several commenters stated it is an unrealistic expectation to require the "person in charge" (i.e., the agency's administrator, who also may be the RN supervisor, allowable in accordance with HCSSA regulations) to be present at the time of the unannounced survey. The commenters believe this requirement will mean the administrator must be on-site at all times or to have a designated alternate or supervising nurse or delegate on-site at the agency at all times. The commenters listed the following reasons the "person in charge" might not be in the office: making a patient visit; conducting a supervisory visit; on vacation; out of town at a seminar; preceptoring a new employee; ill or attending to a sick family member; attending to a death in the family; having problems with children; experiencing an unforeseen accident; attending to the needs of clients when nurses call in sick; or is otherwise unavailable at the time the surveyor arrives. One commenter stated, "Most agencies have had to trim back staff in order to survive in this competitive environment and because of the lack of availability of staff." Many commenter said the requirement is too restrictive. Another stated, "This should not be prescribed for the convenience of DHS."

(3) A commenter stated that if someone is at the office when the surveyor arrives, this person would need to know how to assist the surveyor until the administrator or supervising nurse arrive. If no one were at the agency, the surveyor could dial the phone number and get in touch with the administrator through the answering service or on call system. Several commenters suggested the requirement be changed so the administrator or RN supervisor can be contacted once the surveyor is on-site. Several commenters suggested changing "present" to "available." Another commenter suggested that acceptable means of communication such as cell phones should be considered as being available to the agency.

(4) A commenter stated it is unfair for the state to impose sanctions against an agency if the person in charge has other plans for the day.

(5) A commenter stated this requirement imposes a strain on the industry.

(6) A commenter stated that at no time has it been required that the "supervising nurse" always be present. "It would be open for interpretation with health shows, physician conferences, and even lunch being citeable if an unannounced survey was performed and the 'supervising nurse' was not present."

(7) Several commenters stated, "It is not possible or practical for the agency administrator and/or RN supervisor to be present for unannounced surveys." It appears the commenters have interpreted the requirement to mean that both the administrator and the supervising nurse must be present for the survey.

(8) A commenter stated, "DHS must be willing to give some type of early warning to the agency in regards to unannounced surveys." The commenter was not opposed to the requirement in general, but suggested it be applied with exceptions.

(9) A commenter stated, "Our administrator and supervising nurse have always been present for these surveys."

(10) A commenter stated, "This provision conflicts with previous DHS licensing rules that allow the supervising nurse to be designated as the alternate administrator." The proposed rule could cause undue hardship on community care providers. The commenter recommended this restriction be eliminated.

(11) A commenter stated, "The administrator and/or RN supervisor is one person, to require that person be present for unannounced surveys is sometimes impossible.

Response: The "person in charge" may be the administrator, the alternate administrator, the supervising nurse, or the alternate supervising nurse. While it would be in the agency's best interest for the "person in charge" to be present for a survey, DHS understands that will not always be possible. DHS has changed the language from "be present" to "be available." Also, only one of these individuals is required to be available at the time of the survey.

DHS understands there will be unforeseen circumstances that may arise at various times. However, someone should be designated to cover the agency's business affairs when an unforeseen situation arises. Vacations and conferences should be coordinated to maintain coverage of the business during regular business hours. Unannounced surveys are mandated by statute, therefore, DHS cannot provide an early warning of a survey. The statute also mandates that the person in charge must be available for both the entrance and exit conferences. Language has been added to require that when the "person(s) in charge" must be away from the office during business hours, a notice must be posted on the door and a message left on an answering machine

that provides information regarding how the person(s) in charge may be reached.

Comment: In regard to §97.501(a)(5), Survey Procedures. Several commenters expressed opposition to the language that permits photocopying by a DHS surveyor or requires an agency to copy clinical and financial records, and the certification of these copies, at the expense of the agency as necessary to determine or verify compliance with the statute or rules. A summary of the comments follows.

(1) Several commenters stated that this requirement creates a potential financial burden for their agencies. Smaller agencies may not have ready access to a copier to reproduce records at the behest of the surveyor, or the only copier available may be a fax machine, which is expensive to use as a copier. An agency may lease a copier and be charged per copy. One commenter asked the following questions: 1) By what method will an agency ensure that copies of records are certified copies? Depending on DHS's response to this question, this may be costly for small agencies. 2) Why would copies need to be "certified" in the first place if the surveyor is right there as copies are being made? 3) Is the surveyor allowed to "certify" the copies? 4) Why can't this be accomplished on-site, at the agency, by the surveyor reviewing the original records or documents?

(2) Another commenter stated there have been instances in which surveyors have copied many pages of records, or have required the agency to take the clinical records to another location to make the copies. And, in some of these instances, there was no indication by the surveyor that the agency's compliance was at question; rather, it seemed to be for the convenience of the surveyor. Several commenters requested the rules state circumstances where it may be necessary for a surveyor to take copies to determine or verify compliance.

(3) Several commenters stated DHS surveyors abuse or overuse this requirement for their convenience and create a financial burden for the agencies. The commenters asked that DHS develop a guideline that specifies the requirements for copying clinical and financial records so an agency can evaluate the necessity for copying these records.

(4) A commenter stated, "We have had a state surveyor in our office at the same time as a JCAHO surveyor and the state surveyor requested all kinds of photocopied documents and photocopies of charts in a demanding timeline that was difficult to meet. We don't have extra people working in our agency that can drop everything they are doing in patient care to take care of a surveyor's photocopying demands." The commenter requested that some kind of realistic time deadline be established, and a way to recoup costs for providing photocopied documents to a surveyor. The proposed changes in §97.501 pose an unrealistic new burden on home care agencies.

(5) A commenter suggested that surveyors be trained as to when to request additional copies.

(6) Agencies have been burdened with the task of dealing with certain surveyors who demand the copying of records. These certain surveyors are known in the industry for copying records and charging the agencies with additional deficiencies because they have demanded copies of entire charts and wrote additional deficiencies without allowing the agency the opportunity to provide additional information. To allow this as a rule would certainly only contribute to needless litigation between the regulators and providers.

Response: This is not a new requirement and no changes were proposed to the requirement. The third and final review of Chapter 97 will include survey procedures. DHS will consider the establishment of guidelines for photocopying by surveyors at that time. No change will be made at this time.

Comment: In regard to §97.501(g)(6), Survey Procedures. The following comments were received relating to §97.501(g)(5):

(1) Several commenters opposed the language that requires agencies to submit plans of correction for deficiencies cited by surveyors when an agency disagrees with the citation and chooses to seek reconsideration.

(2) Several commenters requested they be allowed the opportunity to clarify, justify or identify the deficiencies that are being placed upon them, and be allowed reconsideration, especially when these deficiencies become a permanent record on their licensure file.

(3) Several commenters asked that deficiencies sited by the surveyor and plans of corrections not be placed in the agency's permanent licensure file, which is subject to public disclosure, until after the agency has had an opportunity to seek reconsideration and has been denied clearance.

(4) A commenter believes areas of the rules contradict other areas of the rules. For instance, §97.501(g)(6) requires that Plans of Corrections (PoC) for any deficiency(ies) cited by the surveyor be submitted by the agency to DHS within 10 calendar days of the agency's receipt of the statement of deficiencies (SoD). Yet, under §97.501(e), the agency is allowed to "submit additional facts or other information" in response to "preliminary findings of the survey" within "ten calendar days of receipt of the preliminary findings of the survey." The commenter stated that the process for a surveyor rendering these "preliminary findings" is not described or defined anywhere in the rule. The commenter asked, "What are 'preliminary findings' and when would the agency be made aware of them?" The commenter further stated, "Additionally, §97.501(g)(6) states that the surveyor will obtain a PoC for deficiencies, either on-site or within ten calendar days of the agency's receipt of the statement of deficiencies. This is confusing!" The commenter asked, "If the surveyor presents the agency with his/her survey findings and provides a written SoD on-site at the end of the survey and simultaneously requests PoCs from the person in charge, how will the agency then be permitted an opportunity to review these findings and use the ten-day allowance to submit additional information, if necessary? The request for reconsideration of any uncertain or questionable deficiency must be allowed to take place before the agency is asked to submit a written plan of correction and before the citation becomes a part of the agency's compliance record, regardless of the regulatory stipulation that 'the person's signature does not indicate the person's agreement with deficiencies stated on the form.' This has been a constant problem in many surveys for quite some time now." The commenter strongly urges DHS to review and revise the language to provide clearer guidance to agencies and surveyors in this regard. This commenter also pointed out that in light of the above concern, the closing statement in subsection (g)(9) is not acceptable. An agency should not be required to submit a plan of correction for any deficiency that it believes is incorrect or for which it is seeking reconsideration in light of additional information. While the regulation allowing an agency an opportunity to submit additional information in response to "preliminary findings" is favorable, the benefit of that opportunity is lost if the agency must submit to "correcting" something it does not believe needs to be corrected.

(5) Many commenters expressed that although this not a new requirement, it has been a source of concern over the past couple of years. 1) "If these proposed rules are passed, the agencies will continue to be penalized needlessly. Agencies are forced out of business or assessed enormous fines." 2) "The problems we are faced with in affording to care for our sick and disabled are magnified." 3) "Non-factual deficiencies become a part of the statement of deficiency, which is subject to public record." 4) "There is no recourse for agencies to take. We suffer from loss of income, clients, employees, and pending provider contracts, which would help increase business. This is truly unjust." 5) "It is illogical for an agency to create and document a plan of correction for a deficiency they are seeking reconciliation. It is unfair for the deficiency to become a part of the agency's permanent file subject to public disclosure when that agency's deficiency becomes overturned."

Response: There were no proposed changes to this section. These are current requirements. The third and final review of Chapter 97 will include survey procedures and DHS will take these comments into consideration during this review. No change was made at this time.

Comment: Rules in general. A commenter stated, "I would like to respectfully recommend the surveying staff implementing these regulations have some of these same requirements imposed. For example, if surveying a home care company, the surveyor should have background experience as a supervising nurse, case manager, administrator, social worker, or pharmacist, in home health care."

Response: DHS appreciates the concern. DHS attempts to select nurses who have home health experience. Upon hiring, DHS provides surveyor training in the HCSSA standards and sends surveyors to training in Conditions of Participation by CMS (formerly HCFA).

Comment: In regard to §97.501(f), Survey Procedures. The term "chief executive officer" is referred to in the opening sentence of this subsection. This term is not defined within these regulations, nor is it otherwise stated therein to be analogous with person in charge of the agency, administrator, supervising nurse, controlling person, etc. We suggest replacing the term with common verbiage used throughout the regulations.

Response: The term "chief executive officer" is the term used in Health and Safety Code, §142.00(g), thus the reason for the change. "Chief executive officer" is a commonly used business term. No change was made.

Comment: In regard to §97.501(i), Survey Procedures. We suggest the language be revised to allow a licensed and certified (L&C) agency to operate as a licensed only (LHH) agency in the event that Medicare certification is denied by HCFA and it can be determined that the agency does meet the LHH standards. As currently worded, if an L&C agency had no other category on its license, and if it were to be terminated/decertified by HCFA, then that agency would have to cease operations altogether, thereby impeding its ability to operate while reapplying for Medicare certification or appealing HCFA's termination decision.

Response: DHS disagrees with the suggestion. The purpose of the change is to give the agency one year to regroup and get the training necessary to correct the problems that caused HCFA, now CMS, to terminate certification.

Comment: In regard to §97.601(f), License Denial, Suspension or Revocation. The term "chief executive officer of the agency" is used. Please refer to previous comments on this issue. The term should be "controlling person" or "administrator" or other term consistent with the language used in these regulations.

Response: "Chief executive officer" is the term used in Health and Safety Code, §142.011(b), thus the reason for the change.

Comment: General comment. A commenter noted inconsistency in the numbering under some sections. The numbering is (a), (b), (c), etc., while others are numbered (1), (2), (3), etc.

Response: Texas Register Form and Style, as adopted by the Secretary of State's Office, dictate the format and style of the rules. Sometimes there is what is called an implied (a). An implied (a) occurs when there is a subsection (a) and no subsection (b). When this occurs, the language in subsection (a) is placed directly after the section title. The next subdivision is the paragraph level, which are numbers (1), (2), (3), etc. No change was necessary.

Comment: In regard to §97.701(a)(6), Home Health Aides. A commenter stated, "VNA, the National Association for Home Care and other national home care associations advocate for a home health aide registry. There is no centralized place to report a home health aide who has documented care that was not provided or committed other acts of fraud. Therefore, these aides may be terminated by one agency and hired by another because there is no centralized reporting." The commenter recommended that the DHS's nurse aide registry be expanded to include home health aides and attendants who work in HCSSAs.

Response: SB 1245 and HB 1418 passed by the 77th Legislature provided that acts described by the commenter be included on the employee misconduct registry. DHS has amended §97.247 to include the requirements.

Comment: The following are general comments. Two commenters stated they are very concerned about the broad-sweeping changes being proposed by DHS.

(1) Imposing stricter regulations is not the answer. We must work together to understand each other's role in the industry. We certainly must stop the needless penalizing of the professionals who strive to make our state and country a better place by providing needed medical services to its sick, frail and disabled.

(2) Some of the proposed changes will negatively affect the operations of home health agencies in the state without demonstrating clear value in improving patient outcomes.

(3) A commenter asked that DHS reconsider the proposed changes in the regulations for home care. The commenter stated, "With HCFA's changes to the reimbursement with the Interim Payment System enacted a couple of years ago, and the Prospective Payment System, which went into effect in October, 2000, the future of home care is being challenged. Any more financial drain on the agencies, especially small agencies such as mine, would be devastating."

(4) There are areas that the rules have become much more restrictive and have regressed. I am concerned that in some areas the state rules will be much more restrictive than the HCFA Conditions of Participation and will conflict.

(5) Once again it appears that the focus has shifted to making it more difficult to operate an existing agency with burdensome regulations and the probability of increasing the cost of doing business at a time when clients are being left unserved because of staffing shortages and inability to access services. It seems

the focus needs to be to make the standards to enter the HCSSA market more stringent so that only qualified persons are providing services.

Response: The proposed rules are the product of extensive review by both internal and external work groups. Providers are always encouraged and welcome to participate in HCSSA work groups that involve rulemaking. The comment period for proposed rules offer providers another opportunity to voice any concerns they may have with any proposed rules. The comments received on the proposed rules provide DHS another opportunity to hear from providers, review the proposed rules, and make necessary changes where and if needed. All comments have been considered and changes, where appropriate, have been made to the final rules. DHS hopes its responses to comments and changes made as a result of some of the comments will ease some of the commenter's concerns. Any increased costs should not be significant. Agencies choose to participate in Medicare and to abide by Medicare's Conditions of Participation (COP). Agencies must understand that these are licensing rules and are completely separate from Medicare's COP. With regard to the comment "the focus needs to be to make the standards to enter the HCSSA market more stringent so that only qualified persons are providing services," the commenter failed to provide any suggestions for consideration by DHS.

Comment: Rules in general. Increased delegation of nursing care to providers is expected, at the same time, DHS is proposing a decrease in reimbursement for nursing requirements. The decline in certified agencies and increase in provider agencies has resulted in many new requirements for agencies. With a decrease in reimbursement rates, it is difficult to comprehend how DHS expects these agencies to perform additional requirements when the reimbursement rate is not increased to correspond to these requirements.

Response: This comment pertains to community care contracting, not the licensing rules.

Comment: Rules in general. A commenter stated, "Persons responsible for writing such regulations need to take a close look at where our industry has been. We have been asked to comply with new regulations, one after another since 1997. First the Interim payment system, which caused most agencies to severely cut staff, then OASIS data recording and reporting, then the Prospective Payment system, which caused a total change in all procedures, then having to report and comply with OASIS data Adverse Events reports. Home health agencies need time to comply with previous changes before being burdened with more."

Response: DHS has taken the comment under serious consideration. When the legislature transferred the Home and Community Support Services Program from TDH to DHS on September 1, 1999, the rules transferred with the program. Many of the rule changes are the result of mandated legislation. The rules will become effective January 1, 2002. This will provide sufficient time to become familiar with the rule changes. DHS will be providing training to surveyors and providers.

Comment: Rules in general. A commenter expressed concern that the proposed rules do not list provisions that allow for phased implementation of the new requirements. The changes proposed will have a tremendous impact all aspects of an agency's operations, including, but not limited to, policies and procedures, business practices, and printed materials. Implementation of new requirements for all agencies, such as client rights, will require a thorough examination of current practices and documents so a thorough plan can be made. Agencies should be allowed a minimum of six months to review current processes and policies, make appropriate changes, and most importantly, train all agency staff in order to be compliant with the new rules. We strongly believe that any shorter implementation period will have grave consequences for home health agencies, as they will be forced to hurry to make these changes, which can lead to inadvertent but serious errors.

Response: DHS understands the commenter's concern. DHS will provide training before the effective date of the rules. The rules will be effective on January 1, 2002.

Comment: Rules in general. A commenter commended DHS for clarifying ambiguous wording, eliminating duplication, and strengthening the licensing standards where needed. The commenter also provided comments as previously discussed in this summary of comments.

Response: DHS appreciates the compliment.

Comment: Rules in general. The Texas Department of Human Services has done a wonderful job of reorganizing the rules to be user-friendlier.

Response: DHS appreciate the compliment.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §§97.1 - 97.3

The amendments are adopted under the Health and Safety Code, Chapter 142, which provides the department with the authority to adopt rules for the licensing and regulation of home and community support services agencies.

The amendments implement the Health and Safety Code, §§142.001 - 142.030.

§97.1. Purpose and Scope.

(a) Purpose.

(1) The purpose of this chapter is to implement the Health and Safety Code, Chapter 142, which provides the Texas Department of Human Services (DHS) with the authority to adopt minimum standards that a person must meet in order to be licensed as a home and community support services agency (HCSSA) and also to qualify to provide certified home health services. The requirements serve as a basis for survey activities for licensure.

(2) Except as provided by the Health and Safety Code, §142.003 (relating to Exemptions from Licensing Requirement), a person, including a health care facility licensed under the Health and Safety Code, may not engage in the business of providing home health, hospice, or personal assistance services, or represent to the public that the person is a provider of home health, hospice, or personal assistance services for pay without a HCSSA license authorizing the person to perform those services issued by DHS for each place of business from which home health, hospice, or personal assistance services are directed. A certified HCSSA must have a license to provide certified home health services.

(b) Scope. This chapter establishes the minimum standards for acceptable quality of care, and a violation of a minimum standard is a violation of law. These minimum standards are adopted to protect clients of HCSSAs by ensuring that the clients receive quality care, enhancing their quality of life.

(c) Limitations. Requirements established by private or public funding sources such as health maintenance organizations or other private third-party insurance, Medicaid (Title XIX of the Social Security Act), Medicare (Title XVIII of the Social Security Act), or state-sponsored funding programs are separate and apart from the requirements in this chapter for agencies. No matter what funding sources or requirements apply to an agency, the agency must still comply with the applicable provisions in the statute and this chapter. The agency is responsible for researching availability of any funding source to cover the service(s) the agency provides.

§97.2. Definitions.

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

(1) Accessible and flexible services--Services which are delivered in the least intrusive manner possible and are provided in all settings where individuals live, work, and recreate.

(2) Administration of medication--The direct application of any medication by injection, inhalation, ingestion, or any other means to the body of a client. The preparation of medication is part of the administration of medication and is the act or process of making ready a medication for administration, including the calculation of a client's medication dosage; altering the form of the medication by crushing, dissolving, or any other method; reconstitution of an injectable medication; drawing an injectable medication into a syringe; preparing an intravenous admixture; or any other act required to render the medication ready for administration.

(3) Administrative support site--A facility or site where an agency performs administrative and other support functions but does not provide direct home health, hospice, or personal assistance services. This site does not require an agency license.

(4) Administrator--The person who is responsible for the day-to-day operations of an agency.

(5) Advanced practice nurse--A registered nurse who is approved by the Board of Nurse Examiners (BNE) to practice as an advanced practice nurse and who maintains compliance with the applicable rules of the BNE. See BNE's definition of advanced practice nurse in 22 TAC §221.1 (concerning definitions).

(6) Affiliate--With respect to an applicant or owner which is:

(A) a corporation--means each officer, director, stockholder with direct ownership of at least 5.0%, subsidiary, and parent company;

(B) a limited liability company--means each officer, member, and parent company;

(C) an individual--means:

(i) the individual's spouse;

(ii) each partnership and each partner thereof of which the individual or any affiliate of the individual is a partner; and

(iii) each corporation in which the individual is an officer, director, or stockholder with a direct ownership of at least 5.0%.

(D) a partnership--means each partner and any parent company; and

(E) a group of co-owners under any other business arrangement--means each officer, director, or the equivalent under the specific business arrangement and each parent company.

(7) Agency--A home and community support services agency.

(8) Alternate delivery site--A facility or site, including a residential unit or an inpatient unit:

(A) that is owned or operated by an agency providing hospice services;

(B) that is not the hospice's principal place of business. For the purposes of this definition, the hospice's principal place of business is the parent office for the hospice;

(C) that is located in the geographical area served by the hospice; and

(D) from which the hospice provides hospice services.

(9) Applicant--The owner of an agency which is applying for a license under the statute. This is the person in whose name the license will be issued.

(10) Assistance with medication--Any needed ancillary aid provided to a client in the client's self-administered medication or treatment regimen, such as reminding a client to take a medication at the prescribed time, opening and closing a medication container, pouring a predetermined quantity of liquid to be ingested, returning a medication to the proper storage area, and assisting in reordering medications from a pharmacy. Such ancillary aid includes administration of any medication when the client has the cognitive ability to direct the administration of their medication and would self-administer if not for a functional limitation.

(11) Association--A partnership, limited liability company, or other business entity that is not a corporation.

(12) Audiologist--A person who is currently licensed under Texas Civil Statutes, Article 4512j, as an audiologist.

(13) Bereavement--The process by which a survivor of a deceased person mourns and experiences grief.

(14) Bereavement services--Support services offered to a family during bereavement. Family includes a significant other(s).

(15) Branch office--A facility or site in the service area of a parent agency from which home health or personal assistance services are delivered or where active client records are maintained. This does not include inactive records which are stored at an unlicensed site.

(16) Care plan--

(A) a written plan prepared by the appropriate health care personnel for a client of the home and community support services agency; or

(B) for home dialysis designation, a written plan developed by the physician, registered nurse, dietitian and qualified social worker to personalize the care for the client and enable long- and short-term goals to be met.

(17) Case conference--A conference among personnel furnishing services to the client to ensure that their efforts are coordinated effectively and support the objectives outlined in the plan of care or care plan.

(18) Certified agency--A home and community support services agency that:

(A) provides a home health service; and

(B) is certified by an official of the Department of Health and Human Services as in compliance with conditions of

participation in Social Security Act, Title XVIII (42 United States Code (USC) §1395 et seq.).

(19) Certified home health services--Home health services that are provided by a certified agency.

(20) Client--An individual receiving home health, hospice, or personal assistance services from a licensed home and community support services agency. This term includes each member of the primary client's family if the member is receiving ongoing services. This term does not include the spouse, significant other, or other family member living with the client who receives a one-time service (e.g., vaccine) if the spouse, significant other, or other family member receives the service in connection with the care of a client.

(21) Clinical note--A dated and signed written notation by agency personnel of a contact with a client containing a description of signs and symptoms; treatment and medication given; the client's reaction; other health services provided; and any changes in physical and emotional condition.

(22) Complaint--An allegation against an agency regulated by or against an employee of an agency regulated by the Texas Department of Human Services (DHS) that involves a violation(s) of this chapter or the statute.

(23) Controlling person--A person with the ability, acting alone or in concert with others, to directly or indirectly, influence, direct, or cause the direction of the management, expenditure of money, or policies of an agency or other person.

(A) A controlling person includes:

(i) a management company, landlord, or other business entity that operates or contracts with others for the operation of an agency;

(ii) any person who is a controlling person of a management company or other business entity that operates an agency or that contracts with another person for the operation of an agency;

(iii) any other individual who, because of a personal, familial, or other relationship with the owner, manager, landlord, tenant, or provider of an agency, is in a position of actual control or authority with respect to the agency, without regard to whether the individual is formally named as an owner, manager, director, officer, provider, consultant, contractor, or employee of the agency.

(B) A controlling person, as described by subparagraph (A)(iii) of this paragraph, does not include an employee, lender, secured creditor, or landlord, or other person who does not exercise formal or actual influence or control over the operation of an agency.

(24) Counselor--An individual qualified under Medicare standards to provide counseling services, including bereavement, dietary, spiritual, and other counseling services to both the client and the family.

(25) DHS--The Texas Department of Human Services.

(26) Dialysis treatment record--For home dialysis designation, a dated and signed written notation by the person providing dialysis treatment which contains a description of signs and symptoms, machine parameters and pressure settings, type of dialyzer and dialysate, actual pre- and post-treatment weight, medications administered as part of the treatment, and the client's response to treatment.

(27) Dietitian--A person who is currently licensed under the laws of the State of Texas to use the title of licensed dietitian or provisional licensed dietitian, or who is a registered dietitian.

(28) Director--The director of the Home and Community Support Services Agencies Program of the Texas Department of Human Services or his or her designee.

(29) End stage renal disease (ESRD)--For home dialysis designation, the stage of renal impairment that appears irreversible and permanent and requires a regular course of dialysis or kidney transplantation to maintain life.

(30) Freestanding hospice--An agency that provides hospice services to clients of the agency who are residing at the agency's physical location including inpatient and respite care.

(31) Functional need--Needs of the individual which require services without regard to diagnosis or label.

(32) Health assessment--A determination of a client's physical and mental status through inventory of systems.

(33) Home and community support services agency--A person who provides home health, hospice, or personal assistance services for pay or other consideration in a client's residence, an independent living environment, or another appropriate location.

(34) Home health medication aide--A person permitted under the Health and Safety Code, Chapter 142, Subchapter B.

(35) Home health service--The provision of one or more of the following health services required by an individual in a residence or independent living environment:

(A) nursing, including blood pressure monitoring and diabetes treatment;

(B) physical, occupational, speech, or respiratory therapy;

(C) medical social service;

(D) intravenous therapy;

(E) dialysis;

(F) service provided by unlicensed personnel under the delegation of a licensed health professional;

(G) the furnishing of medical equipment and supplies, excluding drugs and medicines; or

(H) nutritional counseling.

(36) Hospice--A person licensed under this chapter to provide hospice services, including a person who owns or operates a residential unit or an inpatient unit.

(37) Hospice services--Services, including services provided by unlicensed personnel under the delegation of a registered nurse or physical therapist, provided to a client or a client's family as part of a coordinated program consistent with the standards and rules adopted under this chapter. These services include palliative care for terminally ill clients and support services for clients and their families that:

(A) are available 24 hours a day, seven days a week, during the last stages of illness, during death, and during bereavement;

(B) are provided by a medically directed interdisciplinary team; and

(C) may be provided in a home, nursing facility, residential unit, or inpatient unit according to need. These services do not include inpatient care normally provided in a licensed hospital to a terminally ill person who has not elected to be a hospice client. For the

purposes of this definition, the word "home" includes a person's "residence" as defined in this section.

(38) Independent living environment--A client's individual residence, which may include a group home or foster home, or other settings where a client participates in activities, including school, work, or church.

(39) Individual/family choice and control--Individuals and families who express preferences and make choices about how their support service needs are met.

(40) Inpatient unit--A facility that provides a continuum of medical or nursing care and other hospice services to clients admitted into the unit and that is in compliance with the conditions of participation for inpatient units adopted under Social Security Act, Title XVIII (42 United States Code §1395 et seq.) and standards adopted under this chapter.

(41) Licensed vocational nurse--A person who is currently licensed under Occupations Code, Chapter 302, as a licensed vocational nurse.

(42) Manager--A person having a contractual relationship to provide management services to a home and community support services agency for the overall operation of a home and community support services agency including administration, staffing, or delivery of services. Examples of contracts for services that will not be considered contracts for management services include contracts solely for maintenance, laundry, or food services.

(43) Medication administration record--A record used to document the administration of a client's medications.

(44) Medication list--A list of a client's medications that includes the physician orders relating to dosage and the frequency and method of administration. The medication list is used to identify possible ineffective drug therapy or adverse reactions, significant side effects, drug allergies, and contraindications.

(45) Notarized copy--A sworn affidavit stating that attached copies are true and correct copies of the original documents.

(46) Nursing facility--An institution licensed as a nursing home under the Health and Safety Code, Chapter 242.

(47) Nutritional counseling--Advising and assisting individuals or families on appropriate nutritional intake by integrating information from the nutrition assessment with information on food and other sources of nutrients and meal preparation consistent with cultural background and socioeconomic status, with the goal being health promotion, disease prevention, and nutrition education. Nutritional counseling may include, but is not limited to, the following:

(A) dialogue with the client to discuss current eating habits, exercise habits, food budget and problems with food preparation;

(B) discussion of dietary needs to help the client understand why certain foods should be included or excluded from the client's diet and to help with adjustment to the new or revised or existing diet plan;

(C) a personalized written diet plan as ordered by the client's physician or practitioner, to include instructions for implementation;

(D) providing the client with motivation to help him or her understand and appreciate the importance of the diet plan in getting and staying healthy; or

(E) working with the client or the client's family members by recommending ideas for meal planning, food budget planning, and appropriate food gifts.

(48) Occupational therapist--A person who is currently licensed under the Occupational Therapy Practice Act, Occupations Code, Chapter 454, as an occupational therapist.

(49) Original active client record--A record composed first-hand for a client currently receiving services.

(50) Owner--One of the following persons that will hold or does hold a license issued under the statute in the person's name or the person's assumed name:

(A) a corporation;

(B) a limited liability company;

(C) an individual;

(D) a partnership if a partnership name is stated in a written partnership agreement or an assumed name certificate;

(E) all partners in a partnership if a partnership name is not stated in a written partnership agreement or an assumed name certificate; or

(F) all co-owners under any other business arrangement.

(51) Palliative care--Intervention services that focus primarily on the reduction or abatement of physical, psychosocial, and spiritual symptoms of a terminal illness.

(52) Parent agency--The agency that develops and maintains administrative controls and provides supervision of branch offices and alternate delivery sites.

(53) Parent company--A person, other than an individual, who has a direct 100% ownership interest in the owner of an agency.

(54) Person--An individual, corporation, or association.

(55) Personal assistance services--Routine ongoing care or services required by an individual in a residence or independent living environment that enable the individual to engage in the activities of daily living or to perform the physical functions required for independent living, including respite services. The term includes health-related services performed under circumstances that are defined as not constituting the practice of professional nursing by the Board of Nurse Examiners through a memorandum of understanding with DHS in accordance with Health and Safety Code, §142.016, and health-related tasks provided by unlicensed personnel under the delegation of a registered nurse.

(56) Physical therapist--A person who is currently licensed under Occupations Code, Chapter 453, as a physical therapist.

(57) Physician--A person who holds a doctor of medicine or doctor of osteopathy degree and is currently licensed and practicing medicine under the laws of the state of Texas, Oklahoma, New Mexico, Arkansas, or Louisiana.

(58) Physician assistant--A person who is licensed under the Physician Assistant Licensing Act, Occupations Code, Chapter 204, as a physician assistant.

(59) Physician-delegated tasks--Tasks performed in accordance with the Medical Practice Act, Occupations Code, Chapter 157, including orders signed by a physician which specify the delegated task(s), the individual to whom the task(s) is delegated, and the client's name.

(60) Place of business--An office of a home and community support services agency that maintains client records or directs home health, hospice, or personal assistance services. The term does not include an administrative support site.

(61) Plan of care--The written orders of a practitioner for a client who requires skilled services.

(62) Practitioner--A person who is currently licensed in a state in which the person practices as a physician, dentist, podiatrist, or a physician assistant, or a person who is a registered nurse registered with the Board of Nurse Examiners for the State of Texas as an advanced practice nurse.

(63) Presurvey conference--A conference held with DHS staff and the applicant or his or her representatives to review licensure standards and survey documents, and to provide consultation prior to the on-site licensure survey.

(64) Progress note--A dated and signed written notation by agency personnel summarizing facts about care and the client's response during a given period of time.

(65) Psychoactive treatment--The provision of a skilled nursing visit to a client with a psychiatric diagnosis under the direction of a physician that includes one or more of the following:

(A) assessment of alterations in mental status or evidence of suicide ideation or tendencies;

(B) teaching coping mechanisms or skills;

(C) counseling activities; or

(D) evaluation of the plan of care.

(66) Registered nurse (RN)--A person who is currently licensed under the Nursing Practice Act, Occupations Code, Chapter 301, as a registered nurse.

(67) Registered nurse delegation--Delegation by a registered nurse in accordance with 22 TAC Chapter 218 (concerning Delegation of Selected Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel).

(68) Residence--A place where a person resides and includes a home, a nursing facility, a convalescent home, or a residential unit.

(69) Residential unit--A facility that provides living quarters and hospice services to clients admitted into the unit and that is in compliance with standards adopted under the Health and Safety Code, Chapter 142.

(70) Respiratory therapist--A person who is currently licensed under Occupations Code, Chapter 604, as a respiratory care practitioner.

(71) Respite services--Support options that are provided temporarily for the purpose of relief for a primary caregiver in providing care to individuals of all ages with disabilities or at risk of abuse or neglect.

(72) Section--A reference to a specific rule in Chapter 97 of this title (concerning Licensing Standards for Home and Community Support Services Agencies).

(73) Service area--The geographic area(s) established by an agency in which all or some of the agency's services are available.

(74) Skilled services--Services in accordance with a plan of care that require the skills of a:

(A) registered nurse;

(B) licensed vocational nurse;

(C) physical therapist;

(D) occupational therapist;

(E) respiratory therapist;

(F) speech-language pathologist;

(G) audiologist;

(H) social worker; or

(I) dietitian.

(75) Social worker--A person who is currently licensed as a social worker under Occupations Code, Chapter 505.

(76) Speech-language pathologist--A person who is currently licensed as a speech-language pathologist under Occupations Code, Chapter 401.

(77) Statute--The Health and Safety Code, Chapter 142.

(78) Supervising nurse--The person responsible for supervising skilled services provided by an agency and who has the qualifications described in §97.244(b) of this title (relating to Staffing Qualifications and Conditions) This person may also be known as the director of nursing or similar title.

(79) Supervision--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity with initial direction and periodic inspection of the actual act of accomplishing the function or activity.

(80) Support services--Social, spiritual, and emotional care provided to a client and a client's family by a hospice.

(81) Survey--An inspection or investigation conducted by a DHS representative to determine if a licensee is in compliance with the statute and this chapter.

(82) Terminal illness--An illness for which there is a limited prognosis if the illness runs its usual course.

(83) Unlicensed person--An individual who is not licensed as a health care professional. The term includes, but is not limited to, home health aides, medication aides permitted by DHS, and other individuals providing personal care or assistance in health services.

(84) Volunteer--An individual who provides assistance to a home and community support services agency without compensation other than reimbursement for actual expenses.

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 October 26, 2001.

TRD-200106551
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: January 1, 2002
Proposal publication date: April 27, 2001
For further information, please call: (512) 438-3734

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SUBCHAPTER B. APPLICATION AND ISSUANCE OF A LICENSE

40 TAC §§97.11, 97.13 - 97.16

The amendments are adopted under the Health and Safety Code, Chapter 142, which provides the department with the authority to adopt rules for the licensing and regulation of home and community support services agencies.

The amendments implement the Health and Safety Code, §§142.001 - 142.030.

§97.11. Application and Issuance of Initial License.

(a) All first-time applications for a license are applications for an initial license. An application for a license when there is a change of ownership is considered to be a first- time application for an initial license.

(b) Upon written request, the Texas Department of Human Services (DHS) will furnish a person with an application packet for an agency license.

(c) If the applicant is an individual, the applicant must be at least 18 years of age.

(d) The applicant must retain a copy of all documentation that is submitted to DHS.

(e) An agency operating in another state must receive a license as a parent agency in Texas in order to operate as an agency in Texas.

(f) A separate license is required for each principal place of business.

(g) The applicant must apply for a license in accordance with this subsection.

(1) The applicant may request one or a combination of the following categories under the license. An agency is not required to be licensed in more than one category if the agency's category covers the provided services:

(A) licensed and certified home health services;

(B) licensed and certified home health services with home dialysis designation;

(C) licensed home health services;

(D) licensed home health services with home dialysis designation;

(E) hospice services which may include residential or inpatient units; or

(F) personal assistance services.

(2) All applications for a license must be made on forms prescribed by and available from DHS.

(A) The application must be completed in accordance with DHS instructions, and it must contain original signatures and be notarized.

(B) The address provided on the application must be the address from which the agency will be operating and providing services.

(C) The address for the agency's place of business to be licensed must be located in the State of Texas.

(3) The following items must accompany the application form and must be originals or notarized copies:

(A) a description of the agency's service area. The service area must be established in accordance with §97.220 of this title (relating to Service Areas);

(B) a nonrefundable license fee;

(C) the name of the applicant and identifying information relating to the owner(s), administrator, and chief financial officer (if applicable) on a form provided by the department to enable DHS to conduct criminal background checks;

(D) the name of any controlling person and documentation relating to any controlling person, if requested by DHS and relevant to the controlling person's compliance with any applicable licensing standard;

(E) a list of names of all persons and entities who own at least a 5.0% interest in the applicant;

(F) a list of any businesses with which the applicant subcontracts and in which the persons listed under subparagraph (E) of this paragraph hold at least 5.0% of the ownership;

(G) the name and business address of:

(i) each limited partner and general partner if the applicant is a partnership; and

(ii) each director and officer if the applicant is a corporation, limited liability company or other business entity;

(H) if the applicant has held or holds an agency license or has been or is an affiliate of another licensed agency, the relationship, including the name and current or last address of the other agency and the date such relationship commenced and, if applicable, the date it was terminated;

(I) if the applicant is a subsidiary of another organization, the names and addresses of the parent organization, the names and addresses of the officers and directors of the parent organization and the name of each subsidiary of the parent organization; and

(J) if the facility is operated by or proposed to be operated under a management contract, the names and addresses of any person and organization having an ownership interest of 5.0% or more in the management company;

(K) for a parent agency:

(i) a proposed budget covering the period of time of the license;

(ii) a notarized affidavit attesting to the following:

(I) that the applicant has not been adjudged insolvent or bankrupt in a state or federal court during the seven-year period preceding the application date;

(II) that the applicant is not a party in a state or federal court to a bankruptcy or insolvency proceeding with respect to the applicant; and

(III) that the applicant has the financial resources to meet its proposed budget and to provide the services required by the statute and by the department during the term of the license;

(iii) its organizational structure, a list of management personnel (including names and titles), and a job description of each administrative and supervisory position. The job description must contain at a minimum the job title, qualifications including required education and training, and job responsibilities;

(iv) a plan to provide annual continuing education and training for management personnel;

(v) the resume or curriculum vitae of the agency administrator. The resume or curriculum vitae must reflect that the administrator meets the qualifications and conditions described in §97.244(a) of this title (relating to Staffing Qualifications and Conditions);

(vi) the resume or curriculum vitae of the agency supervising nurse (if applicable). The resume or curriculum vitae must reflect that the supervising nurse has the qualifications described in §97.244(b) of this title (relating to Staffing Qualifications and Conditions);

(L) a written plan for the orderly transfer of care of the applicant's clients and clinical records if the applicant is unable to maintain services under the license;

(M) a notarized statement attesting that the applicant is capable of meeting the requirements of this chapter for the provision of home health, hospice, or personal assistance services;

(N) if an applicant is a corporation, a current letter from the state comptroller's office stating the corporation is in good standing or a notarized certification that the tax owed to the state under the Tax Code, Chapter 171, is not delinquent or that the corporation is exempt from the payment of the tax and is not subject to the Tax Code, Chapter 171;

(O) if accredited, documentation from:

(i) the Joint Commission for Accreditation of Healthcare Organizations indicating the agency holds a current accreditation for the applicable service; or

(ii) the Community Health Accreditation Program indicating the agency is accredited for the applicable service;

(P) if accredited by another accrediting organization, documentation regarding the accrediting organization to show that the accrediting organization's standards meet or exceed this chapter;

(Q) if certified by another state agency to deliver services for which a license is required under this chapter, documentation from the certifying state agency(ies) confirming the certification;

(R) the following data concerning the applicant, the applicant's affiliates, and the managers of the applicant:

(i) denial, suspension, or revocation of an agency license or a license for any health care facility in any state or any other enforcement action, such as court civil or criminal action;

(ii) denial, suspension, or revocation of or other enforcement action against an agency license or a license for any health care facility in any state which is or was proposed by the licensing agency and the status of the proposal;

(iii) surrendering a license before expiration of the license or allowing a license to expire in lieu of the department proceeding with enforcement action;

(iv) federal or state Medicaid or Medicare sanctions or penalties relating to the operation of an agency or health care facility;

(v) federal or state (any state) criminal felony convictions;

(vi) operation of an agency that has been decertified in any state under Medicare or Medicaid; or

(vii) debarment, exclusion, or contract cancellation in any state from Medicare or Medicaid;

(S) for the two-year period preceding the application date, the following data concerning the applicant, the applicant's affiliates, and the managers of the applicant:

(i) federal or state (any state) criminal misdemeanor convictions;

(ii) federal or state (any state) tax liens;

(iii) unsatisfied final judgements;

(iv) eviction involving any property or space used as an agency in any state;

(v) unresolved final state or federal Medicare or Medicaid audit exceptions; or

(vi) injunctive orders from any court; and

(T) notice that the agency has attended a presurvey conference at the office designated by DHS, or that the designated survey office has waived the presurvey conference.

(i) It is the agency's responsibility to contact the designated survey office to schedule a presurvey conference.

(ii) The administrator and supervising nurse (if applicable) must attend the presurvey conference.

(iii) The designated survey office must verify compliance with the applicable provisions of this chapter and recommend that the agency be issued an initial license or that the application be denied pursuant to §97.601 of this title (relating to License Denial, Suspension, or Revocation); and

(U) information relating to compliance by the applicant or a controlling person with respect to the applicant with regulatory requirements in any other state in which the applicant or controlling person operates or operated a home and community support services agency.

(V) any other document or information that DHS requests that is relevant to the application process.

(4) Upon DHS's receipt of the application form, the required information described in paragraph (3) of this subsection, and the fee from an applicant, DHS will review the material to determine whether it is complete and correct.

(A) DHS will review the materials in accordance with time periods established in §97.16 of this title (relating to Time Periods for Processing and Issuing a License).

(B) If an agency receives a notice from DHS that some or all of the information required under paragraphs (2) and (3) of this subsection is deficient, the agency must submit the required information no later than 30 calendar days from the date of the notice.

(i) An agency which fails to submit the required information within 30 calendar days from the notice date is considered to have withdrawn its application for an initial agency license. The license fee will not be refunded.

(ii) An agency which has withdrawn its application must reapply for a license in accordance with this section, if it wishes to continue the application process. A new license fee is required.

(C) Information received by the department relating to the competence and financial resources of the applicant is confidential and may not be disclosed to the public.

(5) Once DHS has determined that the application form, the information described in paragraph (3) of this subsection required to accompany the application form, and the license fee are complete and

correct, and that the applicant meets the requirements for the license, DHS will issue the initial license. The initial license is valid for one year from the date of issuance.

(6) DHS will mail the initial license certificate to the licensee. The license certificate will designate the category(ies) of service the agency is authorized to provide at or from the designated place of business.

(h) An agency may not admit a client or initiate services until it has received the initial license certificate.

(i) The agency must admit at least one client and initiate services during the initial license period.

(1) Upon admitting the first client, the agency must inform the designated survey office of the admission and the name of the client and request that an initial survey be conducted.

(2) The agency is not required to admit a client(s) under each category authorized under the license in order to be surveyed by DHS.

(j) A DHS surveyor will conduct an on-site survey of the agency after the issuance of the initial license.

(1) Upon receiving an agency request for an initial survey, the designated survey office will schedule the survey of the agency and will inform the agency of the survey date and time.

(2) An initial survey will not be required if the agency has received notification of accreditation from the Community Health Accreditation Program or the Joint Commission on Accreditation for Healthcare Organizations since the issuance of the initial license.

(3) All applicants issued an initial license must be providing or have provided services to one or more clients at the time of the initial survey.

(4) At the time of the initial survey, the agency must:

(A) have the following available and ready for review by the surveyor upon the surveyor's arrival:

(i) a list(s) of clients who are receiving services or who have received services from the agency. This list(s) must include the name(s), address(es), and telephone number(s) of the clients served and the service(s) provided; and

(ii) the client record for each client admitted during the licensing period prior to survey; and

(B) assure that the administrator and supervising nurse or designee(s), if applicable, are present at the entrance conference, available during the survey, and present at the exit conference. If the administrator and supervising nurse or designee(s) are not present at the surveyor's arrival, the survey will not be conducted, the initial license may be revoked and the renewal license denied in accordance with §97.601 of this title (relating to License Denial, Suspension, or Revocation).

(5) DHS will not renew the license unless the designated survey office has conducted an initial survey of the agency.

(6) By applying for or holding a license, an agency consents to entry and survey by DHS or a representative of DHS to verify compliance with the statute or this chapter. The agency must provide a DHS representative entry to the agency and access to documents in accordance with §97.501(a) of this title (relating to Survey Procedures).

(k) A person who has requested the category of licensed and certified home health services on the initial license application must also make application for certification by the United States Department of Health and Human Services (USDHHS) as a Medicare certified agency under the Social Security Act, Title XVIII.

(1) Pending approval by the USDHHS Health Care Financing Administration (HCFA), the person:

(A) will receive an initial license reflecting the category of licensed home health services; and

(B) must comply with the Medicare conditions of participation for home health agencies in 42 Code of Federal Regulations, Part 484, as if the person were duly certified.

(2) Upon becoming certified by HCFA to participate in the Medicare program during the initial licensing period, DHS will send notice to the agency that the category of licensed and certified home health services has been added to the license. The agency must submit a written request for deletion or retention of the licensed home health services category.

(3) If CMS denies certification to the person or if the person withdraws application for participation in the Medicare program, the person will retain the category of licensed home health services. An agency's retention of the licensed home health services category does not preclude DHS from taking enforcement action, as appropriate, under Subchapter F of this chapter (relating to Enforcement).

(l) Continuing compliance with the minimum standards and the provisions of this chapter for the services authorized to be provided under the license is required during the initial licensing period in order for a first renewal license to be issued.

(m) If DHS determines that compliance with the minimum standards and the provisions of this chapter is not substantiated after the issuance of the initial license, DHS may propose to revoke the initial license and deny the first renewal license and must notify the applicant of a license revocation and denial as provided in §97.601 of this title (relating to License Denial, Suspension, or Revocation).

(n) If an applicant decides not to continue the application process for an initial license, the application may be withdrawn. If a license has been issued, the applicant must cease providing services and return the license to the department with its written request to withdraw. DHS will acknowledge receipt of the request to withdraw. The license fee will not be refunded.

§97.15. Application and Issuance of an Alternate Delivery Site License.

(a) The Texas Department of Human Services (DHS) may issue an alternate delivery site license to a person who holds a current agency license to provide hospice services. A person who holds a current agency license to provide hospice services is eligible to apply for an alternate delivery site license:

(1) for an agency with an initial license, if the agency has received a license to provide hospice services in the State of Texas and has successfully completed an initial onsite survey to verify compliance with the statute and this chapter; or for an agency with a first renewal or subsequent renewal license, if the agency has demonstrated substantial compliance with the statute and this chapter during the licensure period; and

(2) if enforcement action against the agency license is not proposed under Subchapter F of this chapter (relating to Enforcement).

(b) Upon written request, DHS will furnish a hospice license holder with an application for an alternate delivery site license.

(c) The hospice must submit to DHS:

(1) a complete and correct application;

(2) the required license fee;

(3) the organizational structure of the alternate delivery site which shows its relationship under the hospice and includes the names and titles of the alternate delivery site management, supervisory, and administrative personnel;

(4) a proposed budget specific to the alternate delivery site covering the period of time of the license; and

(5) a description of the alternate delivery site's service area. The service area must meet the criteria in §97.322(d) of this title (related to Standards for Alternate Delivery Sites).

(d) The hospice must retain a copy of all documentation that is submitted to DHS.

(e) DHS will review the application and accompanying material to determine whether it is complete and correct.

(1) The time frames for review will be in accordance with §97.16 of this title (relating to Time Periods for Processing and Issuing a License).

(2) An agency which fails to respond to DHS's notice of an incomplete application for an alternate delivery site license described in §97.16(b) of this title within 30 calendar days from the date of the notice is considered to have withdrawn the application for an alternate delivery site license. The alternate delivery site license fee will not be refunded.

(3) An agency which has withdrawn its application for an alternate delivery site license must reapply for an alternate delivery site license in accordance with subsection (c) of this section. A new alternate delivery site license fee is required.

(f) DHS will notify the designated survey office of the hospice's request to establish an alternate delivery site.

(g) The designated survey office will conduct a review of the hospice's request to establish an alternate delivery site. The survey office will recommend to approve or disapprove the alternate delivery site request. At the discretion of DHS , the designated survey office may conduct an onsite survey of the alternate delivery site prior to recommending approval or disapproval of the alternate delivery site request.

(h) DHS may propose denial of the application according to §97.601 of this title (relating to License Denial, Suspension, or Revocation) after consideration of the designated survey office's recommendation.

(i) Upon approval of the alternate delivery site application, the department will issue the alternate delivery site a license, which will expire on the same expiration date as the hospice's license, and will be renewed with the hospice's license. The alternate delivery site license must be posted in a conspicuous place on the licensed alternate delivery site premises.

(j) The alternate delivery site must comply with §97.403 of this title (relating to Standards Specific to Agencies Licensed to Provide Hospice Services) and §97.322 of this title (relating to Standards for Alternate Delivery Sites). The designated survey office will conduct an on-site survey after a license has been issued to verify compliance with §97.403 of this title (relating to Standards Specific to Agencies Licensed to Provide Hospice Services) and §97.322 of this title (relating to Standards for Alternate Delivery Sites).

(k) If the designated survey office recommends that the licensed alternate delivery site seek a license as a hospice, a written report supporting the recommendation must be submitted to DHS for review.

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 October 26, 2001.

TRD-200106552
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: January 1, 2002
Proposal publication date: April 27, 2001
For further information, please call: (512) 438-3734

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SUBCHAPTER C. SERVICE STANDARDS

40 TAC §§97.21 - 97.28

The repeals are adopted under the Health and Safety Code, Chapter 142, which provides the department with the authority to adopt rules for the licensing and regulation of home and community support services agencies.

The repeals implement the Health and Safety Code, §§142.001 - 142.030.

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 October 26, 2001.

TRD-200106553
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: January 1, 2002
Proposal publication date: April 27, 2001
For further information, please call: (512) 438-3734

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SUBCHAPTER D. ENFORCEMENT

40 TAC §§97.51 - 97.54

The repeals are adopted under the Health and Safety Code, Chapter 142, which provides the department with the authority to adopt rules for the licensing and regulation of home and community support services agencies.

The repeals implement the Health and Safety Code, §§142.001 - 142.030.

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 October 26, 2001.

TRD-200106554

Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: January 1, 2002
Proposal publication date: April 27, 2001
For further information, please call: (512) 438-3734

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SUBCHAPTER E. HOME HEALTH AIDES AND MEDICATION AIDES

40 TAC §97.61, §97.62

The repeals are adopted under the Health and Safety Code, Chapter 142, which provides the department with the authority to adopt rules for the licensing and regulation of home and community support services agencies.

The repeals implement the Health and Safety Code, §§142.001 - 142.030.

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 October 26, 2001.

TRD-200106555
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: January 1, 2002
Proposal publication date: April 27, 2001
For further information, please call: (512) 438-3734

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SUBCHAPTER F. ADVISORY COMMITTEES

40 TAC §97.71, §97.72

The repeals are adopted under the Health and Safety Code, Chapter 142, which provides the department with the authority to adopt rules for the licensing and regulation of home and community support services agencies.

The repeals implement the Health and Safety Code, §§142.001 - 142.030.

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 October 26, 2001.

TRD-200106556
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: January 1, 2002
Proposal publication date: April 27, 2001
For further information, please call: (512) 438-3734

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SUBCHAPTER C. MINIMUM STANDARDS FOR ALL HOME AND COMMUNITY SUPPORT SERVICES AGENCIES

DIVISION 1. GENERAL PROVISIONS

40 TAC §97.201

The new section is adopted under the Health and Safety Code, Chapter 142, which provides the department with the authority to adopt rules for the licensing and regulation of home and community support services agencies.

The new section implements the Health and Safety Code, §§142.001 - 142.030.

§97.201. Applicability.
Subchapter C, Minimum Standards for All Home and Community Support Services Agencies, applies to all home and community support services agencies providing licensed home health, licensed and certified home health, hospice, or personal assistance services.

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 October 26, 2001.

TRD-200106557
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: January 1, 2002
Proposal publication date: April 27, 2001
For further information, please call: (512) 438-3734

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DIVISION 2. CONDITIONS OF LICENSE

40 TAC §§97.211 - 97.222

The new sections are adopted under the Health and Safety Code, Chapter 142, which provides the department with the authority to adopt rules for the licensing and regulation of home and community support services agencies.

The new sections implement the Health and Safety Code, §§142.001 - 142.030.

§97.214. Telephone Number Change.
An agency must notify the Texas Department of Human Services within seven days of a change in the agency's telephone number.

§97.215. Notification Procedures for Agency Name Change.
(a) If an agency changes the agency's name (legal entity or doing business as), but does not undergo a change of ownership as defined in §97.13(a)(2) of this title (relating to Change of Ownership), the agency must provide to the Texas Department of Human Services (DHS):

(1) written notification within five business days before the effective date of change;

(2) a copy of a certificate of amendment from the Secretary of State's office or other governmental authority(ies), such as, an assumed name certificate, reflecting the name change within 30 days of receipt of the certificate; and

(3) a copy of the agency's current federal taxpayer identification number.

(b) On receipt and verification of the certificate of amendment and the current federal taxpayer identification number, DHS will provide the agency with a notification of change in the agency's name.

§97.217. Agency Closure Procedures.

An agency must notify the Texas Department of Human Services (DHS) in writing within five calendar days prior to the cessation of operation of the agency, branch office, or alternate delivery site.

(1) The agency must include in the written notice the reason for closing, the location of the client records (active and inactive), and the name and address of the client record custodian.

(2) If the agency closes with an active client roster, the agency must transfer a copy of the active client record with the client to the receiving agency in order to assure continuity of care and services to the client.

(3) The agency must mail or return the initial license or renewal license to DHS at the end of the day that services were terminated.

(4) Continuing to operate after the closure date specified in the notice may result in enforcement action.

§97.219. Procedures for Adding or Deleting a Category to the License.

To add or delete a category to the license, the agency must provide written notification to the Texas Department of Human Services (DHS) at least 30 calendar days prior to the addition or deletion of the category.

(1) Additions. DHS will approve or disapprove the addition of a category.

(A) At the discretion of DHS, an agency must attend a presurvey conference at the designated survey office prior to DHS approving the addition of a category.

(B) DHS will either approve or deny the addition within 30 days. An agency may not provide the services under the category being added until written notice of approval has been received from DHS.

(C) If disapproved, DHS will inform the agency of the reason for disapproval.

(D) At the discretion of DHS, an on-site survey may be conducted following the approval of a category.

(2) Deletions. DHS's receipt of an agency request to delete a category from the license does not preclude DHS from taking enforcement action as appropriate in accordance with Subchapter F of this chapter (relating to Enforcement Action).

§97.220. Service Areas.

(a) Licensed service area. An agency must provide services only within its licensed service area.

(b) Staffing. The agency must maintain adequate staff to provide services and to supervise the provision of services within the service area.

(c) Expansion of service area. An agency may expand its service area at any time during the licensure period.

(1) Unless exempted under paragraph (2) of this subsection, to expand its service area, an agency must submit to the Texas Department of Human Services (DHS) a written notice 30 days prior to the expansion that includes:

(A) revised boundaries of the agency's original service area;

(B) the effective date of the expansion; and

(C) an updated list of management and supervisory personnel (including names), if changes are made.

(2) An agency will be exempted from the 30-day written notice requirement under paragraph (1) of this subsection if DHS determines an emergency situation exists that would impact client health and safety. An agency must notify DHS immediately of a possible emergency. DHS will determine if an exemption can be granted.

(d) Reduction of service area. An agency may reduce its service area at any time during the licensure period by sending DHS written notification of the reduction, the revised boundaries of the agency's original service area, and the effective date of the reduction.

(e) Branch office and alternate delivery site location. A branch office or alternate delivery site must be located within the parent agency's service area.

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 October 26, 2001.

TRD-200106558
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: January 1, 2002
Proposal publication date: April 27, 2001
For further information, please call: (512) 438-3734

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DIVISION 3. AGENCY ADMINISTRATION

40 TAC §§97.241 - 97.257

The new sections are adopted under the Health and Safety Code, Chapter 142, which provides the department with the authority to adopt rules for the licensing and regulation of home and community support services agencies.

The new sections implement the Health and Safety Code, §§142.001- 142.030.

§97.241. Management and Ownership.

The licensee is responsible for the conduct of the agency and assumes full legal responsibility for adopting, implementing, enforcing, and monitoring adherence to the written policies required throughout this chapter that govern the home and community support services agency's total operation and for ensuring that these policies comply with the statute and the applicable provisions of this chapter and are administered to provide safe, professional, quality health care.

§97.243. Management Responsibilities.

(a) Administrator. The licensee must appoint an administrator who meets the qualifications and conditions set out in §97.244(a) of this title (relating to Staffing Qualifications and Conditions). The licensee must also designate in writing a person who meets the qualifications of an administrator to act in the absence of the administrator.

(1) The administrator must be responsible for implementing and supervising the administrative policies of the agency and administratively supervise the provision of all services. At a minimum, the administrator must:

(A) organize and direct the agency's ongoing functions;

(B) assure that the documentation of services provided is accurate and timely;

(C) employ qualified, competent personnel;

(D) ensure adequate staff education and evaluations;

(E) ensure the accuracy of public information materials and activities;

(F) implement an effective budgeting and accounting system that promotes the health and safety of the agency's clients; and

(G) supervise and evaluate client satisfaction survey reports on all clients served.

(2) The administrator or designee must be available during the agency's operating hours.

(b) Supervising nurse.

(1) An agency with a license to provide licensed home health, licensed and certified home health, or hospice services must have a supervising nurse.

(2) The administrator must appoint a supervising nurse who meets the qualifications set out in §97.244(b) of this title (relating to Staffing Qualifications and Conditions). The administrator must also appoint a similarly qualified alternate to serve as supervising nurse in the absence of the supervising nurse.

(3) The supervising nurse or designee must:

(A) be available to the agency at all times. The supervising nurse or designee may be available in person or via telecommunication;

(B) participate in activities relevant to professional services furnished including the development of qualifications and assignment of agency personnel;

(C) assure that a client's plan of care is executed as written;

(D) assure that a reassessment of a client's needs is performed by the appropriate health care professional:

(i) when there is a significant health status change in the client's condition;

(ii) at the physician's request; or

(iii) after hospital discharge.

(4) The supervising nurse may also be the administrator of the agency if the supervising nurse meets the qualifications of an administrator described in §97.244(a) of this title (relating to Staffing Qualifications and Conditions).

(5) An agency that provides only physical, occupational, speech, or respiratory therapy; medical social services; or nutritional counseling is not required to have a supervising nurse. Supervision of these services must be provided by a qualified licensed professional.

(c) Supervision of branch offices and alternative delivery sites. An agency must adopt and enforce a written policy relating to the supervision of branch offices or alternate delivery sites, if established. This policy must be consistent with the following:

(1) for a branch office, §97.14 of this title (relating to Application and Issuance of a Branch Office License) and §97.321 of this title (relating to Standards for Branch Offices); or

(2) for an alternate delivery site, §97.15 of this title (relating to Application and Issuance of a Branch Office License) and §97.322 of this title (relating to Standards for Alternate Delivery Sites).

§97.244. Staffing Qualifications and Conditions.

(a) Administrator, including the alternate or other designee.

(1) Qualifications. The administrator and the alternate or other designee must either:

(A) be a licensed physician, a registered nurse, licensed social worker, licensed therapist, or licensed nursing home administrator; or

(B) have at least a high school diploma or a general equivalency degree (GED) (at a minimum), training and experience in health service administration, and at least one year of supervisory or administrative experience in home health care or related health programs. Other related health programs may include a hospital, nursing facility, or hospice, etc.; or

(C) if the agency is licensed to deliver personal assistance services only, have a high school diploma or a general equivalency degree (GED) and at least one year experience or training in caring for individuals with functional disabilities.

(2) Conditions. The administrator and the alternate or other designee must:

(A) be able to read, write, and comprehend English;

(B) not have been employed in the last year as an administrator with another agency at the time the agency was cited with violations of the statute or this chapter that resulted in enforcement action taken against the agency. For purposes of this subparagraph only, the term "enforcement action" means license revocation, suspension, emergency suspension, or denial of a license or injunction action but does not include administrative or civil penalties. If DHS prevails in one enforcement action, such as injunctive action, against the agency but also proceeds with another enforcement action, such as revocation, based on some or all of the same violations, but DHS does not prevail in the second action (the agency prevails), the prohibition in this subparagraph does not apply; and

(C) not have been convicted of a felony or misdemeanor listed in §97.601(b)(2) of this title (relating to License Denial, Suspension, or Revocation); and

(D) complete a minimum of six clock hours per year of continuing education in subjects related to the duties of the administrator.

(b) Supervising nurse qualifications. The supervising nurse and the designated alternate must:

(1) be registered nurses (RN) licensed in the state of Texas or in accordance with the Board of Nurse Examiners rules for Nurse Licensure Compact (NLC), and

(2) have at least one year experience as an RN obtained within the last 36 months; or

(3) if delivering home dialysis services, be:

(A) an RN licensed in the state of Texas or in accordance with the Board of Nurse Examiners rules for Nurse Licensure Compact (NLC) who:

(i) has at least three years current experience in hemodialysis; or

(ii) has at least two years experience as an RN and holds a current certification from a nationally recognized board in nephrology nursing or hemodialysis; or

(B) a nephrologist or physician with training or demonstrated experience in the care of ESRD clients.

§97.245. Staffing Policies.

An agency must adopt and enforce written policies that govern all personnel staffed by the agency. The policies must:

(1) include requirements for orientation; training; and demonstration of competency for tasks when competency cannot be determined through education, license or certification, or experience of all employees, volunteers (if used), and contractors (if used) to the policies, procedures, and objectives of the agency and participation by all personnel in employee training specific to their job. The agency must provide a continuing systematic program for the training of its employees. The staff, including volunteers (if used) and contractors (if used), must be properly oriented to tasks performed, and these individuals must be informed of changes in techniques, philosophies, goals, client's rights, and products, relating to the client's care;

(2) address participation by all personnel in appropriate employee development programs;

(3) include a written job description (statement of those functions and responsibilities which constitute job requirements) and job qualifications (specific education and training necessary to perform the job) for each position within the agency;

(4) include procedures for processing criminal history checks and searches of the nurse aide registry and the employee misconduct registry for unlicensed personnel in accordance with §97.247 of this title (relating to Verification of Employability of Unlicensed Persons);

(5) ensure annual evaluation of employee and volunteer performance;

(6) address employee and volunteer disciplinary action(s) and procedures;

(7) if volunteers are used by the agency, address the use of volunteers. The policy must be in compliance with §97.248 of this title (relating to Volunteers);

(8) specify the qualifications, experience, and training in pediatrics required for any registered nurse who provides or supervises direct care staff in the provision of services to pediatric clients; and

(9) include a requirement that all personnel who are direct care staff and who have direct contact with clients (employed by or under contract with the agency) sign a statement that they have read, understand, and will comply with all applicable agency policies.

§97.247. Verification of Employability of Unlicensed Persons.

(a) This section applies to unlicensed persons who apply for employment or are employed with an agency licensed under this chapter whose duties would or do involve direct contact with an agency consumer. Persons licensed under another law of this state, independent contractors, and volunteers are exempt from this section's requirements.

(b) Prior to an offer of employment to an applicant described under subsection (a) of this section, an agency must inform the applicant that it will conduct a State of Texas criminal history check and search the nurse aide registry and the employee misconduct registry to determine if that person has a criminal conviction or has committed certain conduct that would bar him from employment with the agency.

(c) An agency must notify its employees of the employee misconduct registry and inform them that an employee may not be employed with the agency if he is listed in the registry. Documentation of this notification must be kept in each employee's personnel file.

(d) To obtain a State of Texas criminal conviction record for a person covered by subsection (a) of this section, an agency, or private data broker acting on behalf of the agency, must submit the person's identifying information electronically, on disk, or on a typewritten form to the Texas Department of Public Safety (DPS). Identifying information includes:

(1) the complete name, race, and sex of the person;

(2) any known identifying number of the person, including social security number, driver's license number, or state identification number; and

(3) the person's date of birth.

(e) A conviction of an offense listed in this subsection results in an automatic bar to employment of a person described under subsection (a) of this section by an agency:

(1) an offense under Chapter 19, Penal Code (criminal homicide);

(2) an offense under Chapter 20, Penal Code (kidnapping and false imprisonment);

(3) an offense under Section 21.11, Penal Code (indecency with a child);

(4) an offense under Section 22.011, Penal Code (sexual assault);

(5) an offense under Section 22.02, Penal Code (aggravated assault);

(6) an offense under Section 22.04, Penal Code (injury to a child, elderly individual, or disabled individual);

(7) an offense under Section 22.041, Penal Code (abandoning or endangering a child);

(8) an offense under Section 22.08, Penal Code (aiding suicide);

(9) an offense under Section 25.031, Penal Code (agreement to abduct from custody);

(10) an offense under Section 25.08, Penal Code (sale or purchase of a child);

(11) an offense under Section 28.02, Penal Code (arson);

(12) an offense under Section 29.02, Penal Code (robbery);

(13) an offense under Section 29.03, Penal Code (aggravated robbery); or

(14) an offense that the facility determines to be a contraindication to employment with the consumers the agency serves.

(f) Effective September 1, 2001, a person described by subsection (a) of this section may not be employed in an agency if the person has been convicted of an offense under Chapter 31, Penal Code, that is punishable as a felony before the fifth anniversary of the date of the conviction. This subsection does not apply to a person employed by the agency before September 1, 2001.

(g) If DPS reports that a person has a criminal conviction of any kind, the agency must review the criminal conviction to determine if the conviction(s) listed in the report meets the criteria as an automatic bar for employment provided under subsections (e) and (f) of this section.

(h) If an agency believes that a conviction may bar a person from employment in an agency, the agency must notify the applicant or employee. The notification must include a statement that informs the person he may contact DPS to request an opportunity to be heard concerning the accuracy of the criminal history record information.

(i) An agency must search the nurse aide registry with DHS's toll-free number to verify that an applicant is not listed with a finding concerning abuse, neglect, or mistreatment of a consumer of an agency or a facility licensed under the Health and Safety Code, or misappropriation of a consumer's property.

(j) An agency must search the employee misconduct registry with DHS's toll-free number to verify that an applicant is not listed as having committed an act that constitutes "reportable conduct" as defined by Health and Safety Code, §48.401, and any rules that further define "reportable conduct" as allowed by Health and Safety Code, §48.402.

(k) An agency may request a criminal history conviction check on unlicensed employees at any time the agency determines appropriate.

(l) An agency may not hire an applicant for employment except as provided by subsection (n) of this section and must immediately discharge an employee if the agency:

(1) determines, as a result of a criminal history check, that a person has been convicted of an offense listed in subsections (e)(1)-(14) and (f) of this section;

(2) becomes informed of a person's conviction under the laws of another state, federal law, or the Uniform Code of Military Justice for an offense containing elements that are substantially similar to the elements of an offense listed under subsections (e)(1)-(14) and (f) of this section;

(3) determines that a person is listed in the nurse aide registry (established under the Omnibus Reconciliation Act of 1987) as unemployable due to findings of abuse, neglect, or mistreatment of a consumer of any agency or facility licensed under Health and Safety Code, or misappropriation of a consumer's property; or

(4) determines that a person is listed in the employee misconduct registry (established under Health and Safety Code, Chapter 253), as unemployable due to a finding that the person has committed an act that constitutes "reportable conduct" as described in subsection (j) of this section.

(m) Criminal history checks and registry searches of employees or applicants for employment with a branch office or alternate delivery site must be sent to the parent agency. The parent agency must notify the branch office or alternate delivery site of the findings.

(n) An agency may employ an applicant who is not listed as unemployable in the nurse aide registry or employee misconduct registry, on a temporary or interim basis, pending the results of a criminal conviction check.

(1) The applicant must furnish a written statement to the agency that he has no conviction for an offense barring employment as specified by this section. The written statement must be maintained in the agency personnel records.

(2) An agency must request a criminal history record within 72 hours of employment.

(o) The criminal history records and the information they contain may not be released or otherwise disclosed to any person or entity other than the subject of the information, except on court order or with the written consent of the person being investigated.

(1) An agency may not share information with another agency or other providers except with the written consent of the person who is the subject of the criminal history check.

(2) It is a criminal offense to release information in violation of the law.

(p) Failure to comply with this section is grounds for denial, suspension, or revocation of an agency's license in accordance with §97.601 of this title (relating to License Denial, Suspension, or Revocation).

§97.248. Volunteers.

(a) This section applies to all licensed agencies. However, agencies licensed and certified to provide hospice services also must comply with 42 Code of Federal Regulations, §418.70, Conditions of Participation--Volunteers.

(b) If an agency uses volunteers, the agency must use volunteers in defined roles under the supervision of a designated agency employee.

(1) A volunteer must meet the same requirements and standards in this chapter that apply to agency employees doing the same activities, unless the volunteer is exempt under this chapter from certain requirements or standards.

(2) Volunteers may be used in administrative and direct client care roles.

(3) The agency must document the level of volunteer activity.

(4) The agency must record expansion of care and services achieved through the use of volunteers, including type of services and the time worked.

§97.249. Reportable Conduct.

An agency must adopt and enforce a written policy relating to reporting acts of abuse, neglect, or exploitation of clients and reportable conduct by an employee(s) of the agency.

(1) In this section, the terms "abuse," "exploitation," and "neglect" have the meanings assigned by §48.002, Human Resources Code.

(2) In this section, "reportable conduct" has the meanings assigned by Health and Safety Code, §253.001.

(3) An agency that has cause to believe that an employee has abused, exploited, or neglected a client of the agency, the agency must report the information upon discovery to:

(A) the Texas Department of Human Services at 1-800-228-1570; and

(B) the Texas Department of Protective and Regulatory Services (TDPRS) at 1-800-252- 5400.

§97.256. Natural Disaster Preparedness.

The agency must adopt and enforce a written policy that includes a plan for publicly known natural disaster preparedness for clients receiving services. The written policy must include a plan for the reasonable mechanism for triaging clients; the notification of appropriate personnel and clients in the event of a disaster, if possible; the identification

of appropriate community resources; and the identification of possible evacuation procedures. The plan need not require that the agency actually evacuate, transport, or triage the clients.

§97.257. Medicare Certification Optional.

(a) An agency which makes application for licensed and certified home health category of service must comply with the regulations in the Medicare Conditions of Participation for Home Health Agencies, 42 Code of Federal Regulations (CFR), Part 484, pending approval of certification granted by the Centers for Medicare & Medicaid Services (CMS). An agency providing hospice services and applying for participation in the Medicare program must comply with the Medicare Conditions of Participation for Hospice Services, 42 CFR, Part 418.

(b) Upon the Texas Department of Human Services' (DHS's) receipt of written approval from CMS, DHS will amend the licensing status of the agency to include the licensed and certified home health services category. The agency must then comply with §97.402 of this title (relating to Standards Specific to Licensed and Certified Home Health Services).

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 October 26, 2001.

TRD-200106559
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: January 1, 2002
Proposal publication date: April 27, 2001
For further information, please call: (512) 438-3734

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DIVISION 4. PROVISION AND COORDINATION OF TREATMENT OF SERVICES

40 TAC §§97.281 - 97.303

The new sections are adopted under the Health and Safety Code, Chapter 142, which provides the department with the authority to adopt rules for the licensing and regulation of home and community support services agencies.

The new sections implement the Health and Safety Code, §§142.001- 142.030.

§97.281. Client Care Policies.

The agency must adopt and enforce a written policy that specifies the agency's client care policies, which may include:

(1) initial assessment, reassessment;

(2) start of care, transfer, and discharge;

(3) intravenous services;

(4) care of the pediatric client;

(5) triaging clients in the event of disaster;

(6) how to handle emergencies in the home;

(7) safety of staff;

(8) procedures the staff will perform for clients, such as dressing changes, Foley catheter changes, wound irrigation, administration of medication;

(9) psychiatric nursing procedures;

(10) patient and caregiver teaching relating to disease process/procedures;

(11) care planning;

(12) care of the dying patient/client;

(13) receiving physician orders;

(14) performing waived testing;

(15) medication monitoring; and

(16) anything else pertaining to client care.

§97.282. Client Conduct and Responsibility and Client Rights.

An agency must adopt and enforce a written policy governing client conduct and responsibility and client rights in accordance with this section.

(1) In advance of furnishing care to the client or during the initial evaluation visit before the initiation of treatment, the agency must provide each client or their legal representative with a written notice of all policies governing client conduct and responsibility and client rights.

(2) The client has the right to be informed in advance about the care to be furnished, the plan of care, expected outcomes, barriers to treatment, and any changes in the care to be furnished. The agency must ensure that written informed consent that specifies the type of care and services that may be provided by the agency has been obtained for every client, either from the client or their legal representative. The client or the legal representative must sign or mark the consent form.

(3) The client has the right to participate in the planning of the care or treatment and in planning changes in the care or treatment.

(A) The agency must advise or consult with the client or legal representative in advance of any change in the plan of care.

(B) The client has the right to refuse care and services.

(C) The client has the right to be informed, before care is initiated, of the extent to which payment may be expected from the client, third-party payers, and any other source of funding known to the agency.

(4) The agency must protect and promote a client's rights.

(5) A client has the right to have assistance in understanding and exercising his or her rights. The agency must maintain documentation showing that it has complied with the requirements of this paragraph and that the client demonstrates understanding of their rights.

(6) The client has the right to exercise his or her rights as a client of the agency.

(7) In the case of a client adjudged incompetent, the rights of the client are exercised by the person appointed by law to act on the client's behalf.

(8) In the case of a client who has not been adjudged incompetent, any legal representative may exercise the client's rights to the extent permitted by law.

(9) The client has the right to have his or her person and property treated with consideration, respect, and full recognition of his or her individuality and personal needs.

(10) The client has the right to confidential treatment of his or her personal and medical records.

(11) The client has the right to voice grievances regarding treatment or care that is or fails to be furnished, or regarding the lack of respect for property by anyone who is furnishing services on behalf of the agency and must not be subjected to discrimination or reprisal for doing so.

(A) The written policy must include a grievance mechanism under which a client can participate without fear of reprisal.

(B) At the time of admission, an agency must provide each person who receives home health, hospice, or personal assistance services with a written statement that informs the client that a complaint against the agency may be directed to the director, Texas Department of Human Services (DHS), P.O. Box 149030, Austin, Texas 78714-9030, toll free 1-800-228-1570. The statement also may inform each client that a complaint against the agency may be directed to the administrator of the agency. Information about complaints directed to the administrator also must include the timeframe for the agency's review and resolution.

(12) An agency must comply with the provisions of the Human Resources Code, Chapter 102, concerning the rights of the elderly.

§97.283. Advance Directives.

(a) An agency must maintain a written policy regarding implementation of advance directives. The policy must be in compliance with the Advance Directives Act, Health and Safety Code, Chapter 166.

(1) The policy must include a clear and precise statement of any procedure the agency is unwilling or unable to provide or withhold in accordance with an advance directive.

(2) Except as provided by paragraph (4) of this subsection, the agency must provide written notice to an individual of the written policy required by this subsection. The notice must be provided at the earlier of:

(A) the time the individual is admitted to receive services from the agency; or

(B) the time the agency begins providing care to the individual.

(3) If, at the time notice is to be provided under paragraph (2) of this subsection, the individual is incompetent or otherwise incapacitated and unable to receive the notice required by this subsection, the agency must provide the required written notice, in the following order of preference, to:

(A) the individual's legal guardian;

(B) a person responsible for the health care decisions of the individual;

(C) the individual's spouse;

(D) the individual's adult child;

(E) the individual's parent; or

(F) the person admitting the individual.

(4) If paragraph (3) of this subsection applies, except as provided by paragraph (5) of this subsection, if an agency is unable, after a diligent search, to locate an individual listed by paragraph (3) of this subsection, the agency is not required to provide the notice.

(5) If an individual who was incompetent or otherwise incapacitated and unable to receive the notice required by this subsection at the time notice was to be provided under paragraph (2) of this subsection later becomes able to receive the notice, the agency must provide the written notice at the time the individual becomes able to receive the notice.

(b) The Texas Department of Human Services (DHS) will assess an administrative penalty of $500 against an agency that violates subsection (a) of this section, relating to requirements for the provision of a written statement relating to advance directives. DHS will provide notice of administrative penalty and opportunity for a hearing in accordance with §97.602 of this title (relating to Administrative Penalties).

§97.284. Laboratory Services.

An agency that provides laboratory services must adopt and enforce a written policy to ensure that the agency meets the Clinical Laboratory Improvement Act, 42 United States Code Annotated, §263a, (CLIA 1988). CLIA 1988 applies to all agencies with laboratories that examine human specimens for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings.

§97.285. Infection Control.

An agency must adopt and enforce written policies addressing infection control including the prevention of the spread of infectious and communicable disease. The policies must:

(1) ensure compliance with the Communicable Disease Prevention and Control Act, Health and Safety Code, Chapter 81;

(2) ensure compliance with Occupational Safety and Health Administration (OSHA), 29 CFR Part 1910.1030 relating to Bloodborne Pathogens and Appendix A to 1910.1030;

(3) require documentation of infections that are acquired while the client is receiving services from the agency. Documentation must include at a minimum the date that the infection was detected, the client's name, primary diagnosis, signs/symptoms, type of infection, pathogens identified and treatment; and

(4) ensure compliance of the agency and its employees and contractors with the Health and Safety Code, Chapter 85, Subchapter I, concerning the prevention of the transmission of human immunodeficiency virus and hepatitis B virus.

§97.287. Quality Assessment and Performance Improvement.

(a) Quality Assessment and Performance Improvement (QAPI) Program.

(1) An agency must maintain an QAPI Program that will be implemented by an QAPI Committee. The QAPI Program must be ongoing, focused on client outcomes that are measurable, and have a written plan of implementation. This plan must be reviewed and updated or revised at least once within a calendar year, or more often if needed, by the QAPI Committee. The QAPI Program must include:

(A) a system of measures that captures significant outcomes that are essential to optimal care and are used in the care planning and coordination of services and events. The measures must include at a minimum and as appropriate the following:

(i) an analysis of a representative sample of services furnished to clients contained in both active and closed records;

(ii) a review of:

(I) negative client care outcomes;

(II) issues of unprofessional conduct by licensed staff and misconduct by unlicensed staff;

(III) infection control activities; and

(IV) medication administration and errors;

(iii) a determination that services have been performed as outlined in the service plan, care plan, or plan of care; and

(iv) an analysis of client complaint and satisfaction survey data; and

(B) an annual evaluation of the total operation, including services provided under contract or arrangement. The findings are to be used by the agency to correct identified problems and to revise policies, if necessary.

(2) QAPI documents must be kept confidential and available to the Texas Department of Human Services (DHS) staff upon request.

(b) QAPI Committee membership. At a minimum, the QAPI Committee must consist of at least:

(1) the administrator;

(2) the supervising nurse/therapist, or the supervisor of an agency licensed to provide personal assistance services (PAS) if delegating health related tasks; and

(3) representation from skilled and unskilled disciplines providing services.

(c) Frequency of QAPI Committee meeting. The QAPI Committee must meet twice a year or more often if needed.

§97.289. Independent Contractors and Arranged Services.

(a) Independent contractors. If an agency uses independent contractors, there must be a contract between each independent contractor that performs services and the agency. The contract must be enforced by the agency and clearly designate:

(1) that clients are accepted for care only by the licensed agency;

(2) the services to be provided and how they will be provided (i.e. per visit, per hours, etc.);

(3) the necessity to conform to all applicable agency policies, including personnel qualifications;

(4) the plan of care or care plan to be carried out;

(5) the manner in which services will be coordinated and evaluated by the licensed agency in accordance with §97.288 of this title (relating to Coordination of Services);

(6) the procedures for:

(A) submitting information and documentation regarding the client's needs and services, including clinical and progress notes;

(B) scheduling of visits;

(C) periodic client evaluation or supervision; and

(D) determining charges and reimbursement.

(b) Arranged services. Services provided by an agency under arrangement with another agency or organization must be provided under written agreement conforming to the requirements specified in subsection (a) of this section.

§97.290. Backup Services and After Hours Care.

(a) Backup services. An agency must adopt and enforce a written policy to ensure that backup services are available when an employee or contractor is not able to deliver the services. This may include agency staff, contractors, or the client's family members or friends.

(b) After hours care. An agency must adopt and enforce a policy to ensure that clients are educated in how to access care from the agency or another health care provider after regular business hours.

§97.291. Agency Dissolution.

An agency must adopt and enforce a written policy that describes the agency's written contingency plan.

(1) The plan must be implemented in the event of dissolution to assure continuity of client care.

(2) The plan must:

(A) be consistent with §97.295 of this title (relating to Client Transfer or Discharge Notification Requirements);

(B) include procedures for:

(i) notifying the client of the agency's dissolution;

(ii) documenting the notification;

(iii) carrying out the notification; and

(C) comply with §97.217(2) of this title (relating to Agency Closure Procedures).

§97.292. Agency and Client Agreement and Disclosure.

(a) The agency must provide the client or the client's family with a written agreement for services. The agency must comply with the terms of the agreement. The agreement must include at a minimum the following:

(1) notification of client rights;

(2) documentation concerning notification to the client of the availability of medical power of attorney for health care, advance directive or "Do Not Resuscitate" orders in accordance with the applicable law;

(3) services to be provided;

(4) supervision by the agency of services provided;

(5) agency charges for services rendered if the charges will be paid in full or in part by the client or the client's family, or on request;

(6) a written statement containing procedures for filing a complaint in accordance with §97.282(11) of this title (relating to Client Conduct and Responsibility and Client Rights); and

(7) a client agreement to and acknowledgement of services by home health medication aides, if home health medication aides are used.

(b) The agency must obtain an acknowledgment of receipt from the client or his family of the items listed under subsection (a) of this section. This acknowledgment of receipt must be kept in the client's record.

§97.293. Client List and Services.

An agency must maintain a current list of clients for each category of service licensed.

(1) The list must include all services being delivered by the agency and services being delivered under contract.

(2) The client list must include the client's name, identification or clinical record number, start of care date or admission date,

certification period (if applicable), diagnosis(es) or functional assessment (as appropriate), and the disciplines that are providing services.

§97.295. Client Transfer or Discharge Notification Requirements.

(a) Except in an emergency, an agency intending to transfer or discharge a client must notify the client or the client's parent, family, spouse, significant other, or legal representative, and the client's attending physician (if applicable) five days before the date on which the client will be transferred or discharged.

(b) An agency may transfer or discharge a client without five days notice required by subsection (a) of this section:

(1) upon the client's request;

(2) if the client's medical needs require transfer, such as a medical emergency;

(3) in the event of a natural disaster when the client's health and safety is at risk;

(4) for the protection of staff or a client after the agency has made a documented reasonable effort to notify the client, the client's family and physician, and appropriate state or local authorities of the agency's concerns for staff or client safety, and in accordance with agency policy;

(5) according to physician orders; or

(6) if the client fails to pay for services, except as prohibited by federal law.

(c) The agency must document notice required by subsection (a) of this section in the client's file.

§97.296. Physician Delegation and Performance of Physician-Delegated Tasks.

(a) An agency must adopt and enforce a written policy that states whether or not physician delegation will be honored by the agency. If an agency accepts physician delegation, the agency must comply with the Medical Practice Act, Occupations Code, Chapter 157, concerning physician delegation.

(b) An agency may accept delegation from a physician only if the agency receives the following from the physician:

(1) the name of the client;

(2) the name of the delegating physician;

(3) the task(s) to be performed;

(4) the name of the individual(s) to perform the task(s);

(5) the time frame for the delegation order; and

(6) if the task is medication administration, the medication to be given, route, dose, and frequency.

§97.300. Medication Administration.

An agency must adopt and enforce a written policy for maintaining a current medication list and medication administration record. The client's practitioner must order administration of medication, unless it can be considered assistance with medications as that term is defined in §97.2(10). A current medication list and medication administration records may be incorporated into one document. Notation must be made in the medication administration record or clinical notes of medications not given and the reason. Any adverse reaction must be reported to a supervisor and documented in the client record on the day of occurrence. If the adverse reaction occurs after regular business hours, the adverse reaction must be reported as soon as it is disclosed to the individual delivering care.

§97.301. Client Records.

(a) In accordance with accepted principles of practice, an agency must establish and maintain a client record system to assure that the care and services provided to each client are completely and accurately documented, readily accessible and systematically organized to facilitate the compilation and retrieval of information.

(1) An agency must establish a record for each client and must maintain the record in accordance with and contain the information described in paragraph (9) of this subsection. An agency must keep a single file or separate files for each category of service provided to the client and the client's family. Hospice services provided to a client's family must be documented in the clinical record.

(2) The agency must adopt and enforce written procedures regarding the use and removal of records, the release of information, and when applicable, the incorporation of clinical, progress, or other notes into the client record. An agency may not release any portion of a client record to anyone other than the client except as allowed by law.

(3) All information regarding the client's care and services must be centralized in the client's record and be protected against loss or damage.

(4) The agency must establish an area for original active client record storage at the agency's place of business. The original active client record must be stored at the place of business (parent agency, branch office, or alternate delivery site) from which services are actually provided. Original active client records must not be stored at an administrative support site or records storage facility.

(5) The agency must ensure that each client's record is treated with confidentiality, safeguarded against loss and unofficial use, and is maintained according to professional standards of practice.

(6) The clinical record must be an original, a microfilmed copy, an optical disc imaging system, or a certified copy. An original record includes manually signed paper records or electronically signed computer records. Computerized records must meet all requirements of paper records including protection from unofficial use and retention for the period specified in subsection (b) of this paragraph. Systems must assure that entries regarding the delivery of care or services are not altered without evidence and explanation of such alteration.

(7) Each entry to the client record must be current, accurate, signed, and dated with the date of entry by the individual making the entry. The record must include all services whether furnished directly or under arrangement. Correction fluid or tape must not be used in the record. Corrections must be made by striking through the error with a single line and must include the date the correction was made and the initials of the person making the correction.

(8) Inactive client records may be preserved on microfilm, optical disc or other electronic means and may be stored at the parent agency location, branch office, alternate delivery site, administrative support site, or records storage facility. Security must be maintained and the record must be readily retrievable by the agency.

(9) Each client record must include (as applicable):

(A) client application for services including, but not limited to: full name; sex; date of birth; name, address, and telephone number of parent(s) of a minor child, or legal guardian, or other(s) as identified by the individual; physician's name and telephone numbers, including emergency numbers; and services requested;

(B) initial health assessment, pertinent medical history, and subsequent health assessments;

(C) care plan, plan of care, or individualized service plan, as applicable. The care plan or the plan of care must include,

as applicable, medication, dietary, treatment, and activities orders. The requirements for the individualized service plan for personal assistance service clients are located in §97.404 of this title (relating to Standards Specific to Agencies Licensed to Provide Personal Assistance Services). The requirements for the plan of care for hospice clients are located in §97.403 of this title (relating to Standards Specific to Agencies Licensed to Provide Hospice Services);

(D) clinical and progress notes. Such notes must be written the day service is rendered and incorporated into the client record within 14 business days;

(E) current medication list;

(F) medication administration record (if medication is administered by agency staff). Notation must also be made in the medication administration record or in the clinical notes of medications not given and the reason. Any adverse reaction must be reported to a supervisor and documented in the client record;

(G) records of supervisory visits;

(H) complete documentation of all known services and significant events. Documentation must show that effective interchange, reporting, and coordination of care occurs as required in §97.288 of this title (relating to Coordination of Services);

(I) for clients 60 years and older, acknowledgment of the client's receipt of a copy of the Human Resources Code, Chapter 102, Rights of the Elderly;

(J) acknowledgment of the client's receipt of the agency's policy relating to the reporting of abuse, neglect, or exploitation of a client;

(K) documentation that the client has been informed of how to register a complaint in accordance with §97.282(11) of this title (relating to Client Conduct and Responsibility and client Rights);

(L) client agreement to and acknowledgment of services by home health medication aides, if home health medication aides are used;

(M) discharge summary, including the reason for discharge or transfer and the agency's documented notice to the client, the client's physician (if applicable), and other individuals as required in §97.295 of this title (relating to Client Transfer or Discharge Notification Requirements);

(N) acknowledgement of receipt of the notice of advance directives;

(O) services provided to the client's family (as applicable); and

(P) consent and authorization and election forms, as applicable.

(b) An agency must adopt and enforce a written policy relating to the retention of records in accordance with this subsection.

(1) An agency must retain original client records for a minimum of five years after the discharge of the client.

(2) The agency may not destroy client records that relate to any matter that is involved in litigation if the agency knows the litigation has not been finally resolved.

(3) There must be an arrangement for the preservation of inactive records to insure compliance with this subsection.

§97.303. Standards for Possession of Sterile Water or Saline, Certain Vaccines or Tuberculin, and Certain Dangerous Drugs.

An agency, which possesses sterile water or saline, certain vaccines or tuberculin, or certain dangerous drugs as specified by this section, must comply with the provisions of this section.

(1) Possession of sterile water or saline. An agency or its employees who are registered nurses or licensed vocational nurses may purchase, store, or transport for the purpose of administering to their home health or hospice clients under physician's orders:

(A) sterile water for injection and irrigation; and

(B) sterile saline for injection and irrigation.

(2) Possession of certain vaccines or tuberculin.

(A) An agency or its employees who are registered nurses or licensed vocational nurses may purchase, store, or transport for the purpose of administering to the agency's employees, home health, or hospice clients, or client family members under physician's standing orders the following dangerous drugs:

(i) hepatitis B vaccine;

(ii) influenza vaccine; and

(iii) tuberculin purified protein derivative for tuberculosis testing.

(B) An agency that purchases, stores, or transports a vaccine or tuberculin under this section must ensure that any standing order for the vaccine or tuberculin:

(i) is signed and dated by the physician;

(ii) identifies the vaccine or tuberculin covered by the order;

(iii) indicates that the recipient of the vaccine or tuberculin has been assessed as an appropriate candidate to receive the vaccine or tuberculin and has been assessed for the absence of any contraindication;

(iv) indicates that appropriate procedures are established for responding to any negative reaction to the vaccine or tuberculin; and

(v) orders that a specific medication or category of medication be administered if the recipient has a negative reaction to the vaccine or tuberculin.

(3) Possession of certain dangerous drugs.

(A) In compliance with Health and Safety Code, §142.0063, an agency or its employees who are registered nurses or licensed vocational nurses may purchase, store, or transport for the purpose of administering to their home health or hospice patients, in accordance with subparagraph (C) of this paragraph, the following dangerous drugs:

(i) any of the following items in a sealed portable container of a size determined by the dispensing pharmacist:

(I) 1,000 milliliters of 0.9% sodium chloride intravenous infusion;

(II) 1,000 milliliters of 5.0% dextrose in water injection; or

(III) sterile saline; or

(ii) not more than five dosage units of any of the following items in an individually sealed, unused portable container:

(I) heparin sodium lock flush in a concentration of 10 units per milliliter or 100 units per milliliter;

(II) epinephrine HCI solution in a concentration of one to 1,000;

(III) diphenhydramine HCI solution in a concentration of 50 milligrams per milliliter;

(IV) methylprednisolone in a concentration of 125 milligrams per two milliliters;

(V) naloxone in a concentration of one milligram per milliliter in a two-milliliter vial;

(VI) promethazine in a concentration of 25 milligrams per milliliter;

(VII) glucagon in a concentration of one milligram per milliliter;

(VIII) furosemide in a concentration of 10 milligrams per milliliter;

(IX) lidocaine 2.5% and prilocaine 2.5% cream in a five-gram tube; or

(X) lidocaine HCL solution in a concentration of 1% in a two-milliliter vial.

(B) An agency or the agency's authorized employees may purchase, store, or transport dangerous drugs in a sealed portable container only if the agency has established policies and procedures to ensure that:

(i) the container is handled properly with respect to storage, transportation, and temperature stability;

(ii) a drug is removed from the container only on a physician's written or oral order;

(iii) the administration of any drug in the container is performed in accordance with a specific treatment protocol; and

(iv) the agency maintains a written record of the dates and times the container is in the possession of a registered nurse or licensed vocational nurse.

(C) An agency or the agency's authorized employee who administers a drug listed in subparagraph (A) of this paragraph may administer the drug only in the client's residence under physician's orders in connection with the provision of emergency treatment or the adjustment of:

(i) parenteral drug therapy; or

(ii) vaccine or tuberculin administration.

(D) If an agency or the agency's authorized employee administers a drug listed in subparagraph (A) of this paragraph pursuant to a physician's oral order, the agency must receive a signed copy of the order:

(i) not later than 24 hours after receipt of the order, reduce the order to written form and send a copy of the form to the dispensing pharmacy by mail or facsimile transmission; and

(ii) not later than 20 days after receipt of the order, send a copy of the order as signed by and received from the physician to the dispensing pharmacy.

(E) A pharmacist that dispenses a sealed portable container under this subsection will ensure that the container:

(i) is designed to allow access to the contents of the container only if a tamper-proof seal is broken;

(ii) bears a label that lists the drugs in the container and provides notice of the container's expiration date, which is the earlier of:

(I) the date that is six months after the date on which the container is dispensed; or

(II) the earliest expiration date of any drug in the container; and

(iii) remains in the pharmacy or under the control of a pharmacist, registered nurse, or licensed vocational nurse.

(F) If an agency or the agency's authorized employee purchases, stores, or transports a sealed portable container under this subsection, the agency must deliver the container to the dispensing pharmacy for verification of drug quality, quantity, integrity, and expiration dates not later than the earlier of:

(i) the seventh day after the date on which the seal on the container is broken; or

(ii) the date for which notice is provided on the container label.

(G) A pharmacy that dispenses a sealed portable container under this section is required to take reasonable precautionary measures to ensure that the agency receiving the container complies with subparagraph (F) of this paragraph. On receipt of a container under subparagraph (F) of this paragraph, the pharmacy will perform an inventory of the drugs used from the container and will restock and reseal the container before delivering the container to the agency for reuse.

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 October 26, 2001.

TRD-200106560
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: January 1, 2002
Proposal publication date: April 27, 2001
For further information, please call: (512) 438-3734

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DIVISION 5. BRANCH OFFICES AND ALTERNATE DELIVERY SITES

40 TAC §97.321, §97.322

The new sections are adopted under the Health and Safety Code, Chapter 142, which provides the department with the authority to adopt rules for the licensing and regulation of home and community support services agencies.

The new sections implement the Health and Safety Code, §§142.001- 142.030.

§97.321. Standards for Branch Offices.

(a) A parent agency is eligible to apply for a branch office license:

(1) if the agency has successfully completed an initial on-site survey; or for an agency with a first renewal or subsequent

renewal license, if the agency continues to demonstrate substantial compliance with the statute and this chapter; and

(2) if enforcement action against the agency license is not proposed under Subchapter F of this chapter (relating to Enforcement).

(b) A branch office operates as a part of the parent agency and must comply with all the appropriate regulations the parent agency must meet. The parent office is responsible for ensuring the compliance of its branches with licensing standards.

(c) A branch office providing licensed and certified home health services must comply with the standards for certified agencies in §97.402 of this title (relating to Standards Specific to Licensed and Certified Home Health Services).

(d) The service area of a branch office must be located within the parent agency's service area.

(1) A branch office must provide services only within its established service area.

(2) The branch office must maintain adequate staff to provide services and to supervise the provision of services within the service area.

(3) A branch office may expand its service area at any time during the licensure period.

(A) Unless exempted under subparagraph (B) of the paragraph, to expand its service area, a branch office must submit to the Texas Department of Human Services (DHS) a written notice 30 days prior to the expansion that includes:

(i) revised boundaries of the branch office's original service area;

(ii) the effective date of the expansion; and

(iii) an updated list of management and supervisory personnel (including names), if changes are made.

(B) An agency will be exempted from the 30-day written notice requirement under subparagraph (A) of this paragraph if DHS determines an emergency exists that would adversely impact client health and safety. An agency must notify DHS immediately of a possible emergency. DHS will determine if an exemption will be granted.

(4) A branch office may reduce its service area at any time during the licensure period by sending DHS written notification of the reduction, revised boundaries of the branch office's original service area, and the effective date of the reduction.

(e) A parent agency and a branch office providing home health or personal assistance services must meet the following requirements.

(1) On-site supervision of the branch office must be conducted at least monthly by the parent agency administrator, administrator's designee, or supervising nurse or designee. More frequent supervision may be required considering the size of the service area and the scope of services provided by the parent agency. The supervisory visits must be documented and include the date of the visit, the content of the consultation, the individuals in attendance, and the recommendations of the staff.

(2) The original active clinical record must be kept at the branch office.

(3) The parent agency must approve all branch office policies and procedures. Such approval must be documented and filed in the parent and branch offices.

(f) DHS will issue or renew a branch office license for applicants who meet the requirements of this section.

(1) Issuance or renewal of a branch office license is contingent upon compliance with the statute and this chapter by the parent agency and branch office.

(2) DHS may take enforcement action against a parent agency license for a branch office's failure to comply with the statute or this chapter. Enforcement action will be in accordance with Subchapter F of this chapter (relating to Enforcement).

(3) Revocation, suspension, denial, or surrender of a parent agency license will result in the same revocation, suspension, denial, or surrender of a branch office license for all branch office licenses of the parent agency.

(g) A branch office may offer fewer health services or categories than the parent office but may not offer health services or categories that are not also offered by the parent agency.

§97.322. Standards for Alternate Delivery Sites.

(a) A hospice is eligible to apply for an alternate delivery site license:

(1) if the agency has successfully completed an initial on-site survey; or for a hospice agency with a first renewal or subsequent renewal license, if the agency continues to demonstrate substantial compliance with the statute and this chapter; and

(2) if enforcement action against the agency is not proposed under Subchapter F of this chapter (relating to Enforcement).

(b) An alternate delivery site providing hospice services must comply with §97.403 of this title (relating to Standards Specific to Agencies Licensed to Provide Hospice Services).

(c) An alternate delivery site must independently meet §97.403(c), (f)(1), and (i) of this title (relating to Standards Specific to Agencies Licensed to Provide Hospice Services), and §97.301 of this title (relating to Client Records).

(d) An alternate delivery site must be established within the parent hospice's service area.

(1) The alternate delivery site must provide services only within its established service area.

(2) The alternate delivery site must maintain adequate staff to provide services and to supervise the provision of services within the service area.

(3) An alternate delivery site may expand its service area at any time during the licensure period.

(A) Unless exempted under subparagraph (B) of this paragraph, to expand its service area, an alternate delivery site must submit to the Texas Department of Human Services (DHS) a written notice 30 days prior to the expansion that includes:

(i) revised boundaries of the alternate delivery site's original service area;

(ii) the effective date of the expansion; and

(iii) an updated list of management and supervisory personnel (including names), if changes are made.

(B) An agency will be exempted from the 30-day written notice requirement under subparagraph (A) of this paragraph if DHS determines that an emergency exists that would impact client health and safety. An agency must notify DHS immediately of a possible emergency. DHS will determine if an exemption can be granted.

(4) An alternate delivery site may reduce its service area at any time during the licensure period by sending DHS written notification of the reduction, revised boundaries of the alternate delivery site's original service area, and the effective date of the reduction.

(e) A hospice and an alternate delivery site providing hospice services must meet the following requirements.

(1) On-site supervision of the alternate delivery site must be conducted by the parent agency once a month at a minimum. More frequent supervision may be required considering the size of the service area provided by the parent agency. The parent agency administrator, administrator's designee, or supervising nurse or designee must conduct supervisory visits to the alternate delivery site. The supervisory visits must be documented and include the date of the visit, the content of the consultation, the individuals in attendance, and the recommendations of the staff.

(2) The original active clinical record must be kept at the alternate delivery site office.

(3) The parent agency must approve all alternate delivery site policies and procedures. Such approval must be documented and filed in the parent and alternate delivery sites.

(f) DHS will issue to or renew an alternate delivery site license for applicants who meet the requirements of this section.

(1) Issuance or renewal of an alternate delivery site office license is contingent upon compliance with the statute and this chapter by the parent agency and alternate delivery site.

(2) DHS may take enforcement action against a parent agency license for an alternate delivery site's failure to comply with the statute or this chapter. Enforcement action will be in accordance with Subchapter F of this chapter (relating to Enforcement).

(3) Revocation, suspension, denial or surrender of a parent agency license will result in the same revocation, suspension, denial or surrender of all alternate delivery site licenses of the parent agency.

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 October 26, 2001.

TRD-200106561
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: January 1, 2002
Proposal publication date: April 27, 2001
For further information, please call: (512) 438-3734

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SUBCHAPTER D. ADDITIONAL STANDARDS SPECIFIC TO LICENSE CATEGORY AND SPECIFIC TO SPECIAL SERVICES

40 TAC §§97.401 - 97.407

The new sections are adopted under the Health and Safety Code, Chapter 142, which provides the department with the authority to adopt rules for the licensing and regulation of home and community support services agencies.

The new sections implement the Health and Safety Code, §§142.001- 142.030.

§97.401. Standards Specific to Licensed Home Health Services.

(a) In addition to the standards in Subchapter C of this chapter (relating to Minimum Standards for All Licensed Home and Community Support Services Agencies), an agency providing licensed home health services must also meet the standards of this section.

(b) The agency must accept a client for home health services based on a reasonable expectation that the client's medical, nursing, and social needs can be met adequately in the client's residence. An agency has made a reasonable expectation that it can meet a client's needs if, at the time of the agency's acceptance of the client, the client and the agency have agreed as to what needs the agency would meet; for instance, the agency and the client could agree that some needs would be met but not necessarily all needs.

(1) The agency must start providing licensed home health services to a client within a reasonable time after acceptance of the client and according to the agency's policy. The initiation of licensed home health services must be based on the client's health service needs.

(2) An initial health assessment must be performed in the client's residence by the appropriate health care professional prior to or at the time that licensed home health services are initially provided to the client. The assessment must determine whether the agency has the ability to provide the necessary services.

(A) If a practitioner has not ordered skilled care for a client, then the appropriate health care professional must prepare a care plan. The care plan must be developed after consultation with the client and the client's family and must include services to be rendered, the frequency of visits or hours of service, identified problems, method of intervention, and projected date of resolution. The care plan must be reviewed and updated by all appropriate staff members involved in client care at least annually, or more often as necessary to meet the needs of the client.

(B) If a practitioner orders skilled treatment, then the appropriate health care professional must prepare a plan of care. The plan of care must be signed and approved by a practitioner in a timely manner. The plan of care must be developed in conjunction with agency staff and must cover all pertinent diagnoses, including mental status, types of services and equipment required, frequency of visits at the time of admission, prognoses, functional limitations, activities permitted, nutritional requirements, medications and treatments, any safety measures to protect against injury, and any other appropriate items. The appropriate health care personnel must perform services as specified in the plan of care. The plan of care must be revised as necessary, but it must be reviewed and updated at least every six months.

(c) Agency staff must provide at least one home health service. All services must be rendered and supervised by qualified personnel. The appropriate health professional must be available to supervise as needed, when services are provided.

(1) If nursing service is provided, a registered nurse must be employed by or be under contract with the agency to provide services or supervision.

(2) If physical therapy service is provided, a physical therapist must be employed by or be under contract with the agency to provide services or supervision.

(3) If occupational therapy service is provided, an occupational therapist must be employed by or be under contract with the agency to provide services or supervision.

(4) If speech-language pathology services are provided, a speech-language pathologist must be employed by or be under contract with the agency to provide services or supervision.

(5) If audiology services are provided, an audiologist must be employed by or be under contract with the agency to provide services or supervision.

(6) If medical social service is provided, a social worker with a bachelor's degree in social work from an accredited college or university must be employed by or be under contract with the agency to provide services or supervision. When medical social service is provided in an agency with a home dialysis designation, the social worker must meet the qualifications in §97.405(q) of this title (relating to Standards Specific to Agencies Licensed to Provide Home Dialysis Services).

(7) If nutritional counseling is provided, a dietitian or registered nurse must be employed by or be under contract with the agency to provide services or supervision.

(8) If services are provided by unlicensed personnel, a qualified person must be employed by or be under contract with the agency to provide the service and a registered nurse must be employed by or be under contract with the agency to perform the initial health assessment, prepare the client care plan, as appropriate, and supervise the unlicensed personnel.

(9) If respiratory therapy service is provided, a respiratory therapist must be employed by or be under contract with the agency to provide services.

(d) An agency may use a home health aide who meets the qualifications in §97.701 of this title (relating to Home Health Aides) or other individuals under the supervision of a registered nurse or physician. This subsection applies only to an agency providing licensed home health services that implements a home health aide training and competency evaluation program.

(1) An agency providing licensed home health services is not required to utilize home health aides. Unlicensed personnel utilized by an agency providing licensed home health services must be at least 18 years of age and must demonstrate competency in the task assigned when competency cannot be determined through education and experience. An unlicensed person who is under 18 years of age, is a high school graduate or is enrolled in a vocational educational program, and has demonstrated competency to perform the tasks assigned by the supervisor, may perform licensed home health services.

(2) An agency providing licensed home health services that implements a home health aide training and competency evaluation program must meet the requirements in §97.701(d)-(f) of this title (relating to Home Health Aides).

(3) An agency providing licensed home health services that implements a home health aide competency evaluation program must comply with §97.701(f) of this title (relating to Home Health Aides).

(4) Since the individual's most recent completion of a training and competency evaluation program or a competency evaluation program, if there has been a period of 24 consecutive months during which the individual has not furnished home health services, the individual will not be considered as having completed a training and competency evaluation program or a competency evaluation program.

§97.402. Standards Specific to Licensed and Certified Home Health Services.

(a) In addition to the standards in Subchapter C of this chapter (relating to Minimum Standards for All Licensed Home and Community Support Services Agencies), an agency providing licensed and certified home health services must comply with the requirements of the Social Security Act and the regulations in Title 42 of the Code of Federal Regulations, Part 484. Copies of the regulations adopted by reference in this section are indexed and filed in the Texas Department of Human Services, 701 W. 51st Street, Austin, Texas 78751-2321, and are available for public inspection during regular working hours.

(b) An agency providing licensed and certified home health services that plans to implement a home health aide training and competency evaluation program must meet the requirements in §97.701(d)-(f) of this title (relating to Home Health Aides).

(c) An agency providing licensed and certified home health services that plans to implement a competency evaluation program must comply with §97.701(f) of this title (relating to Home Health Aides).

(d) An agency providing licensed and certified home health services may not use an individual as a home health aide unless:

(1) the individual has met the federal requirements under subsection (a) of this section;

(2) the individual qualifies as a home health aide on the basis of a:

(A) training and competency evaluation program, and the program meets the requirements of subsection (b) of this section; or

(B) competency evaluation program, and the program meets the requirements of subsection (c) of this section; or

(3) the individual is a licensed health care provider.

(e) Since the individual's most recent completion of a training and competency evaluation program or a competency evaluation program, if there has been a period of 24 consecutive months during which the individual has not furnished home health services, the individual will not be considered as having completed a training and competency evaluation program or a competency evaluation program.

§97.403. Standards Specific to Agencies Licensed to Provide Hospice Services.

(a) In addition to complying with the minimum standards in Subchapter C of this chapter (relating to Minimum Standards for All Home and Community Support Services Agencies), an agency that is licensed to provide hospice services, must also comply with the standards of this section. If licensed and certified to provide hospice services, an agency must also comply with the requirements of the Social Security Act and the regulations in Title 42, Code of Federal Regulations, Part 418.

(b) A person who is not licensed to provide hospice services may not use the word "hospice" in a title or description of a facility, organization, program, service provider or services or use any other words, letters, abbreviations, or insignia indicating or implying that the person holds a license to provide hospice services.

(c) A hospice must adopt and enforce a written policy relating to the provision of hospice services in accordance with this section. All covered services must be available 24 hours a day, seven days a week, during the last stages of illness, during death, and during bereavement, to the extent necessary for the palliation and management of terminal illness and related conditions. Services include, at a minimum:

(1) nursing;

(2) medical social services;

(3) counseling;

(4) volunteer care;

(5) bereavement counseling;

(6) coordination of short-term inpatient care;

(7) physician services; and

(8) medications.

(d) The hospice must have a medical director who:

(1) is a hospice employee, independent contractor, or volunteer;

(2) is a doctor of medicine or osteopathy licensed in the State of Texas; and

(3) assumes responsibility for the medical component of the hospice's client care program.

(e) The hospice must designate an interdisciplinary team or teams composed of individuals who provide or supervise the care and services offered by the hospice.

(1) The interdisciplinary team or teams must include at least the following individuals who are employees of the hospice:

(A) a physician;

(B) a registered nurse;

(C) a social worker; and

(D) a counselor.

(2) The interdisciplinary team must be responsible for the:

(A) participation in the establishment of the plan of care;

(B) provision and supervision of hospice care and services;

(C) periodic reviews and updates of the plan of care for each client receiving hospice care; and

(D) establishment of policies governing the day to day provision of hospice care and services.

(3) If the hospice has more than one interdisciplinary team, the hospice must designate in advance the team it chooses to execute the functions described in paragraph (2)(D) of this subsection.

(4) The hospice must designate a registered nurse to coordinate the implementation of the plan of care for each client.

(f) Subject to subsections (m) and (r) of this section, the hospice may arrange for another individual or entity to furnish services to the hospice clients. If services are provided under arrangement, the hospice must meet the following standards.

(1) The hospice program must assure the continuity of client and family care in home and outpatient and inpatient settings.

(2) The hospice must have a contract for the provision of arranged services. The contract must be signed by authorized representatives of the hospice as well as the contracting party. The contract must include the following:

(A) identification of the services to be provided;

(B) a stipulation that services may be provided only with the express authorization of the hospice;

(C) the manner in which the contracted services are coordinated, supervised, and evaluated by the hospice;

(D) the delineation of the role(s) of the hospice and the contractor in the admission process, client and family health assessment, and the interdisciplinary team case conferences;

(E) requirements for documentation that services are furnished in accordance with the agreement; and

(F) the qualifications of the personnel providing the services.

(3) The hospice must retain professional management responsibility for arranged services and ensure they are furnished in a safe and effective manner by persons meeting the qualifications under this chapter, and in accordance with the client's plan of care and the other requirements of this subsection.

(4) The hospice must retain responsibility for payment for services.

(5) The hospice must ensure that inpatient care is furnished only in a licensed facility that meets the requirements of subsection (w) of this section, and the hospice's arrangement for inpatient care must be described in a contract and must meet the requirements of paragraph (2) of this subsection. The contract, at minimum, must meet the following requirements:

(A) that the hospice furnishes to the inpatient provider a copy of the client's plan of care and specifies the inpatient services to be furnished;

(B) that the inpatient provider has established policies consistent with those of the hospice and agrees to abide by the client care protocols established by the hospice for its clients;

(C) that the medical record includes a record of all inpatient services and events, and that a copy of the discharge summary and, if requested, a copy of the medical record are provided to the hospice;

(D) include the party responsible for implementation of the provisions of the contract; and

(E) that the hospice retains responsibility for appropriate hospice care training (to include palliative and end of life issues) of the personnel who provide the care under the agreement.

(g) Prior to the start of care, the hospice physician or registered nurse must make an initial health assessment visit to determine the immediate care and support needs of the client.

(1) The hospice physician or registered nurse must contact the client or client's representative other within 24 hours of receiving the physician's referral for hospice care to schedule an appointment for the initial health assessment.

(2) The initial health assessment visit must be held within 48 hours after the hospice's receipt of the physician's referral for hospice care, unless ordered otherwise.

(3) After the initial health assessment is completed, services approved by the physician may be rendered.

(h) The hospice must perform and make available to each client admitted for hospice services a client-specific comprehensive health assessment that identifies the client's need for hospice care and the client's need for medical, nursing, social, emotional, and spiritual care which includes, but is not limited to, the palliation and management of the terminal illness and related conditions and support services for clients and their families.

(1) The hospice must complete the comprehensive health assessment in a timely manner consistent with the client's immediate

needs, but no later than seven calendar days after the start of hospice care.

(2) The comprehensive health assessment must include:

(A) input from the appropriate interdisciplinary team member(s) and an assessment of:

(i) each client's physical condition, including functional ability and nutritional status;

(ii) each client's pain and other symptoms and the management of discomfort and symptom relief;

(iii) the client's and the client's family's social and emotional well-being;

(iv) the client's spiritual orientation and needs;

(v) the survivor risk factors to be considered in developing the bereavement care plan; and

(vi) any other information necessary to develop an effective, interdisciplinary plan of care;

(B) a review, repeated as necessary, of the client's medication list. The medication list must include all prescription and over-the-counter drugs to assure that all drugs are indicated and to identify any potential problems including, but not limited to:

(i) ineffective drug therapy;

(ii) significant side effects;

(iii) significant drug interactions;

(iv) significant drug and food interactions;

(v) duplicate drug therapy; and

(vi) noncompliance with drug therapy; and

(C) a system of measures that captures significant outcomes that are essential to optimal hospice care, that are used in the care planning and coordination of services, and that are an essential part of the hospice's quality assessment and performance improvement program. The measures include, but are not limited to:

(i) pain;

(ii) nutritional status;

(iii) continence;

(iv) respiratory comfort;

(v) infections;

(vi) skin integrity;

(vii) level of consciousness;

(viii) anxiety;

(ix) depression;

(x) client emotional well being and satisfaction, including anxiety and depression;

(xi) spiritual well being;

(xii) social well being;

(xiii) family knowledge and understanding; and

(xiv) client and family satisfaction.

(3) The comprehensive health assessment must be updated and revised:

(A) as frequently as the condition of the client requires, as determined by:

(i) changes in the client's physical, social, emotional or spiritual status;

(ii) family environment; or

(iii) suboptimal response to care, treatments or therapies; and

(B) within 24 hours of the client's return home from an inpatient stay.

(i) A written plan of care must be established and maintained for each client admitted to the hospice program, and the care provided to a client must be in accordance with the plan. The plan of care must specify the care and services necessary to meet the client- specific needs identified in the comprehensive health assessment described in subsection (h) of this section, include all client care orders, reflect planned interventions for problems identified, and ensure that care and services are appropriate to the severity level of each client's and the client's family's specific needs.

(1) The plan must be established by the attending physician, the medical director or physician designee, and interdisciplinary team prior to providing care.

(2) The plan must be reviewed and updated as necessary, at intervals specified in the plan, by the attending physician, the medical director or physician designee and interdisciplinary team. These reviews must be documented. An updated plan must include information from the client's comprehensive health assessment and information concerning the client's progress toward outcomes as specified in the plan.

(3) The plan must include:

(A) a comprehensive health assessment of the client's needs and identification of the services including the management of pain and symptom relief. The plan must state in detail the scope and frequency of services that are needed to meet the client's and family's needs;

(B) interventions to facilitate the management of pain and symptoms;

(C) frequency and mix of services necessary to meet the client and family specific needs identified in the comprehensive health assessment;

(D) measurable outcomes that the hospice anticipates will occur as a result of implementing and coordinating the plan of care;

(E) drugs and treatments necessary to meet the needs of the patient as identified in the health assessment;

(F) medical supplies and appliances necessary to meet the needs of the client identified in the health assessment; and

(G) client and family understanding, agreement, and involvement with the plan as desired.

(j) The interdisciplinary team may reassess the client for an appropriate level of care, as long as the reassessment does not reduce core services.

(k) The hospice must inform the client of the availability of short-term inpatient care for pain control, management, and respite purposes and the names of the facilities with which the agency has a contract agreement.

(l) The hospice must document reasonable efforts to arrange for visits of clergy and other members of spiritual and religious organizations in the community to clients who request such visits and must advise all clients of this opportunity.

(m) The hospice must ensure that substantially all the core services described in subsections (n)-(q) of this section are routinely provided directly by hospice employees. The hospice may use contracted staff if necessary to supplement its employees in order to meet the needs of clients during periods of peak client loads or under extraordinary circumstances. If contracting is used, the hospice must maintain professional, financial, and administrative responsibility for the services and assure that the qualifications of staff and services provided meet the requirements specified in subsections (n)-(q) of this section.

(n) The hospice must provide nursing care and services by or under the supervision of a registered nurse.

(1) Nursing services must be directed and staffed to assure that the nursing needs of the clients are met.

(2) Client care responsibilities of nursing personnel must be specified.

(3) Services must be provided in accordance with recognized standards of practice.

(o) Medical social services must be provided by a social worker with a bachelor's degree in social work from an accredited college or university and must be under the direction of a physician.

(p) In addition to palliation and management of terminal illness and related conditions, hospice physicians, including physician member(s) of the interdisciplinary team, must meet the general medical needs of the clients to the extent that these needs are not met by the attending physician. The hospice physician may meet these requirements either by directly providing the services or through coordination with the attending physician. If the attending physician is unavailable, the hospice physician is responsible for the care of the client.

(q) Counseling services must be available to both the client and the family. Counseling includes dietary, spiritual, and any other counseling services for the client and family provided while the client is enrolled in the hospice program as well as bereavement counseling provided after the client's death.

(1) Bereavement counseling service must be available to the family.

(A) There must be an organized program for the provision of bereavement services under the supervision of the interdisciplinary team, a social worker, a mental health professional, a counselor, or other person with documented evidence of training and experience in dealing with bereavement and structured training in bereavement counseling. Persons providing bereavement counseling must have documented evidence of training in personnel folders.

(B) The plan of care for these services must reflect family needs, as well as a clear delineation of services to be provided and the frequency of service delivery. Services must be provided up to one year following the death of the client.

(2) Dietary counseling must be planned by a registered or licensed dietitian, a person who is eligible for registration by the American Dietetic Association, or an individual who has documented equivalency in education or training. Dietary counseling must meet specific client needs as described in the client's plan of care. Although a dietitian need not be a full-time employee, there must be a record of this individual's credentials on file in the hospice. Dietary counseling must be supervised by a registered or licensed dietitian or a registered nurse.

(3) Spiritual counseling must include notice to clients as to the availability of clergy as required under subsection (l) of this section. Spiritual counseling may be conducted by clergy or other members of a spiritual and religious organization of the client's choice.

(4) Counseling may be provided by other members of the interdisciplinary team as well as by other professionals qualified by license or education to perform the type of counseling provided as determined by the hospice. Counseling, other than bereavement, dietary, or spiritual must be provided by persons qualified by license or education to perform the type of counseling to be provided in accordance with the client's plan of care. The counseling requirements do not preclude other members of the interdisciplinary team or other professionals from serving in the capacity of counselor. Nonprofessional volunteers may be used for listening and social interaction with clients.

(r) The hospice must ensure that the services described in subsections (s)-(v) of this section are provided directly by hospice employees or under arrangements made by the hospice as specified in subsection (f) of this section. The hospice must maintain a system of communication and integration of services, whether provided directly or under arrangement, that ensures the identification of client needs and the ongoing liaison of all disciplines providing care.

(s) Physical therapy services, occupational therapy services, and speech-language pathology services must be available, and when provided, must be offered in a manner consistent with accepted standards of practice.

(t) Home health aide and homemaker services must be available and adequate in frequency to meet the needs of the clients. A home health aide must meet the training and competency evaluation requirements or the competency evaluation requirements as specified in §97.701(d)-(f) of this title (relating to Home Health Aides).

(1) A registered nurse must visit the residence site no less frequently than every two weeks when aide services are being provided, and the visit must include an assessment of the aide services. The aide need not be present at each supervisory visit.

(2) Written instructions for client care must be prepared by a registered nurse.

(u) Medical supplies and appliances, including medications, must be provided as needed for the palliation and management of the terminal illness and related conditions.

(1) All medications must be administered in accordance with accepted standards of practice.

(2) The hospice must have and enforce a policy for the disposal of controlled medications maintained in the client's residence when those medications are no longer needed by the client.

(3) Medications must be administered only by the following individuals:

(A) a licensed nurse or physician;

(B) a permitted home health medication aide;

(C) the client if his or her attending physician has approved; or

(D) another individual acting in accordance with applicable federal and state laws, or as specified in the rules adopted by the Board of Nurse Examiners at 22 TAC Chapter 218 (Delegation of Selected Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel).

(4) The persons who are authorized to administer medications must be specified in the client's plan of care.

(v) Inpatient care must be available for pain control, symptom management, and respite purposes.

(1) Inpatient care must be provided by a licensed freestanding hospice or a hospital or nursing facility that meets the requirements specified in subsection (w)(1) and (5) of this section.

(2) A hospice must develop, implement, maintain and evaluate an ongoing, comprehensive integrated self assessment of the quality and appropriateness of care provided, including inpatient care, home care, and care provided under arrangement. The findings must be documented and used by the hospice to correct identified problems and to revise hospice policies if necessary. Corrective action must be taken and tracked to ensure that improvements are sustained over time.

(A) The hospice's quality assessment and performance improvement program must include, but not be limited to, the use of objective measures to demonstrate improved performance with regard to:

(i) the system of measures that the hospice uses to determine if individual and aggregate outcomes are achieved compared to a previous time period;

(ii) current clinical practice guidelines and professional practice standards applicable to hospice care;

(iii) utilization data, as appropriate. This includes data, such as numbers of staff, types of visits, and inpatient care; and

(iv) effectiveness and safety of services. This includes services such as parenteral therapy or infusion controlling devices, if provided; competency of clinical staff; promptness of service delivery; and appropriateness of responses to client and family problems.

(B) The hospice must set priorities for performance improvement, considering prevalence and severity of identified problems and giving priority to improvement activities that affect clinical outcomes. The hospice must immediately correct identified problems that directly or potentially threaten the care and safety of clients.

(w) A freestanding hospice that provides inpatient care directly must comply with the following standards in addition to the standards in subsections (a)-(v) of this section.

(1) A freestanding hospice that provides inpatient care directly must have on-site 24-hour nursing service provided by registered nurses and licensed vocational nurses.

(A) The facility must provide 24-hour nursing services that are sufficient to meet total nursing needs and which are in accordance with the client's plan of care. Each client must receive treatments, medications, and diet as prescribed, and must be kept comfortable, clean, well groomed, and protected from accident, injury, and infection.

(B) Each shift must include a registered nurse that provides and supervises direct client care.

(2) The hospice must have a written plan, periodically rehearsed with staff, with procedures to be followed in the event of an internal or external disaster and for the care of casualties (clients and personnel) arising from such disasters.

(3) The hospice must meet all federal, state, and local laws, regulations, and codes pertaining to health and safety, such as provisions regulating the following:

(A) construction, maintenance, and equipment for the hospice;

(B) sanitation;

(C) communicable and reportable diseases; and

(D) post-mortem procedures.

(4) Except as provided in this subsection, the hospice must meet National Fire Protection Association 101, Code for Safety to Life from Fire in Buildings and Structures, 1994 Edition (NFPA 101), Chapter 12 (concerning new health care occupancies) and Chapter 13 (concerning existing health care occupancies), published by the National Fire Protection Association (NFPA). All documents published by the NFPA as referenced in this subsection may be obtained by writing the National Fire Protection Association, Post Office Box 9101, Batterymarch Park, Quincy, Massachusetts 02169, or calling 1-800-344-3555.

(A) The Texas Department of Human Services (DHS) recognizes the Centers for Medicare & Medicaid Services (CMS) waiver of specific provisions of the NFPA 101 required by this paragraph for a certified hospice for as long as CMS honors the waiver, if the waiver would not adversely affect the health and safety of the clients and rigid application of specific provisions of the NFPA 101 would result in unreasonable hardship for the hospice. DHS may waive specific provisions of the NFPA 101 for a licensed hospice, if the waiver would not adversely affect the health and safety of the clients; and rigid application of specific provisions of the NFPA 101 would result in unreasonable hardship for the hospice.

(B) Any existing facility of two or more stories that is not of fire-resistive construction and is participating on the basis of a waiver of construction type or height, may not house blind, nonambulatory, or physically disabled clients above the street-level floor unless the facility is one of the following construction types (as defined in the NFPA 101)

(i) Type II (1,1,1)-protected noncombustible;

(ii) fully-sprinklered Type II (0,0,0)-noncombustible;

(iii) fully-sprinklered Type III (2,1,1)-protected ordinary;

(iv) fully-sprinklered Type V (1,1,1)-protected wood frame; or

(v) achieves a passing score on the Fire Safety Evaluation System (FSES) for Health Care Occupancies, National Fire Codes, Volume 10, NFPA 101A, Guide on Alternative Approaches to Life Safety, Chapter 3, 1995 Edition published by the NFPA.

(5) The hospice must be designed and equipped for the comfort and privacy of each client and family member. The hospice must provide:

(A) physical space for private client and family visiting;

(B) accommodations for family members to remain with the client throughout the night;

(C) accommodations for family privacy after a client's death;

(D) decor that is homelike in design and function; and

(E) accommodations where clients are permitted to receive visitors at any hour, including small children.

(6) Client rooms must be designed and equipped for adequate nursing care and the comfort and privacy of clients. Each client's room must:

(A) be equipped with or conveniently located near toilet and bathing facilities;

(B) be at or above grade level;

(C) contain a suitable bed for each client and other appropriate furniture;

(D) have closet space that provides security and privacy for clothing and personal belongings;

(E) contain no more than four beds;

(F) measure at least 100 square feet for a single room or 80 square feet for each client for a multiclient room; and

(G) be equipped with a device for calling the staff member on duty.

(7) For an existing building, DHS recognizes the CMS waiver for the space and occupancy requirements of paragraph (6)(E) and (F) of this subsection for a certified hospice for as long as CMS honors the waiver, if DHS finds that the requirements would result in unreasonable hardship on the hospice if strictly enforced, and the waiver serves the particular needs of the clients and does not adversely affect their health and safety. For an existing building, DHS may waive the space and occupancy requirements of paragraph (6)(E) and (F) of this subsection for a licensed hospice for as long as it is considered appropriate, if it finds that the requirements would result in unreasonable hardship on the hospice if strictly enforced and the waiver serves the particular needs of the clients and does not adversely affect their health and safety.

(8) The hospice must provide bathroom facilities. The bathroom facilities must include the following:

(A) an adequate supply of hot water at all times for client use; and

(B) plumbing fixtures with control valves that automatically regulate the temperature of the hot water used by clients.

(9) The hospice must have available at all times a quantity of linen essential for the proper care and comfort of clients. Linens must be handled, stored, processed, and transported in such a manner as to prevent the spread of infection.

(10) The hospice must make provisions for isolating clients with infectious diseases.

(11) The hospice must provide and supervise meal service and menu planning. The hospice must:

(A) serve at least three meals or their equivalent each day at regular times, with not more than 14 hours between a substantial evening meal and breakfast;

(B) procure, store, prepare, distribute, and serve all food under sanitary conditions;

(C) have a staff member trained or experienced in food management or nutrition if the staff member responsible for dietary services is not a dietitian.

(i) The person must:

(I) be a graduate of a dietetic technician or dietetic assistant training program, correspondence or classroom, approved by the American Dietetic Association; or

(II) be a graduate of a state-approved course that provided 90 or more hours of classroom instruction in food service supervision and must have experience as a supervisor in a health care institution with consultation from a dietitian; or

(III) have training and experience in food service supervision and management in a military service equivalent in content to the program in this paragraph.

(ii) The staff member is responsible for:

(I) planning menus that meet the nutritional needs of each client. The menus must follow the orders of the client's physician and, to the extent medically possible, follow the recommended dietary allowances of the Food and Nutrition Board of the National Research Council, National Academy of Sciences (Recommended Dietary Allowances, 10th ed., 1989, available from the Printing and Publications Office, National Academy of Sciences, Washington, D.C. 20418). The menus must be approved by a licensed dietitian. The hospice must use written guidelines for substitutions that are approved by the licensed dietitian; and

(II) supervising the meal preparation and meal service that is conducted to ensure that the menu plan is followed; and

(D) have the menus for those clients who require medically prescribed special diets. The menus must be planned by a dietitian who monitors the preparation and serving of meals to ensure that the client accepts the special diet.

(12) The hospice must provide appropriate methods and procedures for dispensing and administering medications. Whether medications are obtained from community or institutional pharmacists or stocked by the facility, the facility must be responsible for medications for its clients, insofar as they are covered under the program, and for ensuring that pharmaceutical services are provided in accordance with accepted professional principles and appropriate federal and state laws.

(A) The hospice must employ a licensed pharmacist or have a formal agreement with a licensed pharmacist to advise the hospice on ordering, storage, administration, disposal, and record keeping of medications.

(B) A physician must order all medications for the client.

(C) If the medication order is verbal, the physician must give it only to a licensed nurse, pharmacist, or another physician.

(D) If the medication order is verbal, the individual receiving the order must record and sign it immediately and have the prescribing physician sign it in a manner consistent with good medical practice.

(E) Medications must be administered only by one of the following individuals:

(i) a licensed nurse or physician;

(ii) a permitted home health medication aide or an employee as specified in the rules adopted by the Board of Nurse Examiners at 22 TAC Chapter 218 (Delegation of Selected Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel); or

(iii) the client if his or her attending physician has approved.

(F) The pharmaceutical service must have procedures for control and accountability of all medications throughout the facility. Medications must be dispensed in compliance with federal and state laws. Records of receipt and disposition of all controlled medications must be maintained in sufficient detail to enable an accurate reconciliation. The pharmacist must determine that medication records are in order and that an account of all controlled medications is maintained and reconciled.

(G) The labeling of medications must be based on currently accepted professional principles, and must include the appropriate accessory and cautionary instructions, as well as the expiration date when applicable.

(H) In accordance with state and federal laws, all medications must be stored in locked compartments under proper temperature controls and only authorized personnel must have access to the keys. Separately locked compartments must be provided for storage of controlled medications listed in Schedule II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 United States Code, §801 et seq. and other medications that are subject to abuse, except under single-unit package medication distribution systems in which the quantity stored is minimal and a missing dose is readily detected. An emergency medication kit must be kept readily available.

(I) Controlled medications no longer needed by the client must be disposed of in compliance with state requirements. The pharmacist and registered nurse must dispose of medications and prepare a record of the disposal.

§97.404. Standards Specific to Agencies Licensed to Provide Personal Assistance Services.

(a) In addition to meeting the standards in Subchapter C of this chapter (relating to Minimum Standards for All Home and Community Support Services Agencies), an agency holding a license with the category of personal assistance services must meet the standards of this section.

(b) Personal assistance services as defined in §97.2 of this title (relating to Definitions) may be performed by an unlicensed person who is at least 18 years of age and has demonstrated competency, when competency cannot be determined through education and experience, to perform the tasks assigned by the supervisor. An unlicensed person who is under 18 years of age, is a high school graduate or is enrolled in a vocational educational program, and has demonstrated competency to perform the tasks assigned by the supervisor, may perform personal assistance services.

(c) The following tasks may be performed under a personal assistance services category:

(1) personal care including feeding, preparing meals, transferring, toileting, ambulation and exercise, grooming, bathing, dressing, routine care of hair and skin, and assistance with medications that are normally self administered;

(2) health-related tasks that may be delegated by a registered nurse (RN) in accordance with the agency's written policy adopted, implemented and enforced to ensure compliance with the rules of the Board of Nurse Examiners for the State of Texas adopted at 22 TAC §§218.1-218.11 (Delegation of Selected Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel) except for nursing tasks that may not be delegated and nursing tasks that may not be routinely delegated;

(3) health-related tasks that are not the practice of professional nursing under the memorandum of understanding between the Texas Department of Human Services (DHS) and the Board of Nurse Examiners; and

(4) health-related tasks that are delegated by a physician under the Occupations Code, Chapter 157.

(d) The agency must ensure that when developing its operational policies, that the policies are considerate of principles of individual and family choice and control, functional need, and accessible and flexible services.

(e) In addition to the client record requirements in §97.301(a)(9) of this title (relating to Client Records), the client file must include the following:

(1) documentation of determination of services based on an on-site visit by the supervisor where services will be primarily delivered and records of supervisory visits, if applicable;

(2) individualized service plan developed, agreed upon, and signed by the client or family and the agency. The individualized service plan must include, but not be limited to the following:

(A) types of services, supplies, and equipment to be provided;

(B) locations of services;

(C) frequency and duration of services;

(D) planned date of service initiation;

(E) charges for services rendered if the charges will be paid in full or in part by the client or significant other(s), or on request; and

(F) plan of supervision;

(3) documentation that the services have been provided according to the individualized service plan;

(f) In addition to the written policies required by §97.245 of this title (relating to Staffing Policies) the agency must adopt and enforce a written policy addressing the supervision of personnel with input from the client or family on the frequency of supervision.

(1) Supervision of personnel must be in accordance with the agency's policies and applicable state laws and rules, including 22 TAC, §§218.1-218.11, concerning the delegation of selected nursing tasks by registered professional nurses to unlicensed personnel adopted by the Board of Nurse Examiners.

(2) A supervisor must be a licensed nurse or have completed two years of full-time study at an accredited college or university. An individual with a high school diploma or general equivalence diploma (GED) may substitute one year of full-time employment in a supervisory capacity in a health care facility, agency, or community-based agency for each required year of college.

(3) The client in a client managed attendant care program funded by DHS or Texas Rehabilitation Commission is not required to meet the standard in paragraph (2) of this subsection.

(g) Tube feedings and medication administration through a permanently placed gastrostomy tube (g-tube) in accordance with subsection (c)(3) of this section may be performed by an unlicensed person only after successful completion of the training and competency program and procedures described in paragraphs (1)-(5) of this subsection.

(1) The training and competency program for the performance of g-tube feedings by an unlicensed person must be taught by an RN, physician, physician assistant (PA), or qualified trainer. A qualified trainer must:

(A) have successfully completed the training and competency program described in paragraphs (2) and (3) of this subsection taught by an RN, physician, or PA;

(B) have demonstrated upon return demonstration to an RN, physician or PA the performance of the task and the ability to teach the task; and

(C) have been deemed competent by an RN, physician, or PA to train unlicensed personnel in these procedures. Documentation of competency to perform, train and teach must be maintained in the employee's or contractor's file. Competency must be evaluated and documented by an RN, physician or PA annually.

(2) The minimum training program must include:

(A) a description of the g-tube placement, including its purpose;

(B) infection control procedures and universal precautions to be utilized when performing g- tube feedings or medication administration through a g-tube;

(C) a description of conditions which must be reported to the client or the primary caregiver, or in the absence of the primary caregiver, to the agency administrator, supervisor, or the client's physician. The description of conditions must include a plan to be effected if the g-tube comes out or is not positioned correctly to ensure medical attention is provided within one hour;

(D) review of a written procedure for g-tube feeding or medication administration through a g-tube. The written procedure must be equivalent to current acceptable nursing standards of practice, including addressing the crushing of medications;

(E) conditions under which g-tube feeding or medication administration must not be performed; and

(F) demonstration of a g-tube feeding and medication administration to a client. If the trainee will become a qualified trainer, the demonstration must be done by the RN, PA, or physician. If the trainee will not become a qualified trainer, the demonstration may be done by an RN, PA, physician, or qualified trainer.

(3) The minimum competency evaluation must be documented and maintained in the employee's file and must include:

(A) a score of 100% on a written multiple choice test that consists of situational questions to include the criteria in paragraph (2)(A)-(E) of this subsection and evaluate the trainee's judgment and understanding of the essential skills, risks, and possible complications of a g- tube feeding or medication administration through a g-tube;

(B) a skills checklist demonstrating that the trainee has successfully completed the necessary skills for a g-tube feeding and medication administration via g-tube, and if the trainee will become a qualified trainer, the skills checklist must also demonstrate the ability to teach another person to perform the task. The skills checklist must be completed by an RN, physician, or PA if the trainee will become a qualified trainer. The skills checklist for a trainee who will not become a qualified trainer may be completed by an RN, physician, PA, or qualified trainer; and

(C) documentation of an accurate demonstration of the g-tube feeding and medication administration performed by the trainee as required by paragraph (2)(F) of this subsection. If the trainee will become a qualified trainer, documentation of competency to teach this task must be maintained in the file of the qualified trainer. The person responsible for the training of the trainee must document the successful demonstration of the g-tube feeding and medication administration via g-tube by the trainee and the trainee's competency to perform this task in the trainee's file.

(4) The client or primary caregiver must provide information on the client's g-tube feeding or medication administration to the agency supervisor. If the client is not capable of directing his or her own care, the client's primary caregiver must be present to instruct and orient the supervisor regarding the client's g-tube feeding and medication regime. A copy of the current regime including unique conditions specific to the client must be placed in the client's file by the agency supervisor and provided to the respite caregiver. The respite caregiver must be oriented by the client, the client's primary caregiver, or the agency supervisor. The supervisor of the delivery of these services must have successfully completed a training and competency program outlined in paragraphs (2) and (3) of this subsection or be a qualified trainer.

(5) Legend medications that are to be administered must be in a legally labeled container from a pharmacy that contains the name of the client. Instructions for dosages according to weight or age for over the counter drugs commonly given the client must be furnished by the primary caregiver to the respite caregiver performing the tube feeding or medication administration.

§97.405. Standards Specific to Agencies Licensed to Provide Home Dialysis Services.

(a) License designation. An agency may not provide peritoneal dialysis or hemodialysis services in a client's residence, independent living environment, or other appropriate location unless the agency holds a license to provide licensed home health or licensed and certified home health services and designated to provide home dialysis services. In order to receive a home dialysis designation, the agency must meet the licensing standards specified in this section and the standards for home health services in accordance with Subchapter C of this title (relating to Minimum Standards for All Home and Community Support Services Agencies) and §97.401 of this title (relating to Standards Specific to Licensed Home Health Services) except for §97.401(b)(2)(A) and (B) of this title (relating to Standards Specific to Licensed Home Health Services). If there is a conflict between the standards specified in this section and those specified in Subchapter C of this title (relating to Minimum Standards for All Home and Community Support Services Agencies) §97.401 of this title (relating to Standards Specific to Licensed Home Health Services), the standards specified in this section will apply to the home dialysis services.

(b) Governing body. An agency must have a governing body. The governing body must appoint a medical director and the physicians who are on the agency's medical staff. The governing body must annually approve the medical staff policies and procedures. The governing body on a biannual basis must review and consider for approval continuing privileges of the agency's medical staff. The minutes from the governing body of the agency must be on file in the agency office.

(c) Qualifications and responsibilities of the medical director.

(1) Qualifications. The medical director must be a physician licensed in the State of Texas who:

(A) is eligible for certification or is certified in nephrology or pediatric nephrology by a professional board; or

(B) during the five-year period prior to September 1, 1996, served at least 12 months as director of a dialysis facility or program.

(2) Responsibilities. The medical director must:

(A) participate in the selection of a suitable treatment modality for all clients;

(B) assure adequate training of nurses in dialysis techniques;

(C) assure adequate monitoring of the client and the dialysis process; and

(D) assure the development and availability of a client care policy and procedures manual and its implementation.

(d) Personnel files. An agency must have individual personnel files on all physicians, including the medical director. The file must include the following:

(1) a curriculum vitae which documents undergraduate, medical school, and all pertinent post graduate training; and

(2) evidence of current licensure, and evidence of current United States Drug Enforcement Administration certification, Texas Department of Public Safety registration, and the board eligibility or certification, or the experience or training described in subsection (c)(1) of this section.

(e) Provision of services. An agency that provides home staff-assisted dialysis must, at a minimum, provide nursing services, nutritional counseling, and medical social service. These services must be provided as necessary and as appropriate at the client's home, by telephone, or by a client's visit to a licensed ESRD facility in accordance with this subsection. The use of dialysis technicians in home dialysis is prohibited.

(1) Nursing services.

(A) A registered nurse (RN), licensed by the State of Texas, who has at least 18 months experience in hemodialysis obtained within the last 24 months and has successfully completed the orientation and skills education described in subsection (f) of this section, must be available whenever dialysis treatments are in progress in a client's home. The agency administrator must designate a qualified alternate to this registered nurse.

(B) Dialysis services must be supervised by an RN who meets the qualifications for a supervising nurse as set out in §97.244(b)(3) of this title (relating to Staffing Qualifications).

(C) Dialysis services must be provided by a qualified licensed nurse who:

(i) is licensed as a registered or licensed vocational nurse by the State of Texas;

(ii) has at least 18 months experience in hemodialysis obtained within the last 24 months; and

(iii) has successfully completed the orientation and skills education described in subsection (f) of this section.

(2) Nutritional counseling. A dietitian who meets the qualifications of this paragraph must be employed by or under contract with the agency to provide services. A qualified dietitian must meet the definition of dietitian in §97.2 of this title (relating to Definitions) and have at least one year of experience in clinical nutrition after obtaining eligibility for registration by the American Dietetic Association, Commission on Dietetic Registration.

(3) Medical social services. A social worker who meets the qualifications established in this paragraph must be employed by or be under contract with the agency to provide services. A qualified social worker is a person who:

(A) is currently licensed under the laws of the State of Texas as a social worker and has a master's degree in social work from a graduate school of social work accredited by the Council on Social Work Education; or

(B) has served for at least two years as a social worker, one year of which was in a dialysis facility or program prior to September 1, 1976, and has established a consultative relationship with a licensed master social worker.

(f) Orientation, skills education, and evaluation.

(1) All personnel providing dialysis in the home must receive orientation and skills education and demonstrate knowledge of the following:

(A) anatomy and physiology of the normal kidney;

(B) fluid, electrolyte, and acid-base balance;

(C) pathophysiology of renal disease;

(D) acceptable laboratory values for the client with renal disease;

(E) theoretical aspects of dialysis;

(F) vascular access and maintenance of blood flow;

(G) technical aspects of dialysis;

(H) peritoneal dialysis catheter, testing for peritoneal membrane equilibration, and peritoneal dialysis adequacy clearance, if applicable;

(I) the monitoring of clients during treatment, beginning with treatment initiation through termination;

(J) the recognition of dialysis complications, emergency conditions, and institution of the appropriate corrective action. This includes training agency personnel in emergency procedures and how to use emergency equipment;

(K) psychological, social, financial, and physical complications of chronic dialysis;

(L) care of the client with chronic renal failure;

(M) dietary modifications and medications for the uremic client;

(N) alternative forms of treatment for ESRD;

(O) the role of renal health team members (physician, nurse, social worker, and dietitian);

(P) performance of laboratory tests (hematocrit and blood glucose);

(Q) the theory of blood products and blood administration; and

(R) water treatment to include:

(i) standards for treatment of water used for dialysis as described in §3.2.1 (Hemodialysis Systems) and §3.2.2 (Maximum Level of Chemical Contaminants) of the American National Standard, Hemodialysis Systems, March 1992 Edition, published by the Association for the Advancement of Medical Instrumentation (AAMI), 3330 Washington Boulevard, Suite 500, Arlington, Virginia 22201. Copies of the standards are indexed and filed in the Texas Department of Human Services, 701 W. 51st Street, Austin, Texas 78751-2321, and are available for public inspection during regular working hours;

(ii) systems and devices;

(iii) monitoring; and

(iv) risks to clients of unsafe water.

(2) The requirements for the orientation and skills education period for licensed nurses are as follows.

(A) The agency must develop an 80-hour written orientation program that includes classroom theory and direct observation of the licensed nurse performing procedures on a client in the home.

(i) The orientation program must be provided by a registered nurse qualified under subsection (e)(1) of this section to supervise the provision of dialysis services by a licensed nurse.

(ii) The licensed nurse must pass a written skills examination or competency evaluation at the conclusion of the orientation program and prior to the time the licensed nurse delivers independent client care.

(B) The licensed nurse must complete the required classroom component as described in paragraph (1)(A)-(E), (K)-(O), (Q) and (R) of this subsection and satisfactorily demonstrate the skills described in paragraph (1)(F)-(J) and (P) of this subsection. The orientation program may be waived by successful completion of the written examination as described in subparagraph (A)(ii) of this paragraph.

(C) The supervising nurse or qualified designee must complete an orientation competency skills checklist for each licensed nurse to reflect the progression of learned skills, as described in subsection (f)(1) of this section.

(D) Prior to the delivery of independent client care, the supervising nurse or qualified designee must directly supervise the licensed nurse for a minimum of three dialysis treatments and ensure satisfactory performance. Dependent upon the trainee's experience and accomplishments on the skills checklist, additional supervised dialysis treatments may be required.

(E) Continuing education for employees must be provided quarterly.

(F) Performance evaluations must be done annually.

(G) The supervising nurse or qualified designee must provide direct supervision to the licensed nurse providing dialysis services monthly or more often if necessary. Direct supervision means that the supervising nurse is on the premises but not necessarily immediately present where dialysis services are being provided.

(g) Hospital transfer procedure. An agency must establish an effective procedure for the immediate transfer to a local Medicare-certified hospital for clients requiring emergency medical care. The agency must have a written transfer agreement with such a hospital, or all physician members of the agency's medical staff must have admitting privileges at such a hospital.

(h) Backup dialysis services. An agency that supplies home staff-assisted dialysis must have an agreement with a licensed end stage renal disease (ESRD) facility to provide backup outpatient dialysis services.

(i) Coordination of medical and other information. An agency must provide for the exchange of medical and other information necessary or useful in the care and treatment of clients transferred between treating facilities. This provision must also include the transfer of the client care plan, hepatitis B status, and long-term program.

(j) Transplant recipient registry program. An agency must ensure that the names of clients awaiting cadaveric donor transplantation are entered in a recipient registry program.

(k) Testing for hepatitis B. An agency must conduct routine testing of home dialysis clients and agency employees to ensure detection of hepatitis B in employees and clients.

(1) An agency must offer hepatitis B vaccination to previously unvaccinated, susceptible new staff members in accordance with 29 Code of Federal Regulations, §1910.1030(f)(1)-(2) (Bloodborne Pathogens).

(A) Staff vaccination records must be maintained in each staff member's personnel file.

(B) New staff members providing home dialysis care must be screened for hepatitis B surface antigen (HBsAg) and the results reviewed prior to the staff providing client care, unless the new staff member provides the agency documentation of positive serologic response to hepatitis B vaccine.

(C) An agency must establish, implement, and enforce a policy for repeated serologic screening of staff. The repeated serologic screening must be based on each staff member's HBsAg/antibody to HBsAg (anti-HBs), and must be congruent with Appendices i and ii of the National Surveillance of Dialysis Associated Disease in the United States, 1993, published by the United States Department of Health and Human Services (USDHHS). This document may be obtained by writing the Home and Community Support Services Program, Texas Department of Human Services, 701 W. 51st Street, Austin, Texas 78751-2321 or calling 438-3011 or writing the United States Department of Health and Human Services at the Public Health Service, Centers for Disease Control and Prevention, National Center for Infectious Diseases, Hospital Infection Program, Mail Stop C01, Atlanta, Georgia 30333, or calling 404-639-2318.

(2) With the advice and consent of a client's nephrologist or attending physician, an agency must make the hepatitis B vaccine available to a client who is susceptible to hepatitis B, provided that the client has coverage or is willing to pay for vaccination.

(A) An agency must make available to clients literature describing the risks and benefits of the hepatitis B vaccination.

(B) Candidates for home dialysis must be screened for HBsAg within one month before or at the time of admission to the agency.

(C) Repeated serologic screening must be based on the antigen or antibody status of the client.

(D) Monthly screening for HBsAg is required for clients whose previous test results are negative for HBsAg.

(E) Screening of HbsAg-positive or anti-HbsAg-positive clients may be performed on a less frequent basis, provided that the agency's policy on this subject remains congruent with Appendices i and ii of the National Surveillance of Dialysis Associated Diseases in the United States, 1993, published by the USDHHS.

(l) CPR certification. All direct client care employees must have current CPR certification.

(m) Initial admission assessment. Assessment of the client's residence must be made to ensure a safe physical environment for the performance of dialysis. The initial admission assessment must be performed by a qualified registered nurse who meets the qualifications under subsection (e)(1)(A) of this section.

(n) Client long-term program. The agency must develop a long-term program for each client admitted to home dialysis. Criteria must be defined in writing and must provide guidance to the agency in the selection of clients suitable for home staff-assisted dialysis and in noting changes in a client's condition that would require discharge from the program. For the purposes of this subsection, Long-term program means the written documentation of the selection of a suitable treatment modality and dialysis setting which has been selected by the client and the interdisciplinary team.

(o) Client history and physical. The agency must ensure that the history and physical is conducted upon the client's admission or no

more than six months prior to the date of admission, then annually after the date of admission.

(p) Physician orders. If home staff-assisted dialysis is selected, the physician must prepare orders outlining specifics of prescribed treatment.

(1) If these physician's orders are received verbally, they must be confirmed in writing within a reasonable time frame. An agency must adopt and enforce a policy on the time frame for the countersignature of a physician's verbal orders. Medical orders for home staff-assisted dialysis must be revised as necessary but reviewed and updated at least every six months.

(2) The initial orders for home staff-assisted dialysis must be received prior to the first treatment and must cover all pertinent diagnoses, including mental status, prognosis, functional limitations, activities permitted, nutritional requirements, medications and treatments, and any safety measures to protect against injury. Orders for home staff- assisted dialysis must include frequency and length of treatment, target weight, type of dialyzer, dialysate, dialysate flow rate, heparin dosage, and blood flow rate, and must specify the level of preparation required for the caregiver, such as a licensed vocational nurse or registered nurse.

(q) Client care plan. The client care plan must be developed after consultation with the client and the client's family by the interdisciplinary team. The interdisciplinary team must include the physician, the registered nurse, the dietitian, and the qualified social worker responsible for planning the care delivered to the home staff-assisted dialysis patient.

(1) The initial client care plan must be completed by the interdisciplinary team within ten calendar days after the first home dialysis treatment.

(2) The client care plan must implement the medical orders and must include services to be rendered, such as the identification of problems, methods of intervention, and the assignment of health care personnel.

(3) The client care plan must be in writing, be personalized for the individual, and reflect the ongoing medical, psychological, social, nutritional, and functional needs of the client, including treatment goals.

(4) The client care plan must include written evidence of coordination with other service providers, such as dialysis facilities or transportation providers, as needed to assure the provision of safe care.

(5) The client care plan must include written evidence of the client's or client's legal representative's input and participation, unless they refuse to participate. At a minimum, the client care plan must demonstrate that the content was shared with the client or the client's legal representative.

(6) For non-stabilized clients, where there is a change in modality, unacceptable laboratory work, uncontrolled weight changes, infections, or a change in family status, the client care plan must be reviewed at least monthly by the interdisciplinary team. Evidence of the review of the client care plan with the client and the interdisciplinary team to evaluate the client's progress or lack of progress toward the goals of the care plan, and interventions taken when progress toward stabilization or the goals are not achieved, must be documented and included in the client record.

(7) For a stable client, the client care plan must be reviewed and updated as indicated by any change in the client's medical, nutritional, or psychosocial condition or at least every six months. The long-term program must be revised as needed and reviewed annually. Evidence of the review of the client care plan with the client and the interdisciplinary team to evaluate the client's progress or lack of progress toward the goals of the care plan, and interventions taken when the goals are not achieved, must be documented and included in the client record.

(r) Medication administration. Medications must be administered only by licensed personnel.

(s) Client records. In addition to the applicable information described in §97.301(a)(9) of this title (relating to Client Records), records of home staff assisted dialysis clients must include the following:

(1) a medical history and physical;

(2) clinical progress notes by the physician, qualified licensed nurse, qualified dietitian, and qualified social worker;

(3) dialysis treatment records;

(4) laboratory reports;

(5) a client care plan;

(6) a long-term program; and

(7) documentation of supervisory visits.

(t) Water treatment.

(1) Water used for dialysis purposes must be analyzed for chemical contaminants every six months. Additional chemical analysis must be conducted if test results exceed the maximum levels of chemical contaminants listed in §3.2.2 (Maximum Level of Chemical Contaminants) of the American National Standards for Hemodialysis Systems, March 1992 Edition, published by the AAMI. Copies of the standards are indexed and filed in the Texas Department of Human Services, 701 W. 51st Street, Austin, Texas 78751- 2321, and are available for public inspection during regular working hours.

(2) Water used for dialysis must be treated as necessary to maintain a continuous water supply that is biologically and chemically compatible with acceptable dialysis techniques.

(3) Water used to prepare dialysate must meet the requirements set forth in §3.2.1 (Hemodialysis Systems) and §3.2.2 (Maximum Level of Chemical Contaminants), March 1992 Edition, published by the AAMI. Copies of the standards are indexed and filed in the Texas Department of Human Services, 701 W. 51st Street, Austin, Texas 78751- 2321, and are available for public inspection during regular working hours.

(4) Records of test results and equipment maintenance must be maintained at the agency.

(u) Equipment testing. An agency must adopt and enforce a policy to describe how the nurse will check the machine for conductivity, temperature, and pH prior to treatment, and describe the equipment required for these tests. The equipment must be available for use prior to each treatment. This policy must reflect current standards.

(v) Preventive maintenance for equipment. An agency must develop, and enforce a written preventive maintenance program to ensure client care related equipment receives electrical safety inspections, if appropriate, and maintenance at least annually or more frequently if recommended by the manufacturer. The preventive maintenance may be provided by agency or contract staff qualified by training or experience in the maintenance of dialysis equipment.

(1) All equipment used by a client in home dialysis must be maintained free of defects, which could be a potential hazard to clients, the client's family or agency personnel.

(A) Agency staff must be able to identify malfunctioning equipment and report such equipment to the appropriate agency staff. Malfunctioning equipment must be immediately removed from use.

(B) Written evidence of all preventive maintenance and equipment repairs must be maintained.

(C) After repairs or alterations are made to any equipment, the equipment must be thoroughly tested for proper operation before returning to service.

(D) An agency must comply with the federal Food, Drug, and Cosmetic Act, 21 United States Code (USC), §360i(b), concerning reporting when a medical device as defined in 21 USC, §321(h) has or may have caused or contributed to the injury or death of an agency client.

(2) In the event that the water used for dialysis purposes or home dialysis equipment is found not to meet safe operating parameters, and corrections cannot be effected to ensure safe care promptly, the client must be transferred to a licensed hospital (if inpatient care is required) or licensed ESRD facility until such time as the water or equipment is found to be operating within safe parameters.

(w) Reuse or reprocessing of medical devices. Reuse or reprocessing of disposable medical devices, including but not limited to, dialyzers, end-caps, and blood lines must be in accordance with this subsection.

(1) An agency's reuse practice must comply with the American National Standard, Reuse of Hemodialyzers, 1993 Edition, published by the AAMI. A facility must adopt and enforce a policy for dialyzer reuse criteria (including any agency-set number of reuses allowed) which is included in client education materials.

(2) A transducer protector must be replaced when wetted during a dialysis treatment and must be used for one treatment only.

(3) Arterial lines may be reused only when the arterial lines are labeled to allow for reuse by the manufacturer and the manufacturer-established protocols for the specific line have been approved by the United States Food and Drug Administration.

(4) An agency must consider and address the health and safety of clients sensitive to disinfectant solution residuals.

(5) An agency must provide each client and the client's family or legal representative with information regarding the reuse practices of the agency, the opportunity to tour the reuse facility used by the agency, and the opportunity to have questions answered.

(6) An agency practicing reuse of dialyzers must:

(A) ensure that dialyzers are reprocessed via automated reprocessing equipment in a licensed ESRD facility or a centralized reprocessing facility;

(B) maintain responsibility and accountability for the entire reuse process;

(C) adopt and enforce policies to ensure that the transfer and transport of used and reprocessed dialyzers to and from the client's home does not increase contamination of the dialyzers, staff, or the environment; and

(D) ensure that DHS staff has access to the reprocessing facility as part of an agency inspection.

(x) Laboratory services. Provision of laboratory services must be as follows.

(1) All laboratory services ordered for the client by a physician must be performed by a laboratory which meets the Clinical Laboratory Improvement Amendments of 1988, 42 United States Code, §263a, Certification of Laboratories (CLIA 1988) and in accordance with a written arrangement or agreement with the agency. CLIA 1988 applies to all agencies with laboratories that examine human specimens for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings.

(2) Copies of all laboratory reports must be maintained in the client's medical record.

(3) Hematocrit and blood glucose tests may be performed at the client's home in accordance with §97.284 of this title (relating to Laboratory Services). Results of these tests must be recorded in the client's medical record and signed by the qualified licensed nurse providing the treatment. Maintenance, calibration, and quality control studies must be performed according to the equipment manufacturer's suggestions, and the results must be maintained at the agency.

(4) Blood and blood products must only be administered to dialysis clients in their homes by a licensed nurse or physician.

(y) Home dialysis supplies. Supplies for home dialysis must meet the following requirements.

(1) All drugs, biologicals, and legend medical devices must be obtained for each client pursuant to a physician's prescription in accordance with applicable rules of the Texas Board of Pharmacy.

(2) In conjunction with the client's attending physician, the agency must ensure that there are sufficient supplies maintained in the client's home to perform the scheduled dialysis treatments and to provide a reasonable number of backup items for replacements, if needed, due to breakage, contamination, or defective products. All dialysis supplies, including medications, must be delivered directly to the client's home by a vendor of such products. However, agency personnel may transport prescription items from a vendor's place of business to the client's home for the client's convenience, so long as the item is properly labeled with the client's name and direction for use. Agency personnel may transport medical devices for reuse.

(z) Emergency procedures. The agency must adopt and enforce policies and procedures for emergencies addressing fire, natural disaster, and medical emergencies.

(1) Procedures must be individualized for each client to include the appropriate evacuation from the home and emergency telephone numbers. Emergency telephone numbers must be posted at each client's home and must include 911 if available, the number of the physician, the ambulance, the qualified registered nurse on call for home dialysis, and any other phone number deemed as an emergency number.

(2) The agency must ensure that the client and the client's family know the agency's procedures for emergencies.

(3) The agency must ensure that the client and the client's family know the procedure for disconnecting the dialysis equipment.

(4) The agency must ensure that the client and the client's family know emergency call procedures.

(5) A working telephone must be available during the dialysis procedure.

(6) Depending on the kinds of medications administered, an agency must have available emergency drugs as specified by the medical director.

(7) In the event of a medical emergency requiring transport to a hospital for care, the agency must assure the following:

(A) the receiving hospital is given advance notice of the client's arrival;

(B) the receiving hospital is given a description of the client's health status; and

(C) the selection of personnel, vehicle, and equipment are appropriate to effect a safe transfer.

§97.406. Standards for Agencies Providing Psychoactive Services.

An agency that provides skilled nursing psychoactive treatments must comply with the requirements of this section.

(1) An agency must adopt and enforce a written policy relating to the provision of psychoactive treatments consistent with this section.

(2) Skilled nursing psychoactive treatments must be under the direction of a physician. Psychoactive treatments may only be provided by a physician or a registered nurse.

(3) A registered nurse providing skilled nursing psychoactive treatments must have one of the following qualifications:

(A) a master's degree in psychiatric or mental health nursing;

(B) a bachelor's degree in nursing with one year of full-time experience in an active treatment unit in a mental health facility or outpatient clinic;

(C) a diploma or associate degree with two years of full-time experience in an active treatment unit in a mental health facility or outpatient clinic; or

(D) for a registered nurse for Medicare certified agencies, as allowed by the fiscal intermediary for Texas contracting with the United States Department of Health and Human Services (USDHHS) Centers for Medicare & Medicaid Services (CMS).

(4) An agency must have written documentation that a registered nurse providing skilled nursing psychoactive treatments is qualified under paragraph (3) of this subsection.

(5) The initial health assessment of a client receiving skilled nursing psychoactive treatments must include:

(A) mental status including psychological and behavioral status;

(B) sensory and motor function;

(C) cranial nerve function;

(D) language function; and

(E) any other criteria established by an agency's policy.

§97.407. Standards for Agencies Providing Home Intravenous Therapy.

An agency furnishing intravenous therapy directly or under arrangement must comply with the following standards of care.

(1) A physician's order must be written specifically for intravenous therapy.

(2) Intravenous therapy must be provided by a licensed nurse.

(3) To insure that prescribed care is administered safely, a licensed nurse must have the knowledge and documented competency to interpret and implement the written order.

(4) Written policies and procedures regarding the agency's provision of intravenous therapy must include, but are not limited to, addressing initiation, medication administration, monitoring, and discontinuation. Responsibilities of the licensed nurse must be clearly delineated in written policies and procedures.

(5) A registered nurse must be available 24 hours a day.

(6) The client and caregiver must be assessed for the ability to safely administer the prescribed intravenous therapy as per agency written criteria.

(7) If the client or caregiver is willing and able to safely administer the prescribed intravenous therapy, the agency must offer to teach the client or caregiver such administration. The teaching process is based on the client and caregiver needs and may include written instructions, verbal explanations, demonstrations, evaluation and documentation of competency, proficiency in performing intravenous therapy, scope of physical activities, and safe disposal of equipment.

(8) Actions must be implemented prior to and during all intravenous therapy to minimize the risk of anaphylaxis or other adverse reactions as stated in the agency's written policy.

(9) An ongoing assessment of client and caregiver compliance in performing intravenous therapy related procedures must be done at periodic intervals.

(10) Care coordination must be provided in order to assure continuity of care.

(11) The client and caregiver must be provided with 24-hour access to appropriate health care professionals employed by or having a contract with the agency.

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 October 26, 2001.

TRD-200106562
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: January 1, 2002
Proposal publication date: April 27, 2001
For further information, please call: (512) 438-3734

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SUBCHAPTER E. SURVEYS

40 TAC §97.501, §97.502

The new sections are adopted under the Health and Safety Code, Chapter 142, which provides the department with the authority to adopt rules for the licensing and regulation of home and community support services agencies.

The new sections implement the Health and Safety Code, §§142.001- 142.030.

§97.501. Survey Procedures.

(a) An on-site survey will determine if the requirements of the statute and the rules are being met.

(1) The Texas Department of Human Services (DHS) or its authorized representative(s) (surveyor) may enter the premises of a license applicant or license holder at reasonable times during business

hours to conduct an on-site survey incidental to the issuance of a license, and at other times as it considers necessary to ensure compliance with the statute or the rules adopted under the statute, an order of the commissioner of human services (commissioner) or the commissioner's designee, a court order granting injunctive relief, or other enforcement action. A standard-by-standard evaluation is required before the first renewal license is issued unless waived in accordance with §97.13(b)(8) of this title (relating to Change of Ownership).

(2) At the discretion of DHS, an on-site survey may be conducted for renewal of a license or issuance of a branch office or alternate delivery site license.

(3) If there is a question relating to the accuracy of an agency's financial records relating to the operation of the agency or the agency's financial ability to carry out its functions, DHS or its designee may conduct an extensive review of the records. Any financial review by DHS will be conducted by an individual who has the financial qualifications to review such records.

(4) The person in charge of the agency must be available at the time of a survey by DHS. For the purposes of this section, the person in charge of the agency is the administrator, the administrator's designated alternate, the supervising nurse, or supervising nurse's designated alternate. Whenever the person in charge of the agency will be away from the agency during business hours, there must be a notice posted on the door and a message left on an answering machine that will provide information regarding how to contact the person in charge.

(5) DHS or a representative of DHS is entitled access to all books, records, or other documents maintained by or on behalf of the agency to the extent necessary to ensure compliance with the statute, this chapter, an order of the commissioner, a court order granting injunctive relief, or other enforcement action. Failure to grant access will result in immediate enforcement action. DHS will maintain the confidentiality of agency records as applicable under federal or state law. Ensuring compliance includes permitting photocopying by a DHS surveyor or providing photocopies to a DHS surveyor of any records or other information by or on behalf of DHS as necessary to determine or verify compliance with the statute or this chapter. Copies of clinical records supplied by the agency to DHS must be certified copies and must include a complete copy of all records requested by DHS.

(6) By applying for or holding a license, the agency consents to entry and survey of the agency by DHS or a representative of DHS in accordance with the statute and this chapter.

(b) Except for the initial survey, a survey conducted by DHS will be unannounced.

(c) Except for the investigation of complaints, an agency licensed by DHS is not subject to additional surveys relating to home health, hospice, or personal assistance services while the agency maintains deemed accreditation status for the applicable services from the Joint Commission on Accreditation of Healthcare Organizations, the Community Health Accreditation Program. An initial survey after issuance of an initial license will be done by DHS:

(1) if the agency is not yet accredited; or

(2) unless waived under §97.13(b)(8) of this title (relating to Change of Ownership).

(d) A DHS representative will hold an exit conference with the person in charge of the agency before beginning the on-site survey to explain the nature and scope of the survey. When the survey is completed, the DHS representative will hold an exit conference with the person in charge of the agency and will identify any records that were duplicated. Any records that are removed from an agency will be removed only with the consent of the agency.

(e) A DHS representative will fully inform the person in charge of the agency of the preliminary findings of the survey and will give the person a reasonable opportunity to submit additional facts or other information to DHS's authorized representative in response to those findings. The response will be made a part of the record of survey for all purposes and must be received by DHS within ten calendar days of receipt of the preliminary findings of the survey by the agency.

(f) After a survey of an agency, DHS will provide the chief executive officer of the agency:

(1) specific and timely written notice of the findings of the survey including:

(A) the specific nature of the survey;

(B) any alleged violations of a specific statute or rule;

(C) specific nature of any finding regarding an alleged violation or deficiency;

(D) if a deficiency is alleged, the severity of the deficiency; and

(E) if there are no deficiencies found, a statement indicating this fact;

(2) information on the identity, including the signature, of each department representative conducting, reviewing, or approving the results of the survey and the date on which the department representative acted on the matter; and

(3) if requested by the agency, copies of all documents relating to the survey maintained by the department or provided by the department to any other state or federal agency that are not confidential under state law.

(g) The surveyor will:

(1) conduct a survey for all categories of services authorized under the license;

(2) conduct a minimum of three home visits unless the agency has only three clients;

(3) review a minimum of ten client records unless the agency has had less than ten clients; such review must include a sample of pediatric clients if pediatric clients are served by the agency;

(4) obtain a client's signature consenting to the home visit. A client may refuse a home visit without effect on the level and nature of care or benefit to the client;

(5) prepare a statement of deficiencies, if any;

(6) obtain a plan of correction for deficiencies, which is provided by the agency, either on- site or within ten calendar days of the agency's receipt of the statement of deficiencies and which indicates the date(s) by which correction(s) will be made;

(7) obtain the signature of the person in charge of the agency acknowledging the receipt of the statement of deficiencies and plan of correction form. The person's signature does not indicate the person's agreement with deficiencies stated on the form;

(8) obtain within ten calendar days of the survey written comments, if any, by the person in charge of the agency. Additional facts, written comments or other information provided by the agency in response to the findings will be made a part of the record of the survey for all purposes; and

(9) inform the person in charge of the agency of the agency's right of reconsideration of any deficiency(ies) cited and of the procedures for requesting a reconsideration. A reconsideration requested by an agency does not excuse the agency from submitting a plan of correction required in subsection (h)(1) of this section.

(h) The agency must:

(1) submit an acceptable written plan of correction for each deficiency no later than ten days from its receipt of a statement of deficiencies. A plan of correction date must not exceed 45 days from the date the deficiency was cited; and

(2) correct each deficiency no later than the plan of correction date for that deficiency. Failure of an agency to correct each deficiency by the plan of correction date may result in enforcement action in accordance with Subchapter F of this chapter (relating to Enforcement).

(i) If Medicare certification is denied by the Centers for Medicare & Medicaid Services (CMS) or the agency withdraws from the Medicare program, the agency may operate only under the category remaining on the current license. The effective date of the change will be the date indicated on the final termination letter issued to the agency by CMS. This change does not preclude DHS from taking enforcement action, if appropriate, under Subchapter F of this chapter (relating to Enforcement).

(j) If deficiencies are cited and the plan of correction is not acceptable, DHS will notify the agency in writing and request the plan of correction be resubmitted no later than 30 calendar days of the agency's receipt of DHS's written notice. Upon resubmission of an acceptable plan of correction, DHS will send written notice to the agency acknowledging same.

(k) DHS will verify the correction of deficiencies by mail or by an on-site survey within 90 days of DHS's receipt of an acceptable plan of correction.

(l) Acceptance of a plan of correction does not preclude DHS from taking enforcement action as appropriate under Subchapter F of this chapter (relating to Enforcement).

(m) Except as provided by Health and Safety Code, §142.009(h), (i), and (l), an on-site survey will be conducted within 18 months after a survey for an initial license. After that time, an on-site survey will be conducted at least every 36 months.

(n) If a person is renewing or applying for a license to provide more than one category of services under the statute or for a branch office or alternate delivery site license, the required surveys for each of the services or location(s) the license holder or applicant seeks to provide will be completed during the same survey visit.

§97.502. Complaint Investigation.

(a) A complaint containing allegations that are a violation of the statute or this chapter will be investigated by DHS.

(b) A complaint containing allegations that are not a violation of the statute or this chapter will not be investigated by DHS but will be referred to law enforcement agencies or other agencies, as appropriate.

(c) DHS will inform in writing a complainant who identifies himself by name and address of the following information:

(1) the receipt of the complaint;

(2) whether the complainant's allegations allege potential violations of the statute or this chapter warranting an investigation;

(3) whether the complaint will be investigated by DHS;

(4) whether and to whom the complaint will be referred; and

(5) the findings of the complaint investigation.

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 October 26, 2001.

TRD-200106563
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Effective date: January 1, 2002
Proposal publication date: April 27, 2001
For further information, please call: (512) 438-3734

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SUBCHAPTER F. ENFORCEMENT

40 TAC §§97.601 - 97.604

The new sections are adopted under the Health and Safety Code, Chapter 142, which provides the department with the authority to adopt rules for the licensing and regulation of home and community support services agencies.

The new sections implement the Health and Safety Code, §§142.001- 142.030.

§97.601. License Denial, Suspension or Revocation.

(a) The Texas Department of Human Services (DHS) may deny, suspend, suspend on an emergency basis, or revoke a license issued to an applicant or agency if the applicant or agency:

(1) fails to comply with any provision of the statute;

(2) fails to comply with any provision of this chapter;

(3) has a provider agreement under the Social Security Act, Title XVIII, which has been terminated by the certifying body, Centers for Medicare & Medicaid Services (CMS), or if the agency withdraws its certification or its request for certification. An agency providing licensed and certified home health services that submits a request for a hearing as provided by this section is governed by the requirements of the statute and the rules relating to an agency providing licensed only home health services until suspension or revocation is finally determined by DHS or, if the license is suspended or revoked, until the last day for seeking review of the DHS order or a later date fixed by order of the reviewing court;

(4) commits fraud, misrepresentation, or concealment of a material fact on any documents required to be submitted to DHS or required to be maintained by the agency pursuant to this chapter;

(5) has aided, abetted, or permitted the commission of an illegal act;

(6) fails to provide the required application or renewal information;

(7) fails to comply with an order of the commissioner of human services or another enforcement procedure under the statute;

(8) discloses action as described in §97.11(g)(3)(R) and (S) of this title (relating to Application and Issuance of Initial License)

or §97.12(b)(2)(A) of this title (relating to Issuance and Renewal of License);

(9) knowingly employs as the agency administrator or chief financial officer, an individual who was convicted of a felony or misdemeanor listed in subsection (b) of this section.

(b) DHS may suspend or revoke an existing valid license or disqualify a person from receiving a license because of a person's conviction of a felony or misdemeanor if the crime directly relates to the duties and responsibilities of a licensed agency.

(1) In determining whether a criminal conviction directly relates, DHS will consider the provisions of Texas Civil Statutes, Article 6252-13c.

(2) The following felonies and misdemeanors directly relate because these criminal offenses indicate an inability or a tendency for the person to be unable to own or operate an agency. These offenses also relate to the holding of a home health medication aide permit or an entity approved under §95.128 of this title (relating to Home Health Medication Aides), to conduct a home health medication aide training program:

(A) a misdemeanor violation of the statute;

(B) a conviction relating to deceptive business practices;

(C) a misdemeanor or felony offense involving moral turpitude;

(D) the misdemeanor of practicing any health-related profession without a required license;

(E) a conviction under any federal or state law relating to drugs, dangerous drugs or controlled substances;

(F) an offense under the Texas Penal Code involving a client or client of a health care facility or agency;

(G) Texas Penal Code, Chapter 19 concerning criminal homicide;

(H) Texas Penal Code, Chapter 20 concerning kidnapping and false imprisonment;

(I) Texas Penal Code, §21.11 concerning indecency with a child;

(J) Texas Penal Code, §22.011 concerning sexual assault;

(K) Texas Penal Code, §22.02 concerning aggravated assault;

(L) Texas Penal Code, §22.04 concerning injury to a child, elderly individual, or disabled individual;

(M) Texas Penal Code, §22.041 concerning abandoning or endangering child;

(N) Texas Penal Code, §22.08 concerning aiding suicide;

(O) Texas Penal Code, §25.031 concerning agreement to abduct from custody;

(P) Texas Penal Code, §25.08 concerning sale or purchase of a child;

(Q) Texas Penal Code, §28.02 concerning arson;

(R) Texas Penal Code, §29.02 concerning robbery;

(S) Texas Penal Code, §29.03 concerning aggravated robbery;

(T) a misdemeanor or felony offense under the Texas Penal Code, as follows:

(i) Title 5, concerning offenses against the person;

(ii) Title 7, concerning offenses against property;

(iii) Title 9, concerning offenses against public order and decency;

(iv) Title 10, concerning offenses against public health, safety, and morals; and

(v) Title 4, concerning offenses of attempting or conspiring to commit any of the offenses in subparagraphs (A)-(T) of this paragraph; and

(vi) other misdemeanors and felonies that indicate an inability or tendency for the person to be unable to own or operate an agency, hold a permit, or receive program approval under §95.128 of this title (relating to Home Health Medication Aides), if action by DHS will promote the intent of the statute, this chapter, or Texas Civil Statutes, Article 6252-13c.

(3) Upon a licensee's felony conviction, felony probation revocation, revocation of parole, or revocation of mandatory supervision, the license will be revoked.

(c) Before the institution of proceedings to revoke or suspend a license or deny an application for the renewal of a license, DHS will give the license holder:

(1) notice by personal service or by registered or certified mail of the facts or conduct alleged to warrant the proposed action; and

(2) an opportunity to show compliance with all requirements of law for the retention of the license by sending the director of DHS's Long Term Care-Regulatory a written request for an informal reconsideration. The request must:

(A) be postmarked within 10 days of the date of DHS's notice and be received in the state office of the director of DHS's Long Term Care-Regulatory within 10 days of the date of the postmark; and

(B) contain specific documentation refuting DHS's allegations.

(d) If the agency requests an informal reconsideration under subsection (c)(2) of this subsection, DHS's review will be limited to a review of documentation submitted by the license holder and information DHS used as the basis for its proposed action and will not be conducted as an adversary hearing. DHS will give the license holder a written affirmation or a reversal of the proposed action, as appropriate.

(e) If DHS proposes to deny, suspend, or revoke a license, DHS will notify the agency by certified mail, return receipt requested, or personal delivery of the reasons for the proposed action and offer the agency an opportunity for a hearing. If a notice served by mail is returned undeliverable or DHS is unable to execute personal delivery of the notice, DHS will publish the notice in a newspaper of general circulation serving the county in which the agency is located based upon the last address provided by the agency. Publication of the notice will be for seven consecutive calendar days. An agency, which fails to claim a notice sent by certified mail or refuses to accept the notice does not make the notice null and void.

(1) The agency must request a hearing within 15 calendar days of receipt of the notice. The request must be in accordance with Chapter 79, Subchapter Q of this title (relating to Formal Hearings).

Receipt of the notice is presumed to occur on the tenth day after the notice is mailed to the last address known to DHS unless another date is reflected on a United States Postal Service return receipt.

(2) A hearing will be conducted pursuant to the Administrative Procedure Act, Texas Government Code, Chapter 2001, and DHS's formal hearing procedures in Chapter 79, Subchapter Q of this title (relating to Formal Hearings).

(3) If the agency does not request a hearing in writing within 15 calendar days of receipt of the notice, the agency is deemed to have waived the opportunity for a hearing and the proposed action will be taken.

(4) If the agency fails to appear or be represented at the scheduled hearing, the agency has waived the right to a hearing and the proposed action will be taken.

(5) The denial, suspension, or revocation of a license will take effect when the deadline for appeal of the denial, suspension, or revocation passes, unless the agency appeals the enforcement action. If the agency appeals the enforcement action, the status of the license holder is preserved until final disposition of the contested matter.

(f) DHS may suspend or revoke a license to be effective immediately when the health and safety of persons are threatened. DHS will immediately give the chief executive officer of the agency adequate notice of the action taken, the legal grounds for the action, and the procedure governing appeal of the action. DHS will also notify the agency of the emergency action including the legal grounds for the action and the procedure governing appeal of the action by certified mail, return receipt requested, or personal delivery of the notice and of the date of a hearing, which will be not later than seven calendar days after the effective date of the suspension or revocation. The effective date of the emergency action will be stated in the notice. The hearing will be conducted pursuant to the Administrative Procedure Act, Texas Government Code, Chapter 2001, and DHS's formal hearing procedures in Chapter 79, Subchapter Q of this title (relating to Formal Hearings).

(g) If an agency has had enforcement action taken by DHS against the agency, the agency, its owner(s), or its affiliate(s) may not apply for an agency license or make any requests to change categories of license for one year following the effective date of the enforcement action. For purposes of this paragraph only, the term "enforcement action" means license revocation, suspension, emergency suspension, or denial or injunctive action but does not include administrative penalties or civil penalties. If DHS prevails in one enforcement action, such as an injunctive action, against the agency but also proceeds with another enforcement action, such as a revocation, based on some or all of the same violations, but DHS does not prevail in the second enforcement action (the agency prevails), the prohibition in this paragraph does not apply.

(h) If DHS suspends a license, the suspension will remain in effect until DHS determines that the reason for suspension no longer exists. An authorized representative of DHS will conduct a survey of the agency before making a determination.

(1) During the time of suspension, the suspended license holder must return the license to DHS.

(2) If a suspension overlaps a renewal date, the suspended license holder must comply with the renewal procedures in this chapter; however, DHS may not renew the license until DHS determines the reason for suspension no longer exists.

(3) If suspension is for more than one year, the suspended license holder may apply to DHS for cancellation of the suspension only after one year following the initial date of the suspension.

(i) If DHS revokes or does not renew a license and the one-year period described in subsection (h)(3) of this section has passed, a person may reapply for a license by complying with the requirements and procedures in this chapter at the time of reapplication. DHS may refuse to issue a license if the reason for revocation or nonrenewal continues to exist.

(j) Upon revocation or nonrenewal, a license holder must return the license to DHS.

§97.602. Administrative Penalties.

(a) General. The Texas Department of Human Services (DHS) may assess an administrative penalty against a person who violates the statute of this chapter. A person under this section includes a licensed agency.

(b) Assessment of a penalty.

(1) Notwithstanding any other provision of the statute, DHS may not assess an administrative penalty against an agency:

(A) that provides only long-term care Medicaid waiver services that are publicly funded and is certified and monitored by a state agency that has developed standards that ensure the health and safety of service recipients; or

(B) that provides home health, hospice, or personal assistance services only to persons enrolled in a program that is funded in whole or in part by the Texas Department of Mental Health and Mental Retardation (TDMHMR) and is monitored by the TDMHMR or its designated local authority in accordance with standards set by the TDMHMR.

(2) The assessment of an administrative penalty will be in accordance with the schedule of appropriate and graduated penalties described in subsection (d) of this section. The schedule of appropriate and graduated penalties for each violation is based on the following criteria:

(A) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation, and the hazard of the violation to the health or safety of clients;

(B) the history of previous violations by a person or a controlling person with respect to that person;

(C) whether the affected home and community support services agency had identified the violation as part of its internal quality assurance process and had made appropriate progress on correction. For purposes of this subparagraph, appropriate progress is defined as making a good faith, substantial effort to correct the violation in a timely manner;

(D) the amount necessary to deter future violations;

(E) efforts made to correct the violation; and

(F) any others matters that justice may require.

(3) In determining which violation(s) warrants a penalty(ies), DHS will consider:

(A) the seriousness of the violation(s), including the nature, circumstances, extent, and gravity of the violation(s), and the hazard of the violation(s) to the health or safety of a client; and

(B) whether the affected agency had identified the violation(s) as part of its internal quality assurance process and had made appropriate progress on correction.

(4) An administrative penalty for a subsequent occurrence may only be assessed when the subsequent occurrence occurs within

three years from the date the agency first receives oral or written notice of the first violation.

(5) The assessment of an administrative penalty does not preclude DHS from suspending, revoking, or denying a license in accordance with §97.601 of this title (relating to License Denial, Suspension or Revocation).

(c) Correction period.

(1) Following the first day of a violation, DHS will give an agency a reasonable period of time to correct the violation. The period of time must be reflected in and implemented through an accepted plan of correction. A reasonable period of time for purposes of this paragraph will be as follows.

(A) For a violation that results in serious harm to or death of a client, constitutes an actual serious threat to the health or safety of a client, or substantially limits the agency's capacity to provide care, the violation must be corrected immediately or no later than seven calendar days from the first time the agency is informed (orally or in writing) by DHS staff of the violation. This is a severity level II violation.

(B) For a violation that has or had minor or no health or safety significance, the violation must be corrected within 20 calendar days from receipt of the written notice of the violation (statement of deficiencies). This is a severity level I violation.

(C) An agency may request an extension in writing. An agency may receive an extension upon DHS's approval. An extension is only appropriate if the agency has made a good faith effort to correct the violation within the required time period but has not been able to correct due to circumstances beyond its control and if there is no serious harm or threat to clients.

(2) If an agency corrects the violation within the time periods described in paragraph (1) of this subsection, DHS may assess an administrative penalty only for one level II violation that occurred before the day on which the agency received written notice of the violation (statement of deficiencies). No administrative penalty would be assessed for a level II violation.

(3) A penalty(ies) assessed under this section may be a severity level I penalty(ies) or a severity level II penalty(ies) or a combination of a severity level I penalty(ies) and severity level II penalty(ies). If an agency does not correct the violation within the time periods described in paragraph (1) of this subsection, DHS may assess an administrative penalty for:

(A) one violation that occurred before the day on which the agency received written notice of the violation (statement of deficiencies); and

(B) each day of the violation during the correction period and after the time period for correction has ended.

(d) Schedule of penalties.

(1) Minimum and maximum amount. An administrative penalty may not be less than $100 or more than $1,000 for each violation.

(2) Subject matter considered. If two or more of the rules listed in paragraphs (3) and (4) of this subsection relate to the same or similar subject matter, only one administrative penalty may be assessed at the higher severity level violation.

(3) Severity level I. A severity level I violation is a violation that has or has had minor or no client health or safety significance.

(A) The penalty for a severity level I violation will be assessed only if the violation is of a continuing nature or the violation was not corrected in accordance with the accepted plan of correction. DHS is not required to provide the agency an opportunity to correct subsequent violations under this section.

(B) The penalty for a severity level I violation is $100-$250.

(C) A violation of each of the rules listed in the following table may warrant a severity level I administrative penalty.
Figure: 40 TAC §97.602(d)(3)(C)

(4) Severity level II.

(A) The penalty for a severity level II violation will be assessed according to following schedule:

(i) for a violation that results in serious harm to or death of a client, the penalty will be $1,000;

(ii) for a violation that constitutes an actual serious threat to the health or safety of a client, the penalty will be $500 to $1,000; or

(iii) for a violation that substantially limits the agency's capacity to provide care, the penalty will be $500 to $750.

(B) DHS may assess a separate level II administrative penalty for a violation of each of the rules listed in the following table.
Figure: 40 TAC §97.602(d)(4)(B)

(e) Notice of violation. After investigation of a possible violation and the facts surrounding that possible violation, and after the agency's receipt of the statement of deficiencies, if DHS determines a violation has occurred, DHS will give further written notice, via a notice of violation letter, to the person alleged to have committed the violation.

(1) The notice will include:

(A) a brief summary of the alleged violation(s);

(B) a statement of the amount of the proposed penalty based on the factors listed in subsection (b) of this section; and

(C) a statement of the person's right to a hearing on the occurrence of the violation(s), the amount of the penalty, or both the occurrence of the violation(s) and the amount of the penalty.

(2) Not later than the 20th calendar day after the date on which the notice is received, the person notified may accept the determination of DHS made under this section, including the proposed penalty, or may make a written request for a hearing on that determination. A person's acceptance of DHS's determination means the person has sent and DHS has received a written acceptance notice accompanied by remittance of the proposed penalty.

(3) If the person notified of the violation accepts the determination of DHS or if the person fails to respond in a timely manner to the notice, the commissioner or the commissioner's designee will issue an order approving the determination and ordering that the person pay the proposed penalty.

(4) If the person requests a hearing, procedures will be in accordance with the statute, §§142.0172-142.0173 and DHS's formal hearing procedures in Chapter 79, Subchapter Q of this title (relating to Formal Hearings).

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 October 26, 2001.

TRD-200106564
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: January 1, 2002
Proposal publication date: April 27, 2001
For further information, please call: (512) 438-3734

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SUBCHAPTER G. HOME HEALTH AIDES

40 TAC §97.701

The new section is adopted under the Health and Safety Code, Chapter 142, which provides the department with the authority to adopt rules for the licensing and regulation of home and community support services agencies.

The new section implements the Health and Safety Code, §§142.001- 142.030.

§97.701. Home Health Aides.

(a) A home health aide may be used by an agency providing licensed home health services if the aide meets one of the following requirements:

(1) a minimum of one year full-time experience in direct client care in an institutional setting (hospital or nursing facility);

(2) one year full-time experience within the last five years in direct client care in an agency setting;

(3) satisfactorily completed a training and competency evaluation program that complies with the requirements of this section;

(4) satisfactorily completed a competency evaluation program that complies with the requirements of this section;

(5) submitted to the agency documentation from the director of programs or the dean of a school of nursing that states that the individual is a nursing student who has demonstrated competency in providing basic nursing skills in accordance with the school's curriculum; or

(6) be on the Texas Department of Human Services' (DHS's) nurse aide registry with no finding against the aide relating to client abuse or neglect or misappropriation of client property.

(b) Tasks to be performed by a home health aide must be assigned by and performed under the supervision of a registered nurse (RN) who must be responsible for the client care provided by a home health aide.

(c) A home health aide may perform those tasks that are delegated and supervised by an RN in accordance with §97.298 of this title (relating to Delegation of Selected Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel).

(d) The training portion of a training and competency evaluation program for home health aides must be conducted by or under the general supervision of an RN who possesses a minimum of two years of nursing experience, at least one year of which must be in the provision of home health care. The training program may contain other aspects of learning, but must contain the following:

(1) a minimum of 75 hours as follows:

(A) an appropriate number of hours of classroom instruction; and

(B) a minimum of 16 hours of clinical experience which will include in-home training and must be conducted in a home, a hospital, a nursing home, or a laboratory;

(2) completion of at least 16 hours of classroom training before a home health aide begins clinical experience working directly with clients under the supervision of qualified instructors;

(3) if licensed vocational nurse (LVN) instructors are used for the training portion of the program, the following qualifications and supervisory requirements apply:

(A) an LVN may provide the home health aide classroom training under the supervision of an RN who has two years of nursing experience, at least one year of which must be in the provision of home health care;

(B) LVNs, as well as RNs, may supervise home health aide candidates in the course of the clinical experience; and

(C) an RN must maintain overall responsibility for the training and supervision of all home health aide training students; and

(4) an assessment that the student knows how to read and write English and carry out directions.

(e) The classroom instruction and clinical experience content of the training portion of a training and competency evaluation program must include, but is not limited to:

(1) communication skills;

(2) observation, reporting, and documentation of a client's status and the care or service furnished;

(3) reading and recording temperature, pulse, and respiration;

(4) basic infection control procedures and instruction on universal precautions;

(5) basic elements of body functioning and changes in body function that must be reported to an aide's supervisor;

(6) maintenance of a clean, safe, and healthy environment;

(7) recognizing emergencies and knowledge of emergency procedures;

(8) the physical, emotional, and developmental needs of and ways to work with the populations served by the agency including the need for respect for the client and his or her privacy and property;

(9) appropriate and safe techniques in personal hygiene and grooming that include:

(A) bed bath;

(B) sponge, tub, or shower bath;

(C) shampoo, sink, tub, or bed;

(D) nail and skin care;

(E) oral hygiene; and

(F) toileting and elimination;

(10) safe transfer techniques and ambulation;

(11) normal range of motion and positioning;

(12) adequate nutrition and fluid intake;

(13) any other task the agency may choose to have the home health aide perform in accordance with §97.298 of this title (relating to Delegation of Selected Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel); and

(14) the rights of the elderly.

(f) This section addresses the requirements for the competency evaluation program or the competency evaluation portion of a training and competency evaluation program.

(1) The competency evaluation must be performed by an RN.

(2) The competency evaluation must address each of the subjects listed in subsection (e)(2)-(13) of this section.

(3) Each of the areas described in subsection (e)(3) and (9)-(11) of this section must be evaluated by observation of the home health aide's performance of the task with a client or person.

(4) Each of the areas described in subsection (e)(2), (4)-(8), (12), and (13) of this section may be evaluated through written examination, oral examination, or by observation of a home health aide with a client.

(5) A home health aide is not considered to have successfully completed a competency evaluation if the aide has an unsatisfactory rating in more than one of the areas described in subsection (e)(2)-(13) of this section.

(6) If an aide receives an unsatisfactory rating, the aide must not perform that task without direct supervision by an RN or LVN until the aide receives training in the task for which he or she was evaluated as unsatisfactory and successfully completes a subsequent competency evaluation with a satisfactory rating on the task.

(7) If an individual fails to complete the competency evaluation satisfactorily, the individual must be advised of the areas in which he or she is inadequate.

(g) If a person, who is not an agency licensed under this section, desires to implement a home health aide training and competency evaluation program or a competency evaluation program, the person must meet the requirements of this section in the same manner as set forth for an agency.

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 October 26, 2001.

TRD-200106565
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: January 1, 2002
Proposal publication date: April 27, 2001
For further information, please call: (512) 438-3734

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PART 5. TEXAS VETERANS LAND BOARD

CHAPTER 175. GENERAL RULES OF THE VETERANS LAND BOARD

40 TAC §175.2

The Veterans Land Board of the State of Texas (the "Board") adopts the amendments to Title 40, Part 5, Chapter 175 of the Texas Administrative Code, §175.2 (relating to "Loan Eligibility Requirements") of the General Rules of the Veterans Land Board without changes to the text as published in the September 7, 2001 issue of the *Texas Register* (26 TexReg 6858) .

These adopted amendments have changed the military discharge requirements that a person who has been discharged from the military has to meet to be eligible for a land loan from the Board under Chapter 175 and for a housing assistance loan from the Board under Title 40, Part 5, Chapter 177 relating to Veterans Housing Assistance Program. Both types of loans are affected since §177.5 (b) (relating to Loan Eligibility Requirements) incorporates the requirements of §175.2 (c) (1) by reference. These adopted amendments do not affect the eligibility of a person who has not received a discharge from military service. Title 40, Part 5, Chapter 176 of the Texas Administrative Code §176.7 (relating to Admissions Requirements) concerning State Veterans Homes is also affected by these adopted amendments since §176.7 (c) (3) refers to the loan eligibility criteria in §175.2 as one of a number of factors that the Board may use to establish a priority system for admitting applicants to State Veterans Homes based on availability of space.

Current §175.2 contains one military discharge requirement for loan eligibility; the person must not have been dishonorably discharged from military service. Under these adopted amendments, the military discharge standard is changed to provide that for a person who has been discharged from the military to be eligible for a loan, the person has to be considered not to have been dishonorably discharged. Under the adopted amendments, a person is considered not to have been dishonorably discharged if the person: (a) received an honorable discharge, (b) received a discharge under honorable conditions, or (c) received a discharge and provides evidence from the United States Department of Veterans Affairs or other competent authority that indicates that the character of the person's duty has been determined to be other than dishonorable.

The adopted amendments are in the best interest of the Board's land and housing assistance programs because they are necessary to bring the Board's loan eligibility rules for said programs in compliance with the new provisions of the Natural Resources Code, Title 7, Chapter 161, §161.001 (c) and Chapter 162, §162.001 (c), as enacted by H. B. 271 of the 77th Legislature, which became effective on May 11, 2001. Although the adopted amendments also revise a factor that the Board may consider in establishing a priority system for admitting applicants to the State Veterans Homes under § 176.7 (c) (3), this revised factor is consistent in principle with the factor in the current § 176.7 (c) (3) in that the factor for the Board to consider is still whether the applicant for admission to a State Veterans Home meets loan eligibility criteria for the Board's land and housing program loans and is thereby eligible for other Board benefits.

No comments were received regarding the proposed amendments.

The amendments to the section are adopted under the Natural Resources Code, Title 7, Chapter 161, §§161.001, 161.061, and 161.063, Chapter 162, §§162.001 and 162.003, and Chapter 164, §164.004, which authorize the Board to adopt land and housing assistance program rules to define the term "veteran," to

adopt rules that it considers necessary and advisable for those programs, and to adopt rules concerning the operation of veterans homes. Natural Resources Code §§161.001, 162.001, and 164.004 are affected by this adoption action.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 29, 2001.

TRD-200106616
Larry R. Soward
Chief Clerk, General Land Office
Texas Veterans Land Board
Effective date: November 18, 2001
Proposal publication date: September 7, 2001
For further information, please call: (512) 305-9129

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PART 19. TEXAS DEPARTMENT OF PROTECTIVE AND REGULATORY SERVICES

CHAPTER 700. CHILD PROTECTIVE SERVICES

SUBCHAPTER M. SUBSTITUTE-CARE SERVICES

40 TAC §700.1350

The Texas Department of Protective and Regulatory Services (TDPRS) adopts an amendment to §700.1350, without changes to the proposed text published in the September 7, 2001, issue of the *Texas Register* (26 TexReg 6860).

The justification for the amendment is to expand day care services for foster children to contracted private sector foster and group homes. The expansion will allow equity of services to foster children, whether they reside in a TDPRS verified foster home or a private agency foster home. The amendment will also assist in the transition of homes from the TDPRS sector to the private sector.

The amendment will function by allowing the private sector an opportunity to provide the same services for children as those provided in TDPRS verified foster homes. The amendment may increase the provider base by offering the incentive of day care services for TDPRS foster children who are being fostered by private agency foster parents who are employed full time.

During the comment period TDPRS received a comment from the Texas Association of Leaders in Children and Family Services in support of the change.

The amendment is adopted under the Human Resources Code (HRC), §40.029, which authorizes the department to propose and adopt rules in compliance with state law and to implement departmental programs.

The amendment implements the Human Resources Code, §40.029.

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 October 26, 2001.

TRD-200106571
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Effective date: December 1, 2001
Proposal publication date: September 7, 2001
For further information, please call: (512) 438-3437

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CHAPTER 732. CONTRACTED SERVICES

SUBCHAPTER L. CONTRACT ADMINISTRATION

The Texas Department of Protective and Regulatory Services (PRS) adopts the repeal of §732.240, and adopts new §732.240 and §732.241, without changes to the proposed text published in the September 7, 2001, issue of the *Texas Register* (26 TexReg 6861).

The justification for the repeal and new sections is to conform to current law and to update and clarify procedures concerning allowable costs.

The repeals and new sections will function by ensuring that contract cost accounting standards are clearer and can be administered more consistently.

No comments were received regarding adoption of the repeal and new sections.

40 TAC §732.240

The repeal is adopted under the Human Resources Code, §40.029, which authorizes the department to adopt rules to facilitate implementation of departmental programs.

The repeal implements the Human Resources Code, §40.029.

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 October 26, 2001.

TRD-200106569
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Effective date: November 15, 2001
Proposal publication date: September 7, 2001
For further information, please call: (512) 438-3437

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40 TAC §732.240, §732.241

The new sections are adopted under the Human Resources Code (HRC), §40.029, which authorizes the department to

adopt rules to facilitate implementation of departmental programs.

The new sections implement the Human Resources Code, §40.029.

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 October 26, 2001.

TRD-200106570
C. Ed Davis
Deputy Director, Legal Services
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Effective date: November 15, 2001
Proposal publication date: September 7, 2001
For further information, please call: (512) 438-3437

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PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 841. WORKFORCE INVESTMENT ACT

The Texas Workforce Commission (Commission) adopts amendments to §§841.31, 841.32, 841.34, 841.41, 841.44, and 841.46 and adopts the repeal of and new §§841.40, 841.43, 841.45, and 841.47 regarding the Eligible Training Provider Certification System (ETPS) required under the Workforce Investment Act of 1998, without changes as published in the August 10, 2001 issue of the *Texas Register* (26 TexReg 5992). The text of these rules will not be republished. Sections 841.38 and 841.39 are adopted with changes to the text as published in the August 10, 2001 issue of the *Texas Register* (26 TexReg 5992). The text of §841.38 and §841.39 will be republished.

A key goal of the federal Workforce Investment Act (WIA) of 1998 (42 U.S.C.A. Section 2801 et seq.) is to improve the effectiveness and efficiency of federally-funded job training programs. WIA recognized Texas state statutes regarding the workforce development system as prior consistent state law. Specifically, the state statutes are grandfathered under the provisions of WIA and are codified primarily in Texas Government Code Chapter 2308 and Texas Labor Code Chapter 302. These state laws create the foundation upon which workforce reform in Texas regarding employment and training service delivery was built. The ETPS is an important component of the workforce reform and employment and training services in Texas.

The Commission has continued to work closely with representatives of the training provider community, Boards and partner agencies to provide formal and informal opportunities to improve the ETPS. The Commission oversees the operational aspects of the Texas workforce development system to ensure compliance with the WIA while providing options for the Boards and the training provider community. The Commission continues to seek options for streamlining processes, including those for the certification process and for performance reporting by eligible training providers. A key objective is to maximize participant access to education and training options, while minimizing providers' reporting burdens.

The purpose of Subchapter C is to address the ETPS as required under WIA. Changes are adopted for the purposes of streamlining the ETPS, reflecting changes necessitated by the implementation of the automated, Internet-based ETPS and to allow Boards discretion to permit the ETPS and the use of Individual Training Accounts (ITAs) to apply to other workforce services funded through the Commission. The language in many of the sections remains the same with the following exceptions:

Section 841.31 addresses the scope and coverage of this subchapter. The ETPS and the use of ITAs to secure and pay for adult training services are primary service delivery mechanisms under the WIA. A sentence is added that acknowledges the Boards' option to use these mechanisms for adult training services funded by Choices, Food Stamp Employment and Training (FS E&T), Welfare-to-Work (WtW), Trade Adjustment Assistance (TAA) and North American Free Trade Agreement-Transitional Adjustment Assistance (NAFTA-TAA).

Section 841.32 addresses training services. The changes to the language include adding a sentence to subsection (a) that acknowledges the expanded coverage of the rule to cover adult training services funded by Choices, FS E&T, WtW, TAA and NAFTA-TAA.

Section 841.34 addresses ITAs. The changes include adding a subsection (c) that acknowledges the expanded coverage of the rule to cover adult training services funded by Choices, FS E&T, WtW, TAA and NAFTA-TAA.

Section 841.38 addresses the initial certification process for exempt providers. A change is made in the first sentence to clarify Board responsibilities for developing local requirements, rather than a written application, for the submission of initial eligibility applications for exempt programs. Technical corrections have also been made to this section.

Section 841.39 addresses the alternative application for initial eligibility determination by non-exempt training providers. Changes are made to subsection (b) to address modifications in application requirements due to conversion to the automated, Internet-based ETPS and to specify the exemption of providers that are subject to Texas or another state's regulation or audit from the requirement to submit financial stability documentation. Changes are also made to subsection (c) to remove the requirement that training provider applicants provide performance information regarding the percentage of all individuals participating in the applicable program who obtained unsubsidized employment in an occupation related to the program conducted. Technical corrections have also been made to this section.

Section 841.40 addresses the submission of an initial eligibility application. Language is added to address the required use of the automated, Internet-based ETPS for application submission and review and to address provider compliance with state law.

Section 841.41 addresses initial eligibility determination. Language in subsection (b) related to a mandatory six-month waiting period for reapplication after Board denial of an initial eligibility application is deleted in order to provide additional flexibility with regard to the development of local appeals policy.

Section 841.43 addresses application for subsequent eligibility determination. The option to request a specific certification date is removed since it is not applicable to the subsequent eligibility determination process. Language is added to address the required use of the automated, Internet-based ETPS for application submission and review and to address provider compliance

with state law. Language is added to allow for adjusting the certification renewal period if an appeal is approved to ensure that the period of certification is one year in length.

Section 841.44 addresses the determination of subsequent eligibility. In subsection (e) language related to a mandatory six-month waiting period for reapplication after Board denial of an initial eligibility application is deleted in order to provide additional flexibility with regard to the development of local appeals policy.

Section 841.45 addresses the annual adoption of standards of performance. Changes are made to clarify the process for annual adoption and issuance of performance standards.

Section 841.46 addresses the requirements for submission and retention of verifiable program-specific performance information. The requirement that performance information be submitted on a quarterly basis is deleted since submission of required data is not subject to this stringent timeline and the subsections are re-lettered accordingly.

Section 841.47 addresses the certified provider list and the name is modified to reflect that the training provider list includes "eligible" training providers. Language related to Board submission of certified provider lists, and applicable performance and cost data, is deleted to reflect process changes related to the conversion to the automated, Internet-based ETPS. The remaining subsections are re-lettered accordingly.

The remaining rules in Subchapter C, §841.48 and §841.49, contain no changes to the prior rules.

Comments were received from the Coastal Bend Local Workforce Development Board. Some comments were for the rule, others recommended changes, or posed questions regarding the rule. The summary of the comments and the related responses are as follows:

Comment: Regarding §841.39(b)(15), Alternative Application for Initial Eligibility Determination, the commenter recommended that paragraph (15) be deleted since a description of employer support of the program is not explicitly required as part of the automated Initial Eligibility Application for non-exempt programs.

Response: The Commission agrees and therefore paragraph (15) will be deleted. With the implementation of the automated Eligible Training Provider Certification System, this application item is no longer specifically required. Employer support must be demonstrated as part of the Board's review process and local protocols, as specified in §841.32(b). This provision requires that training services be directly linked with employment opportunities on the Board's list of demand occupations and that each Board develop a process for considering eligible participants' requests for training in occupations not on the demand list. Further, if the skill sets acquired after successful completion of the training program relate to occupations not currently on the Board's demand list, §841.39(b)(8) requires that each Board develop a process for considering evidence from employers demonstrating that the occupations are in demand.

Comment: Regarding §841.41, Initial Eligibility Determination, the commenter recommended deleting the requirement in subsection (a), which specifies that a Board shall provide a written notice of determination of acceptance or rejection of an Initial Eligibility Application within ninety (90) calendar days of the receipt of the application. The recommendation makes reference to the e-mail notification system, which provides notice of certain application status changes to the affected training provider and or Board contact, as applicable.

Response: The Commission disagrees with deleting the reference in subsection (a) because the e-mail notification system was established to generate appropriate notices on a daily basis and the system does serve to meet the written notification requirements specified in subsection (a). However, if the applicable training provider does not have an e-mail address or if a message is undeliverable due to technical problems, the Board retains the responsibility to provide notification of the specified actions.

Comment: Regarding §841.43, Application for Subsequent Eligibility Determination, the commenter recommended modifying the proposed addition of subsection (d), which, as proposed, would allow the Agency to adjust the certification period if a subsequent eligibility application is denied and later approved on appeal. The commenter recommended that the program retain certification status pending resolution of the appeal.

Response: The Commission does not agree that the program should retain certification status pending the resolution of an appeal for the following reason. In accordance with WIA §122, the certification is granted for a one year period, subject to Board and Agency review and approval. If an application for subsequent or continuing eligibility is denied by the Board or the Agency, the certification period currently in effect would continue until the expiration date, unless the program is withdrawn by the provider or the Board, or removed for cause by the Agency. If any of those actions occur prior to resolution of the appeal, certification would lapse. If the subsequent eligibility application is later approved on appeal, the certification period would be adjusted, as proposed, to ensure that the new certification period is one year in length. Because of the specific WIA language in WIA §122, which requires each certification to end after one year, the Agency intends to continue taking steps to remind and notify Eligible Training Providers in advance of the importance of meeting the deadlines for submitting subsequent applications. One of the goals of the Eligible Training Provider System is to encourage a smooth transition from one certification period to the next to the extent feasible. The Agency also intends to continue expediting the appeal process as much as is feasible to resolve matters as quickly as possible.

Comment: Regarding §841.44, Determination of Subsequent Eligibility, the commenter recommended deleting the requirement in subsection (d), which specifies that a Board shall provide a written notice of determination of acceptance or rejection of an Initial Eligibility Application within thirty (30) calendar days of the receipt of the application. The commenter makes reference to the e-mail notification system, which provides notice of certain application status changes to the affected training provider and or Board contact, as applicable.

Response: The Commission disagrees. Although the e-mail notification system was established to generate appropriate notices on a daily basis and the system does serve to meet the written notification requirement specified in §841.44(d) if a message is undeliverable either due to technical problems or if the applicable training provider does not have an e-mail address, the Board retains the responsibility to provide notification of the specified actions.

SUBCHAPTER C. ELIGIBLE TRAINING PROVIDER CERTIFICATION

40 TAC §§841.31, 841.32, 841.34, 841.38 - 841.41, 841.43 - 841.47

The amendments and new sections are adopted under Texas Labor Code §301.061 and §302.002, which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The adopted amendments and new sections affect the Texas Labor Code, Title 4.

§841.38. Initial Certification Process for Exempt Providers.

(a) For purposes of this section, exempt providers are those providers exempt from having to submit performance data for their initial application as set forth in WIA §122.

(b) Each LWDB shall develop local application requirements for initial certification for the following providers of training services when offering the programs described:

(1) a postsecondary educational institution that:

(A) is eligible to receive federal funds under Title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 *et seq.*), and

(B) provides a program that leads to an associate degree, baccalaureate degree, or certificate; or

(2) an entity that carries out programs under the Act of August 16, 1937, commonly known as the "National Apprenticeship Act," 50 Stat. 664, chapter 663; (29 U.S.C. 50 *et seq.*).

§841.39. Initial Certification Process for Non-Exempt Providers.

(a) Non-exempt providers are those not defined as exempt under §841.38.

(b) The following entities shall be eligible to receive WIA funds if they complete the provider certification process and are determined eligible for participation by a LWDB in the LWDA in which the provider desires to provide training services and the Commission:

(1) public or private providers of a program of training services, including faith-based providers which are not:

(A) postsecondary educational institutions that are eligible to receive federal funds under Title IV of the Higher Education Act of 1965 (20 U.S.C. §1070 *et seq.*), and provide programs that lead to an associate degree, baccalaureate degree or certificate; or

(B) entities that carry out programs under the Act of August 16, 1937, also known as the "National Apprenticeship Act," 50 Stat. 664, chapter 663, (29 U.S.C. 50 *et seq.*);

(2) postsecondary educational institutions which seek to receive WIA funding for a program that does not lead to an associate degree, baccalaureate degree or certificate; and

(3) providers that carry out programs under the Act commonly known as the National Apprenticeship Act that seek to receive WIA funding for a program not covered by the National Apprenticeship Act.

(c) All training provider applicants under this section shall provide the following information to the LWDB:

(1) the name, mailing address and physical address of the training facility;

(2) documentation of financial stability of the applicant, which may include audits or financial statements, unless the applicant is one of the following entities that are subject to regulatory or audit provisions of Texas or another state regarding financial stability: a public university, college, community or technical college;

(3) the name of the program(s) of training services submitted for WIA funding;

(4) the total hours of instruction associated with each program of training services;

(5) the cost of each program of training services, including tuition, fees, books, and any required tools, uniforms, equipment, or supplies;

(6) a description of the skill set which will be acquired through each program of training services;

(7) a list of occupations determined by using a coding system specified by the Commission, in which these skill sets are of primary interest;

(8) if all of the occupations described in paragraph (7) of this subsection are not on the Occupations in Demand List provided by the LWDB, evidence from employers, in a format and meeting specification set by the LWDB, that demonstrates that the occupation is in demand;

(9) description of the class size, instructor/student ratio;

(10) information on whether the students in the course are eligible for Title IV of the Higher Education Act funding (Pell grant);

(11) an outline of the course or program curriculum, including criteria for successful completion;

(12) the qualifications of the training instructors;

(13) a description of any minimum entry level requirement (e.g. reading or math level, previous education requirements such as high school diploma or GED);

(14) description of equipment utilized in the course and equipment/student ratio; and

(15) any additional information that is required by the LWDB in the LWDA in which the training provider is located.

(d) Training provider applicants who provide training on the date of application through a program for which they are seeking certification shall include in their application the following verifiable performance information, or appropriate portion of verifiable performance information, for the program(s) of training services:

(1) the program completion rates for all individuals participating in the applicable program;

(2) the percentage of all individuals participating in the applicable program who obtained unsubsidized employment;

(3) the wages at placement in employment of all individuals participating in the applicable program; and

(4) a description of the methodology that will be utilized to collect and verify performance information.

(e) Each LWDB shall annually establish minimum requirements for initial eligibility. Such requirements shall include consideration of the information required by §841.44(a) of this title (relating to Determination of Subsequent Eligibility). The LWDB shall provide to each applicant the current levels of performance required by the Commission or levels of performance required by the LWDB if higher than those established by the Commission.

(f) For purposes of confirming training provider initial eligibility application information, and as determined reasonable by LWDBs, on-site visits shall be made by LWDB staff or representatives to training provider program sites.

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 October 23, 2001.

TRD-200106437
John Moore
Assistant General Counsel
Texas Workforce Commission
Effective date: November 12, 2001
Proposal publication date: August 10, 2001
For further information, please call: (512) 463-2573

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SUBCHAPTER C. TRAINING PROVIDER CERTIFICATION

40 TAC §§841.40, 841.43, 841.45, 841.47

The repeal adopted under Texas Labor Code §301.061 and §302.002 provides the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The adopted repeal affects the Texas Labor Code, Title 4.

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 October 23, 2001.

TRD-200106438
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Proposal publication date: August 10, 2001
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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 4. EMPLOYMENT PRACTICES

SUBCHAPTER C. EMPLOYMENT AND EDUCATION PROGRAMS

43 TAC §4.25

The Texas Department of Transportation adopts amendments to §4.25, concerning the conditional grant program. Section 4.25 is adopted without changes to the proposed text as published in the September 14, 2001, issue of the *Texas Register* (26 TexReg 7081), and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Education Code, Chapter 56, Subchapter I, requires the department to establish and administer a conditional grant program to provide financial assistance to female and minority students who intend to work for the department. Subchapter I requires the department to adopt rules to implement the program.

Amendments to §4.25 are necessary to further strengthen the default repayment process and also to enhance program competitiveness to make it a more attractive grant program for students in need of financial assistance for education.

Subsection (d)(4)(C) is amended to add participation in the Texas Prefreshman Engineering Program (TexPREP) as an example of an honor the department will consider when ranking applicants. The department is currently a participant in the program, involved in providing appropriate support which hopefully will ensure a pool of highly qualified civil engineering candidates to draw from in the future.

Subsection (f)(3) is amended to increase the maximum conditional grant from $2,500 to $3,000 per student, per semester. This increase is necessary to pay the cost associated with the amendment to subsection (g)(3).

Subsection (g)(3) is amended to include room and board cost in the college education costs covered by the grant. This amendment will enhance the program and make it much more competitive, attracting more applicants with a need for financial aid.

Subsection (i), concerning repayment, is amended to stipulate that applicants who are accepted to the program for their freshman year of school, will not have to repay grant funds expended during that school year in the event the student fails to meet program requirements or chooses to leave the program prior to the student's sophomore year. Currently a large percentage of program students default during their freshman year of college. The amendment will allow the department to terminate the grant agreement with no strings attached if the student is not meeting the agreement requirements, if the student is on probation during their freshman year, or if the student decides not to pursue the degree. This amendment will only apply to the student's freshman year. However, students who continue in the program after the freshman year, but are found to be in default of the agreement at any time during the remaining academic semesters, must repay all grant funds received from the department, including funds received during the freshman year.

Subsection (i)(2), renumbered as paragraph (3), is amended to remove the text, "The minimum installment shall be $50.00...," from the repayment section, and adds the text, "The installment is based on the amount owed the department..." Repayment due to default of a conditional grant is determined based on the amount a student owes the department and is rarely $50.00 or less per month.

Subsection (i)(3), renumbered as paragraph (4), is amended to require repayment of the grant to start four months, instead of six months, subsequent to the determination of default. The amendment decreases the length of time before the student starts repayment. Currently, by the time repayment is due, the student has had sufficient time to move which makes it very difficult for the department to locate and communicate the repayment obligations to the student.

COMMENTS

No comments were received on the proposed amendments.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Education Code, Chapter 56, Subchapter I, which requires the department to adopt rules to implement the conditional grant program.

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 October 25, 2001.

TRD-200106472
Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: November 14, 2001
Proposal publication date: September 14, 2001
For further information, please call: (512) 463-8630

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CHAPTER 15. TRANSPORTATION PLANNING AND PROGRAMMING
SUBCHAPTER E. FEDERAL, STATE, AND LOCAL PARTICIPATION

43 TAC §15.55

The Texas Department of Transportation adopts amendments to §15.55, concerning construction cost participation. Section 15.55 is adopted without changes to the proposed text as published in the September 14, 2001, issue of the *Texas Register* (26 TexReg 7086) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Transportation Code, §222.053(b), authorizes the Texas Transportation Commission to require, request, or accept from a political subdivision matching or other local funds to make the most efficient use of its highway funding. Pursuant to this authority, the commission has previously adopted §§15.50 - 15.56, to specify the roles of federal, state, and local entities in the development of highway improvement projects.

Current subsection (d) of §15.55 authorizes the department to waive the local government's required 10% fund participation in an off-state highway system bridge program project if the local government agrees to spend an equivalent amount of funds for structural improvement work on another deficient bridge(s) or other mainlane cross-drainage structure(s) within its jurisdiction.

The amendments revise the definitions in subsection (d)(1). Currently a "bridge" on an equivalent-match project(s), as defined in this subsection, includes mainlane cross-drainage structures. This definition is being expanded to include low water crossings, with or without pipes. This expansion of definition is needed to provide more flexibility to local governments in addressing their roadway structural needs. The term "deficient bridge" is currently defined as a bridge having a condition or load capacity that is inadequate. This definition is being revised to add the word "structural" to describe the load capacity and is being expanded to include other safety conditions that are inadequate. The revised definition is necessary to provide greater clarity and to ensure that the equivalent-match program also targets bridges with other safety deficiencies. The definition of "equivalent-match project" is also being revised to add the word "structural" to describe load capacity and to include other safety improvements as well as the current improved load capacity as the primary aim of the project. The definition of "participation-waived project" is being supplemented to state that a project must be authorized for development only, or for development and construction, on the department's Unified Transportation Program. This addition is intended to clarify that participation-waived projects are eligible if they are in either Priority 1 or in Priority 2 status in the Unified Transportation Program. The amendments add a definition for the term "safety work." This addition will provide guidance concerning the appropriate types of safety work that should be considered, such as providing improved structural load capacity, improved hydraulic capacity, increased roadway width, adequate bridge rail, and adequate approach guardrail. This should result in increased bridge safety for the traveling public.

Subsection (d)(2) authorizes the department's district engineer to approve a waiver. Currently, in order to receive consideration for a waiver, the local governmental body is required to commit by written resolution to spend an equivalent dollar-amount of funds for structural improvement work on other bridge(s) within its jurisdiction. The amendments will add the word "ordinance" to clarify that either a written resolution or ordinance may be submitted. The amendments will also expand the type of work included for consideration to other safety improvements in addition to structural improvements. In addition, the amendments will expand the area in which the equivalent-match project may take place to the jurisdiction of governmental units geographically adjacent or which overlap the jurisdiction of the governmental unit performing the equivalent-match project. This change is needed to provide local governments additional flexibility in locating viable equivalent-match projects, and to encourage local governments without such viable equivalent-match project options to participate in the program. An additional benefit will be that the adjacent governmental unit would receive help in addressing a deficiency that they may not otherwise have been able to address. The amendments will add that work on one or more equivalent-match projects can be credited to one or more participation-waived projects. This change makes explicit that such multiple project arrangements are acceptable.

Subsection (d)(3) describes the eligibility requirements for a waiver. To ensure that the work is within the intent and the monetary limitations of the rules, one requirement currently is that work on the equivalent-match project may not begin prior to approval of the waiver. An amendment to this requirement adds the clarification that approval of the waiver should not be construed as a guarantee that the participation-waived project agreement will be executed. This is to ensure that the involved parties understand that any equivalent-match work started prior to the execution of the agreement may become unusable in relation to this program if the agreement is not executed. Another current requirement for a waiver is that the improvement work on the equivalent-match project must increase the load capacity of the existing bridge or upgrade the bridge to its original capacity, with a minimum upgrade to safely carry school bus loading if located on a school bus route. This requirement is being revised to add the word "structural" to describe the load capacity and is being expanded to allow for other safety improvements to the deficient bridge in addition

to the work currently specified to improve the load carrying capacity of the deficient bridge. In addition, the amendments remove the modifier that the minimum upgrade to safely carry school bus loading applies only to bridges located on school bus routes, instead adding that all such upgrades should safely carry the expected school bus loading. This change anticipates that school bus routes may change and that upgrades should ensure that school bus loading at that location is always taken into account. The amendments also add that equivalent-match projects may consist of replacing an existing bridge with a new bridge. This change clarifies that such a total replacement is allowable.

Subsection (d)(4) describes the procedures a local government must follow to request a waiver. The local government is currently required to provide a written request to the department district engineer that includes the location(s), description of structural improvement work proposed, estimated cost for the equivalent-match project(s), and a copy of the resolution of the local governmental body. These requirements are being amended to include other safety related work if applicable and to allow the use of either a resolution or ordinance.

Subsection (d)(7) describes additional provisions and conditions related to the administration of this subsection. The amendments to subsection (d)(7)(A) will again state that one or more participation-waived projects can utilize one or more common or independent equivalent-match projects. The relationship between the various projects should be cross-referenced in each of the separate agreements. This change clarifies that such multiple project arrangements are allowable. The amendments to this section will also specifically state that previously executed agreements may be amended to incorporate participation-waived provisions or may be amended to utilize an additional equivalent-match project(s) for any outstanding amount not previously waived, provided that the construction contract for the participation-waived project has not been awarded and the equivalent-match work has not begun. This is to clarify that amendments to the original non-participation-waived project(s) are allowable under these rules, and to clarify that subsequent amendments to participation-waived agreements may utilize an additional equivalent-match project(s) for any outstanding amount not previously waived.

Subsection (d)(7)(B) currently allows the local government three years after the contract award of the participation-waived project to complete structural improvements on the equivalent-match project(s). This requirement allows the local government time to accumulate materials and carry out the work agreed upon. The amendments will modify this provision to allow a maximum of three years to complete the equivalent-match work and will add other safety work in addition to the structural improvements currently specified. This change will allow the district engineer to specify a shorter completion time requirement for specific equivalent-match project(s) to meet project specific conditions. If used, the shorter work period will be specified in the agreement and will require the approval of the local government.

The amendments insert a new subsection (d)(7)(C), which states that with the district engineer's approval, the original equivalent-match project(s) may be substituted at a later date by subsequent amendment to the participation-waived project agreement. This is intended to allow for unforeseen occurrences, such as an equivalent-match project that is selected for replacement by some other program or similar circumstance. A restriction is placed on this to ensure that the substituted equivalent-match project(s) is completed within a maximum of three years from the award of the construction contract for the original participation-waived project. This is to ensure that all equivalent-match project work is accomplished within a reasonable time frame. Due to the insertion of this subparagraph, all subsequent subparagraphs of (d)(7) have been renumbered.

The existing subsection (d)(7)(F), renumbered as (d)(7)(G), states that the department will not reimburse funds already received by the department under the terms of existing agreements. The amendments will state in addition that any such funds already received can be credited against the local government's required participation for subsequent participation-waived project agreement(s) for that same project(s). This change is necessary to clarify that previously received funds can be credited in this manner.

The amendments add subsection (d)(7)(H), which will specify that any equivalent-match project(s) cost that is in excess of the local government's required participation for a specific participation-waived project agreement cannot be credited for use on a future participation-waived project. This addition is to ensure the state is not inappropriately extending credit.

The amendments add subsection (d)(7)(I), which specifies that each equivalent-match project(s) must be specifically identified in the agreement at the time of execution. This addition will ensure the accountability of the local governments for the completion of the specific equivalent-match projects agreed to in the participation-waived project agreement and again prevent the extension of credit for unspecified equivalent-match work.

The amendments add subsection (d)(7)(J), which specifies that the local government must pay its share of the estimated project cost for any balance of local participation amounts remaining at the time the participation-waived project agreement is executed. This addition will ensure that the local government is aware of the need to follow the current rules in relation to the timing of payments on any amounts it owes that have not been covered by work on equivalent-match projects.

COMMENTS

No comments were received on the proposed amendments.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation.

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 October 25, 2001.

TRD-200106473
Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: November 14, 2001
Proposal publication date: September 14, 2001
For further information, please call: (512) 463-8630

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TEXAS DEPARTMENT OF INSURANCE

Notification Pursuant to the Insurance Code, Chapter 5, Subchapter L

As required by the Insurance Code, Article 5.96 and 5.97, the ***Texas Register*** publishes notice of proposed actions by the Texas Board of Insurance. Notice of action proposed under Article 5.96 must be published in the ***Texas Register*** not later than the 30th day before the board adopts the proposal. Notice of action proposed under Article 5.97 must be published in the ***Texas Register*** not later than the 10th day before the Board of Insurance adopts the proposal. The Administrative Procedure Act, the Government Code, Chapters 2001 and 2002, does not apply to board action under Articles 5.96 and 5.97.

The complete text of the proposal summarized here may be examined in the offices of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78714-9104.)

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Administrative Procedure Act.

Texas Department of Insurance

Proposed Action on Rules

EXEMPT FILING NOTIFICATION PURSUANT TO THE INSURANCE CODE CHAPTER 5, SUBCHAPTER L, ARTICLE 5.96

The Commissioner of Insurance, at a public hearing under Docket No. 2503 scheduled for January 22, 2002 at 9:30 a.m., in Room 100 of the William P. Hobby Jr. State Office Building, 333 Guadalupe Street in Austin, Texas, will consider a proposal made in a staff petition. Staff's petition seeks amendment of the Texas Automobile Rules and Rating Manual (the Manual), to adopt new and/or adjusted 2002 model Private Passenger Automobile Physical Damage Rating Symbols and revised identification information. Staff's petition (Ref. No. A-1001-17-I), was filed on October 30, 2001.

The new and/or adjusted symbols for the Manual's Symbols and Identification Section reflect data compiled on damageability, repairability, and other relevant loss factors for the listed 2002 model vehicles.

A copy of the petition, including an exhibit with the full text of the proposed amendments to the Manual is available for review in the office of the Chief Clerk of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas. For further information or to request copies of the petition, please contact Sylvia Gutierrez at (512) 463-6327; refer to (Ref. No. A-1001-17-I).

Comments on the proposed changes must be submitted in writing within 30 days after publication of the proposal in the *Texas Register*, to the Office of the Chief Clerk, Texas Department of Insurance, P. O. Box 149104, MC 113-2A, Austin, Texas 78714-9104. An additional copy of comments is to be submitted to Marilyn Hamilton, Associate Commissioner, Property & Casualty Program, Texas Department of Insurance, P. O. Box 149104, MC 104-PC, Austin, Texas 78714-9104.

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).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

TRD-200106716
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: October 31, 2001

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REVIEW OF AGENCY RULES

This Section contains notices of state agency rules review as directed by Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review*, which invite public comment to specified rules; and (3) notices of *readoption*, which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the ***Texas Administrative Code*** on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the ***Texas Register*** office.

Proposed Rule Reviews

Texas Department of Protective and Regulatory Services

Title 40, Part 19

The Texas Department of Protective and Regulatory Services (PRS) proposes to review Title 40 Texas Administrative Code Chapter 738, Civil Rights. Under the Texas Government Code, §2001.039, and the General Appropriations Act of 1997, Article IX, §167, state agencies must review their rules and readopt, readopt with amendments, or repeal rules as a result of the required rule review.

PRS will accept comments regarding whether the reasons for adopting the rules in Chapter 738 continue to exist.

Comments on the review of 40 TAC Chapter 738, Civil Rights, may be submitted to John Adamo at (512) 719-6153, or PRS, Texas Register Liaison, Legal Services-188, P.O. Box 149030, Mail Code E-611, Austin, Texas 78714-9030, or faxed to (512) 438-3022. All comments must be received within 30 days of publication in the *Texas Register*.

TRD-200106586
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Filed: October 26, 2001

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The Texas Department of Protective and Regulatory Services (PRS) proposes to review Title 40 Texas Administrative Code Chapter 701, Community Initiatives. Under the Texas Government Code, §2001.039, and the General Appropriations Act of 1997, Article IX, §167, state agencies must review their rules and readopt, readopt with amendments, or repeal rules as a result of the required rule review.

PRS will accept comments regarding whether the reasons for adopting the rules in Chapter 701 continue to exist.

Comments on the review of 40 TAC Chapter 701, Community Initiatives, may be submitted to Thomas Chapmond at (512) 438-3309, or PRS, Texas Register Liaison, Legal Services-190, P.O. Box 149030, Mail Code E-611, Austin, Texas 78714-9030, or faxed to (512) 438-3022. All comments must be received within 30 days of publication in the *Texas Register*.

TRD-200106587
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Filed: October 26, 2001

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The Texas Department of Protective and Regulatory Services (PRS) proposes to review Title 40 Texas Administrative Code Chapter 744, Ombudsman Services. Under the Texas Government Code, §2001.039, and the General Appropriations Act of 1997, Article IX, §167, state agencies must review their rules and readopt, readopt with amendments, or repeal rules as a result of the required rule review.

PRS will accept comments regarding whether the reasons for adopting the rules in Chapter 744 continue to exist.

Comments on the review of 40 TAC Chapter 744, Ombudsman Services, may be submitted to Betty Hable at (512) 834-3739, or PRS, Texas Register Liaison, Legal Services-189, P.O. Box 149030, Mail Code E-611, Austin, Texas 78714-9030, or faxed to (512) 438-3022. All comments must be received within 30 days of publication in the *Texas Register*.

TRD-200106588
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Filed: October 26, 2001

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Railroad Commission of Texas

Title 16, Part 1

The Railroad Commission of Texas (Commission) files this notice of intention to review §3.73, relating to Inscriptions on Railroad Commission of Texas Vehicles. This review and consideration is being conducted in accordance with Texas Government Code, §2001.039 (*as added by Acts 1999, 76th Leg., ch. 1499, §1.11(a)*). The Commission, in separate concurrent rulemakings, is proposing to repeal §3.73 and readopt its provisions in new §20.405 in order to move the rule text from Chapter 3, Oil and Gas Division, into Chapter 20, Subchapter D,

relating to Vehicle Management. Other than the change in chapter and rule number, and correction of a statutory citation, there are no substantive changes to the current rule language in proposed new §20.405. The rule declares that Railroad Commission vehicles are exempt from the identification requirements imposed on agencies under Texas Transportation Code, §721.002, as permitted by Texas Transportation Code, §721.003(a)(8).

As required by Texas Government Code, §2001.039 (*as added by Acts 1999, 76th Leg., ch. 1499, §1.11(a)*), the Commission will accept comments regarding whether there is any reason for retaining §3.73 in Chapter 3 rather than moving its provisions to new §20.405 in Chapter 20. Comments on the notice of intention to review §3.73 or on the proposed new §20.405 should be directed to Rebecca Trevino, Director of Finance, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967 or via electronic mail to rebecca.trevino@rrc.state.tx.us. The Commission will accept comments for 30 days after publication in the *Texas Register*. For more information, call Ms. Trevino at (512) 463-7214.

Issued in Austin, Texas, on October 23, 2001.

TRD-200106490
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Filed: October 25, 2001

♦ ♦ ♦

The Railroad Commission of Texas files this notice of intention to review 16 Texas Administrative Code, §20.1, relating to Protest/Dispute Resolution Procedures. This review and consideration is being conducted in accordance with Texas Government Code §2001.039 (*as added by Acts 1999, 76th Leg., ch. 1499, §1.11(a)*).

The Commission has concurrently proposed the repeal of §20.1 and a new §20.1 in order to reorganize the rule, update statutory references, and clarify the Commission's procedures for these protests.

The agency's reasons for adopting the rule continue to exist.

Comments may be submitted to Rebecca Trevino, Director, Finance and Accounting Division, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967 or rebecca.trevino@rrc.state.tx.us. Comments will be accepted for 30 days after publication of this notice in the *Texas Register*.

Issued in Austin, Texas, on October 23, 2001.

TRD-200106489
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Filed: October 25, 2001

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Adopted Rule Review

Texas Natural Resource Conservation Commission

Title 30, Part 1

The Texas Natural Resource Conservation Commission (commission) adopts the rules review and readopts Chapter 321, Control of Certain Activities By Rule, in accordance with Texas Government Code, §2001.039, and the General Appropriations Act, Article IX, §9 - 10.13, 76th Legislature, 1999, which require state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the reasons for the rules continue to exist. The proposed notice of intention to review was published in the July 13, 2001 issue of the *Texas Register* (26 TexReg 5275).

CHAPTER SUMMARY

Chapter 321 provides Texas authorization for numerous discharges that are more efficiently authorized by rule than by individual permits and is organized into the following 15 subchapters.

Subchapter A, Boat Sewage Disposal, contains definitions; the requirements, specifications, and certifications for marine sanitation devices; disposal of boat sewage; specification, certifications, fees, and disposal of sewage from pump out facilities; exclusions; renewal of certifications; disposition of fees; cancellation of certification, replacement, or transfer; and criminal penalties.

Subchapter B, Concentrated Animal Feeding Operations, contains waste and wastewater discharge and air emissions limitations; definitions; applicability; procedures for making application for an individual permit; procedures for making application for registration; notice of application for registration; proper concentrated animal feeding operation (CAFO) operation and maintenance; pollution prevention plans; best management practices; monitoring and reporting requirements; notification; dairy outreach program areas; effect of conflict or invalidity of rule; air standard permit authorization; and initial Texas Pollutant Discharge Elimination System (TPDES) authorization.

Subchapter C, Meat Processing, contains definitions; applicability; certification of registration; domestic waste disposal; right of review; and appeal of decisions by the executive director.

Subchapter D, Sand and Gravel Washing, contains application of subchapter; treatment and retention facilities; diversion of runoff; available capacity; and prohibition of unauthorized discharge.

Subchapter E, Surface Coal Mining, contains definitions; discharges authorized by rule; permit required; term modification; hearing; enforcement; effluent and additional effluent limitations; associated facilities; and monitoring and reporting of data.

Subchapter F, Shrimp Industry, contains definitions; applicability; certificate of registration; domestic waste disposal; requirements; rights of review; and appeal of decisions by the executive director.

Subchapter G, Hydrostatic Test Discharges, contains definitions; applicability; new and used facilities; registration; general and specific requirements for discharge; sampling, reporting, recordkeeping, and restrictions; and enforcement.

Subchapter H, Discharge to Surface Water from Treatment of Petroleum Fuel Substance Contaminated Waters, contains definitions; applicability; discharges of water contaminated by gasoline, jet fuel, or kerosene; and other petroleum substances; telephone utilities; restrictions; enforcement; and reservations.

Subchapter I, Additional Characteristics and Conditions of General Permits And For Controlling Certain Activities By Rule, contains additional characteristics and conditions for general permits and control of certain activities by rule.

Subchapter J, Discharges To Surface Waters From Ready-Mixed Concrete Plants And/Or Concrete Products Plants Or Associated Facilities, contains definitions; purpose and applicability; certificate of registration and public notice; general and specific requirements for discharge; sampling, reporting, recordkeeping, and restrictions; enforcement and revocation; and annual waste treatment fees.

Subchapter K, Concentrated Animal Feeding Operations, contains waste and wastewater discharge and air emission limitations; definitions; applicability requirements; application review; notice of application; public comments; permit issuance; amendments; renewal; proper CAFO operation and maintenance; pollution prevention plans; best management practices; other requirements; monitoring and reporting requirements; registration; dairy outreach program areas; and effect of conflict or invalidity of rule.

Subchapter L, Discharges To Surface Waters From Motor Vehicles Cleaning Facilities, contains definitions; purpose and applicability; certificate of registration and public notice; active agency permits; general and specific requirements for discharge; sampling, reporting, and recordkeeping; restrictions; enforcement and revocation; and annual waste treatment fees.

Subchapter M, Discharges to Surface Waters From Petroleum Bulk Stations And Terminals, contains definitions; purpose and applicability; active permits; certificate of registration and public notice; general and specific requirements for discharge; and sampling, reporting, and recordkeeping.

Subchapter N, Handling of Wastes From Commercial Facilities Engaged In Livestock Trailer Cleaning, contains statement of no discharge policy; definitions; purpose and applicability; certificate of registration and public notice; requirements for containment of waste and ponds; general requirements; restrictions; enforcement and revocation; and annual waste treatment fees.

Subchapter O, Discharges From Aquaculture Production Facilities, contains definitions; purpose and applicability; certificate of registration and public notice; groundwater protection; waste utilization or disposal by land application of wastewater and pond bottom sludges; Edwards Aquifer Recharge Zone; required best management practices and specific requirements for discharge; general requirements; enforcement and revocation, suspension, or annulment; and annual waste treatment fees.

ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission determined that the reasons for the rules in Chapter 321 continue to exist. The rules are needed to implement the commission's objectives to streamline the permitting process consistent with Texas Water Code, Chapters 5 and 26 and Texas Health and Safety Code, Chapters 341, 361, and 382. Chapter 321 provides Texas authorization for numerous discharges that are more efficiently authorized by rule than by individual permits.

PUBLIC COMMENT

The public comment period closed on August 20, 2001. No comments on whether the reasons for the rules continue to exist were received.

TRD-200106512
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: October 26, 2001

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TABLES & GRAPHICS

Graphic material from the emergency, proposed, and adopted sections is published separately in this tables and graphics section. Graphic material is arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic material is indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure 1: 1 TAC §5.195(c)

TABLE I
Federal Programs Requiring TRACS Review

DEPARTMENT OF AGRICULTURE (Agriculture/Rural Development)

10.025 PLANT AND ANIMAL DISEASE, PEST CONTROL AND ANIMAL CARE
10.028 WILDLIFE SERVICES
10.070 COLORADO RIVER BASIN SALINITY CONTROL PROGRAM
10.156 FEDERAL-STATE MARKETING IMPROVEMENT PROGRAM
10.164 WHOLESALE MARKET DEVELOPMENT
10.405 FARM LABOR HOUSING LOANS AND GRANTS
10.411 RURAL HOUSING SITE LOANS
10.415 RURAL RENTAL HOUSING LOANS
10.420 RURAL SELF-HELP HOUSING TECHNICAL ASSISTANCE
10.427 RURAL RENTAL ASSISTANCE PAYMENTS
10.433 RURAL HOUSING PRESERVATION GRANTS
10.475 COOP AGREEMENTS WITH STATES FOR INTRASTATE MEAT AND POULTRY INSPECTION
10.550 FOOD DISTRIBUTION
10.553 SCHOOL BREAKFAST PROGRAM
10.555 NATIONAL SCHOOL LUNCH PROGRAM
10.556 SPECIAL MILK PROGRAM FOR CHILDREN
10.557 SPECIAL SUPPLEMENTAL FOOD PROGRAM (WIC)
10.558 CHILD AND ADULT CARE FOOD PROGRAM
10.559 SUMMER FOOD SERVICE PROGRAM FOR CHILDREN
10.560 STATE ADMINISTRATIVE EXPENSES FOR CHILD NUTRITION
10.561 STATE ADMINISTRATIVE MATCHING GRANTS FOR FOOD STAMP PROGRAM
10.564 NUTRITION EDUCATION & TRAINING PROGRAM
10.565 COMMODITY SUPPLEMENT FOOD PROGRAM
10.566 NUTRITION ASSISTANCE FOR PUERTO RICO
10.567 FOOD DISTRIBUTION PROGRAM ON INDIAN RESERVATIONS
10.568 EMERGENCY FOOD ASSISTANCE PROGRAM (ADMIN. COSTS)
10.569 EMERGENCY FOOD ASSISTANCE (FOOD COMMODITIES)
10.570 NUTRITION PROGRAM FOR THE ELDERLY (COMMODITIES)
10.664 COOPERATIVE FORESTRY ASSISTANCE
10.760 WATER AND WASTE DISPOSAL SYSTEM FOR RURAL COMMUNITIES
~~*10.762 SOLID WASTE MANAGEMENT GRANTS*~~
10.763 EMERGENCY COMMUNITY WATER ASSISTANCE GRANTS
~~*10.764 RESOURCE CONSERVATION AND DEVELOPMENT LOANS*~~
~~*10.765 WATERSHED PROTECTION AND FLOOD PREVENTION LOANS*~~
10.766 COMMUNITY FACILITIES LOANS AND GRANTS
10.767 INTERMEDIARY RELENDING PROGRAM
10.768 BUSINESS AND INDUSTRY LOANS
10.769 RURAL DEVELOPMENT GRANTS
10.770 WATER AND WASTE DISPOSAL LOANS AND GRANTS
10.771 RURAL COOPERATIVE DEV. GRANTS
10.773 RURAL BUSINESS OPPORTUNITY GRANTS
10.854 RURAL ECONOMIC DEVELOPMENT LOANS AND GRANTS
10.855 DISTANCE LEARNING AND TELEMEDICINE LOANS AND GRANTS

10.901 RESOURCE CONSERVATION AND DEVELOPMENT
10.904 WATERSHED PROTECTION AND FLOOD PREVENTION
10.906 WATERSHED SURVEYS AND PLANNING

DEPARTMENT OF COMMERCE (Economic Development)

11.300 GRANTS FOR PUBLIC WORKS AND ECONOMIC DEVELOPMENT
11.302 ECONOMIC DEVELOPMENT - SUPPORT FOR PLANNING ORGANIZATIONS
11.303 ECONOMIC DEVELOPMENT - TECHNICAL ASSISTANCE
~~*11.304 ECO. DEV. -- PUBLIC WORKS IMPACT PROGRAM*~~
~~*11.305 ECO. DEV. -- STATE & LOCAL ECO. DEV. PLNG*~~
11.307 ECONOMIC ADJUSTMENT ASSISTANCE
11.312 RESEARCH AND EVALUATION PROGRAM
11.400 GEODETIC SURVEYS AND SERVICES
11.405 ANADROMOUS FISH CONSERVATION ACT PROGRAM
11.407 INTERJURISDICTIONAL FISHERIES ACT OF 1986
11.419 COASTAL ZONE MANGEMENT ADMINISTRATION AWARDS
11.420 COASTAL ZONE MANAGEMENT ESTAURINE RESEARCH RESERVES
11.426 FINANCIAL ASSISTANCE FOR NATIONAL CENTERS FOR COASTAL OCEAN SCIENCE
11.427 FISHERIES DEVELOPMENT & UTILIZATION R&D GRANTS
11.428 INTERGOVERNMENTAL CLIMATE-PROGRAMS
11.433 MARINE FISHERIES INITIATIVE
11.434 COOPERATIVE FISHERY STATISTICS
11.435 SOUTHEAST AREA MONITORING & ASSESSMENT PROGRAM
11.436 COLUMBIA RIVER FISHERIES DEVELOPMENT PROGRAM
11.437 PACIFIC FISHERIES DATA PROGRAM
11.438 PACIFIC COAST SALMON RECOVERY-PACIFIC SALMON TREATY PROGRAM
11.439 MARINE MAMMAL DATA PROGRAM
11.443 SHORT TERM CLIMATE FLUCTUATIONS
11.452 UNALLIED INDUSTRY PROJECTS
11.454 UNALLIED MANAGEMENT PROJECTS
11.455 COOPERATIVE SCIENCE AND EDUCATION PROGRAM
11.457 CHESAPEAKE BAY STUDIES
11.463 HABITAT CONSERVATION
11.467 METEORLOGIC & HYDROLOGIC MODERNIZATION DEVELOPMENT
11.472 UNALLIED SCIENCE PROGRAM
11.473 COASTAL SERVICES CENTER
11.474 ATLANTIC COASTAL FISHERIES COOPERATIVE MANAGEMENT
11.550 PUBLIC TELECOMMUNICATIONS FACILITIES-PLNG & CONST.
11.552 TECHNOLOGY OPPORTUNITIES
11.611 MANUFACTURING EXTENSION PARTNERSHIP
11.614 EXPERIMENTAL PROGRAM TO STIMULATE COMPETITIVE TECHNOLOGY

DEPARTMENT OF DEFENSE

None CONT. AUTHORITIES PROGRAM : SMALL PROJECTS NSAC
None MITIGATION OF SHORE DAMAGE(SECTION 111 PROGRAM)
None PLANNING, DESIGN & CONSTRUC. AUTH. BY CONGRESS
12.002 PROCUREMENT TECHNICAL ASSISTANCE FOR BUSINESS FIRMS
12.100 AQUATIC PLANT CONTROL

12.101 BEACH EROSION CONTROL PROJECTS
12.104 FLOOD PLAIN MANAGEMENT SERVICES
12.105 PROTECTION OF ESSENTIAL HGHWYS, HGHWY BRIDGE APPROACHES & PUBLIC WORKS
12.106 FLOOD CONTROL PROJECTS
12.107 NAVIGATION PROJECTS
12.108 SNAGGING & CLEARING FOR FLOOD CONTROL
12.109 PROTECTION, CLEARING & STRAIGHTENING CHANNELS
12.110 PLANNING ASSISTANCE TO STATES
12.113 STATE MOA PROGRAM FOR REIMBURSEMENT OF TECHNICAL SERVICES
12.607 COMMUNITY ECONOMIC ADJUSTMENT PLANNING ASSISTANCE
12.610 JOINT LAND USE STUDIES
12.611 COMMUNITY ECO. ADJUST. PLNG ASSIST/REDUCTIONS IN DEFENSE EMPLYMNT
12.613 GROWTH MANAGEMENT PLANNING ASSISTANCE

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

14.112 MORTAGE INSURANCE - CONST/SUBST REHAB OF CONDOS
14.116 MORTAGE INSURANCE - GROUP PRACTICE FACILITIES
14.123 MORTGAGE INSURANCE-HOUSING IN OLDER, DECLINING AREAS
14.126 MORTAGE INSURANCE - COOPERATIVE PROJECTS
14.127 MORTAGE INSURANCE - MANUFACTURED HOME PARKS
14.128 MORTAGE INSURANCE - HOSPITALS
14.129 MORTAGE INSURANCE - NURSING HOMES, INTERMED. CARE FACILITIES, BOARD & CARE HOMES & ASISTED LIVING FACILITIES
14.134 MORTGAGE INSURANCE-RENTAL HOUSING
14.135 MORTAGE INSURANCE - RNTL & CO-OP HSNG FOR MOD & ELD.
14.138 MORTAGE INSURANCE - RENTAL HOUSING FOR ELDERLY
14.139 MORTAGE INSURANCE - RNTL HSNG / URBAN RENEWAL AREAS
14.151 SUPPLEMENTAL LOAN INSURANCE - MULTIFAMILY RENTAL HOUSING
14.157 SUPPORTIVE HOUSING FOR THE ELDERLY
14.181 SUPPORTIVE HOUSING FOR PERSONS WITH DISABILITIES
14.184 MORTGAGES INSURANCE FOR SINGLE ROOM OCCUPANCY (SRO)
14.218 COMMUNITY DEVELOPMENT BLOCK GRANTS/ENTITLEMENTS GRANTS
14.219 COMMUNITY DEVELOPMENT BLOCK GRANTS/SMALL CITIES PROGRAM
14.231 EMERGENCY SHELTER GRANTS PROGRAM
14.246 COMMUNITY DEVELOPMENT BLOCK GRANTS/ECONOMIC DEVELOPMENT INITIATIVE
14.248 COMMUNITY DEVELOPMENT BLOCK GRANTS-SECTION 108 LOAN GURANTEES
14.850 PUBLIC AND INDIAN HOUSING
~~*14.852 PUBLIC AND INDIAN HOUSING-COMPREHENSIVE IMPROVEMENT*~~
~~*14.859 PUBLIC AND INDIAN HOUSING -- COMPREHENSIVE GRANT PROGRAM*~~
14.866 DEMOLITION & REVITALIZATION OF SEVERELY DISTRESSED PUBLIC HOUSING
14.872 PUBLIC HOUSING CAPITAL FUND

DEPARTMENT OF INTERIOR (Reclamation, Historic Preservation and Recreation)

15.250 REGUL. OF SFC COAL MINING & SFC EFFECTS OF UNDERGROUD COAL MINING
15.252 ABANDONED MINE LAND RECLAMATION (AMLR) PROGRAM
15.253 NOT-FOR-PROFIT AMD RECLAMATION
15.506 WATER DESALINATION RESEARCH & DEVELOPMENT PROGRAM

15.605 SPORT FISH RESTORATION
15.611 WILDLIFE RESTORATION
15.614 COASTAL WETLANDS PLNG, PROTECTION & RESTORATION
15.615 COOPERATIVE ENDANGERED SPECIES CONSERVATION FUND
15.616 CLEAN VESSEL ACT
15.617 WILDLIFE CONSERVATION AND RESTORATION
15.622 SPORTFISHING AND BOATING SAFETY PROGRAM
15.623 NORTH AMERICAN WETLANDS CONSERVATION FUND
15.625 WILDLIFE CONSERVATION AND RESTORATION
15.626 HUNTER EDUCATION AND SAFETY PROGRAM
15.628 MULTI-STATE CONSERVATION GRANTS
15.904 HISTORIC PRESERVATION FUND GRANTS-IN-AID
15.916 OUTDOOR RECREATION -- ACQUISTION, DEVELOPMENT & PLANNING
15.919 URBAN PARK AND RECREATION RECOVERY PROGRAM
15.923 NATIONAL CENTER FOR PRESERVATION TECHNOLOGY & TRAINING
15.926 AMERICAN BATTLEFIELD PROTECTION

DEPARTMENT OF JUSTICE (Law Enforcement/Substance Abuse Control)

None BUREAU OF PRISONS -- CONSTRUCTION PROJECTS
None IMMIGRATION AND NATURALIZATION PROJECTS
16.007 STATE DOMESTIC PREPAREDNESS EQUIPMENT SUPPORT PROGRAM
16.008 STATE & LOCAL DOMESTIC PREPAREDNESS TRAINING PROGRAM
16.009 STATE & LOCAL DOMESTIC PREPAREDNESS EXERCISE PROGRAM
16.010 STATE & LOCAL DOMESTIC PREPAREDNESS TECHNICAL ASSISTANCE
16.201 CUBAN & HAITIAN ENTRANT RESETTLEMENT PROGRAM
16.202 YOUNG OFFENDER INITIATIVE: REENTRY GRANT PROGRAM
16.524 LEGAL ASSISTANCE FOR VICTIMS
16.525 GRANTS TO REDUCE VIOLENT CRIMES AGAINST WOMEN ON CAMPUS
16.540 JUVENILE JUSTICE & DELINQUENCY PREVENTION--ALLOCATION TO STATES
16.541 JUVENILE JUSTICE & DELINQUENCY PREVENTION--SPECIAL EMPHASIS
16.544 GANG-FREE SCHOOLS & COMMUNITIES-COMMUNITY-BASED GANG INT.
16.548 TITLE V-DELINQUENCY PREVENTION PROGRAM
16.549 PART E -- STATE CHALLENGE ACTIVITIES
16.550 STATE JUSTICE STATISTICS PROGRAM FOR STATISTICS ANALYSIS CENTERS
16.554 NATIONAL CRIMINAL HISTORY IMPROVEMENT PROGRAM (NCHIP)
16.564 CRIME LAB. IMPROVEMENT - COMBINED OFF. DNA INDEX SYSTEM REDUCTION
16.577 EMERGENCY FEDERAL LAW ENFORCEMENT ASSISTANCE
16.578 FEDERAL SURPLUS PROPERTY TRANSFER PROGRAM
16.579 BYRNE FORMULA GRANT PROGRAM
16.580 EDWARD BYRNE MEMORIAL LAW ENFORCEMENT ASSIS. DISC. GRANTS
16.585 DRUG COURT DISCRETIONARY GRANT PROGRAM
16.586 VIOLENT OFFENDER INCARCER./TRUTH IN SENTENCING INCENTIVE GRANTS
16.587 VIOLENCE AGAINST WOMEN DISCRETIONARY GRANTS FOR INDIAN TRIBAL GOV'T
16.588 VIOLENCE AGAINST WOMEN FORMULA GRANTS
16.589 RURAL DOMESTIC VIOLENCE AND CHILD VICTIMIZATION ENFORCEMENT
16.590 GRANTS TO ENCOURAGE ARREST POLICIES & ENFORCEMENT OF PROT. ORDERS
~~*16.591 MANAGING RELEASED SEX OFFENDERS*~~
16.593 RESIDENTIAL SUBSTANCE ABUSE TREATMENT FOR STATE PRISONERS

~~*16.594 PREV., DIAGNOSIS AND TRTMNT OF TB IN CORRECTIONAL FAC.*~~
16.595 EXECUTIVE OFFICE FOR WEED AND SEED
16.597 MOTOR VEHICLE THEFT PROTECTION ACT PROGRAM
16.598 STATE IDENTIFICATION SYSTEMS GRANT PROGRAM
16.606 STATE CRIMINAL ALIEN ASSISTANCE PROGRAM
16.609 PLANNING, IMPLEMENTING & ENHANCING STRATEGIES IN COMM. PROSECUTION
16.610 REGIONAL INFORMATION SHARING SYSTEMS
16.611 CLOSED-CIRCUIT TELEVISING OF CHILD VICTIMS OF ABUSE
16.612 NATIONAL WHITE COLLAR CRIME CENTER
16.613 SCAMS TARGETING THE ELDERLY
16.614 STATE & LOCAL ANTI-TERRORISM TRAINING
16.710 PUBLIC SAFETY PARTNERSHIP AND COMMUNITY POLICING GRANTS
16.726 JUVENILE MENTORING PROGRAM
16.727 ENFORCING UNDERAGE DRINKING LAWS PROGRAM
16.728 DRUG PREVENTION PROGRAM
16.729 DRUG-FREE COMMUNITIES SUPPORT PROGRAM GRANTS
16.733 NATIONAL INCIDENT BASED REPORTING SYSTEM

DEPARTMENT OF LABOR (Workforce Development)

17,207 EMPLOYMENT SERVICE
17.235 SENIOR COMMUNITY SERVICE EMPLOYMENT PROGRAM
17.247 MIGRANT AND SEASONAL FARMWORKERS
~~*17.250 WORKFORCE INVESTMENT ACT*~~
17.260 WIA DISLOCATED WORKERS
17.600 MINE HEALTH & SAFETY GRANTS
17.801 DISABLED VETERANS OUTREACH PROGRAM
17.802 VETERANS EMPLOYMENT PROGRAM
17.804 LOCAL VETERANS EMPLOYMENT REPRESENTATIVE PROGRAM

DEPARTMENT OF TRANSPORTATION

None SECTION 4 (I) INNOVATIVE TECHNIQUES
20.005 BOATING SAFETY FINANCIAL ASSISTANCE
20.006 STATE ACCESS TO THE OIL SPILL LIABILITY TRUST FUND
20.007 BRIDGE ALTERATION
20.106 AIRPORT IMPROVEMENT PROGRAM
20.108 AVIATION RESEARCH GRANTS
20.109 AIR TRANSPORTATION CENTERS OF EXCELLENCE
20.205 HIGHWAY PLANNING AND CONSTRUCTION
20.219 NATIONAL RECREATIONAL TRAILS PROGRAM
20.303 GRANTS-IN-AID FOR RAILROAD SAFETY-STATE PARTICIPATION
~~*20.308 LOCAL RAIL FREIGHT ASSISTANCE*~~
20.500 FEDERAL TRANSIT CAPITAL IMPROVEMENT GRANTS
20.502 FEDERAL TRANSIT GRANTS FOR UNIVERSITY RESEARCH AND TRAINING
20.503 FEDERAL TRANSIT MANAGERIAL TRAINING GRANTS
20.505 FEDERAL TRANSIT-METROPOLITAN PLANNING GRANTS
20.507 FEDERAL TRANSIT-FORMULA GRANTS
20.509 FORMULA GRANTS FOR OTHER THAN URBANIZED AREAS
20.511 HUMAN RESOURCE PROGRAMS

20.512 FEDERAL TRANSIT TECHNICAL ASSISTANCE
20.513 CAPITAL ASSISTANCE PROGRAM FOR ELDERLY & DISABLED
20.514 TRANSIT PLANNING AND RESEARCH
20.515 STATE PLANNING AND RESEARCH
20.516 JOB ACCESS-REVERSE COMMUTE
20.600 STATE & COMMUNITY HIGHWAY SAFETY
20.601 ALCOHOL TRAFFIC SAFETY & DRUNK DRIVING PREVENTION GRANTS
20.602 OCCUPANT PROTECTION
20.603 FEDERAL HIGHWAY SAFETY DATA IMPROVEMENTS GRANTS
20.604 SAFETY INCENTIVE GRANTS FOR USE OF SEATBELTS
20.605 SAFETY INCENTIVES TO PREVENT OPERATION OF MOTOR VEHICLE BY INTOX. PERSONS
20.700 PIPELINE SAFETY
20.701 UNIVERSITY TRANSPORTATION CENTERS PROGRAM
20.703 INTERAGENCY HAZARDOUS MATERIALS TRNG & PLNG
20.714 NATIONAL PIPELINE MAPPING SYSTEM
20.801 DEV. & PROMOTION OF PORTS & INTERMODAL TRANSPORTATION
20.906 HISPANIC SERVING INSTITUTIONS -- STUDENT TRNG & TECH. ASSIST.
20.907 HISTORICALLY BLACK COLL & UNIV - STUDENT TRNG & TECH. ASSIST

General Services Administration

None INTERGOVERNMENTAL CONSULTATION ON FED. PROJECTS (GSA)
~~*39.002 DISPOSAL OF FEDERAL SURPLUS REAL PROPERTY*~~

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

45.025 PROMOTION OF THE ARTS-PARTNERSHIP AGREEMENTS
45.310 STATE LIBRARY PROGRAM

NATIONAL SCIENCE FOUNDATION

47.076 EDUCATION AND HUMAN RESOURCES

SMALL BUSINESS ADMINISTRATION

~~*59.007 MANAGEMENT AND TA/SOCIALLY & ECO. DISADVANTAGED BUSINESSES*~~
59.037 SMALL BUSINESS DEVELOPMENT CENTER
~~*59.045 NATURAL RESOURCE DEVELOPMENT (SBA)*~~

DEPARTMENT OF VETERAN AFFAIRS

64.005 GRANTS TO STATES FOR CONSTRUCTION OF STATE HOME FACILITIES
64.201 NATIONAL CEMETERIES
64.203 STATE CEMETERY

ENVIRONMENTAL PROTECTION AGENCY

None CONSTRUCTION OF NEW EPA FACILITIES
None EPA PLANS / PERMITS NOT IMPACTING INTERSTATE AREAS

None EPA REAL PROPERTY ACQ. OR DISP., INC. LEASES & ESMTS
66.001 AIR POLLUTION CONTROL PROGRAM SUPPORT
66.032 STATE INDOOR RADON GRANTS
66.033 OZONE TRANSPORT
66.418 CONSTRUCTION GRANTS FOR WASTEWATER TREATMENTS WORKS
66.419 WATER POLLUTIONCONTROL -- STATE & INTERSTATE PROG.SUP.
66.432 STATE PUBLIC WATER SYSTEM SUPERVISION
66.433 STATE UNDERGROUND WATER SOURCE PROTECTION
66.454 WATER QUALITY MANAGEMENT PLANNING
66.456 NATIONAL ESTUARY PROGRAM
66.458 CAPITALIZATION GRANTS FOR STATE REVOLVING FUNDS
66.460 NON POINT SOURCE IMPLEMENTATION GRANTS
66.461 WETLANDS GRANTS
66.463 WATER QUALITY COOPERATIVE AGREEMENTS
66.466 CHESAPEAKE BAY PROGRAM
66.467 WASTEWATER OPERATOR TRAINING GRANT PROGRAM (T/A)
66.468 CAPITALIZATION GRANTS FOR DRINKING WATER STATE REVOLVING FUNDS
66.469 GREAT LAKES PROGRAM
66.471 STATE GRANTS TO REIMBURSE OPERATORS OF SMALL WATER SYSTEMS FOR TRNG
66.472 BEACH MONITORING & NOTIFICATION PROGRAM DEVELOPMENT GRANTS
66.500 ENVIRONMENTAL PROTECTION -- CONSOLIDATED RESEARCH
66.508 SENIOR ENVIRONMENTAL EMPLOYMENT PROGRAM
66.600 ENVIRONMENTAL PROTECTION CONSOLIDATED GRANTS--PROGRAM. SUPPORT
66.604 ENVIRONMENTAL JUSTICE GRANTS TO SMALL COMMUNITY GROUPS
66.605 PERFORMANCE PARTNERSHIP GRANTS
66.606 SURVEYS, STUDIES, INVESTIGATIONS, & SPECIAL PURPOSE GRANTS
~~*66.651 Sustainable Development Challenge Grants*~~
66.700 CONSOLIDATED PESTICIDES ENFORCEMENT COOPERATIVE AGREEMENTS
66.701 TOXIC SUBSTANCES COMPLIANCE MONITORING COOPERATIVE AGREEMENTS
66.707 TSCA TITLE IV STATE LEAD GRANTS
66.708 POLLUTION PREVENTION GRANTS PROGRAM
66.709 CAPACITY BUILDING GRANTS & COOPERATIVE AGREEMENTS FOR STATES & TRIBES
66.711 ENVIRONMENTAL JUSTICE THROUGH POLLUTION PREVENTION GRANTS
66.714 PESTICIDE ENVIRONMENTAL STEWARDSHIP--REGIONAL GRANTS
66.715 CHILDHOOD BLOOD-LEVEL SCREENING & LEAD AWARENESS (EDUC) OUTREACH
66.801 HAZARDOUS WASTE MANAGEMENT STATE PROGRAM SUPPORT
66.802 SUPERFUND STATE SITE--SPECIFIC CO-OP AGREEMENTS
66.804 STATE & TRIBAL UNDERGROUND STORAGE TANKS PROGRAM
66.805 LEAKING UNDERGROUND STORAGE TANK TRUST FUND PROGRAM
66.806 SUPERFUND TECHNICAL ASSISTANCE GRANTS FOR CITIZEN GRPS AT PRIORITY SITES
66.807 SUPERFUND INNOVATIVE TECHNOLOGY EVALUATION PROGRAM
66.808 SOLID WASTE MANAGEMENT ASSISTANCE
66.809 SUPERFUND STATE CORE PROGRAM COOPERATIVE AGREEMENTS
66.810 CEPP TECHNICAL ASSISTANCE GRANTS PROGRAM
66.811 BROWNFIELDS PILOTS COOPERATIVE AGREEMENTS
66.930 U.S. - MEXICO BORDER GRANTS PROGRAM

DEPARTMENT OF ENERGY

81.041 STATE ENERGY CONSERVATION
81.042 WEATHERIZATION ASSISTANCE FOR LOW-INCOME PERSONS
81.049 OFFICE OF SCIENCE FINANCIAL ASSISTANCE PROGRAM

FEDERAL EMERGENCY MANAGEMENT AGENCY (Disaster Assistance)

None SEC. 402 & 414 DISASTER RELIEF
84.536 FLOOD MITIGATION ASSISTANCE
83.537 COMMUNITY DISASTER LOANS
83.541 DISASTER UNEMPLOYMENT ASSISTANCE
83.543 INDIVIDUAL & FAMILY GRANTS
83.544 PUBLIC ASSISTANCE GRANTS
83.552 EMERGENCY MANAGEMENT PERFORMANCE GRANTS

DEPARTMENT OF EDUCATION

84.002 ADULT EDUCATION - STATE GRANT PROGRAM
84.004 CIVIL RIGHTS TRAINING & ADVISORY SERVICES
84.011 MIGRANT EDUC. STATE FORMULA GRANTS
84.015 NATIONAL RESOURCE CENTERS & FELLOWSHIPS PROGRAM FOR LANGUAGE & AREA OR LANGUAGE & INTERNATIONAL STUDIES
84.016 UNDERGRADUATE INTERNATIONAL STUDIES & FOREIGN LANGUAGE PROGRAMS
84.027 SPECIAL EDUCATION - GRANTS TO STATES
84.031 HIGHER EDUCATION - INSTITUTIONAL AID
84.040 IMPACT AID - FACILITIES MAINTENANCE
84.041 IMPACT AID
84.042 TRIO - STUDENT SUPPORT SERVICES
84.044 TRIO - TALENT SEARCH
84.048 VOCATIONAL EDUCATION - BASIC GRANTS TO STATES
84.060 INDIAN EDUCATION - GRANTS TO LOCAL EDUCATIONAL AGENCIES
84.066 TRIO - EDUCATION OPPORTUNITY CENTERS
84.083 WOMEN'S EDUCATIONAL EQUITY ACT PROGRAM
~~*84.086 SPCL EDUCATION -- SEVERELY DISABLED PROGRAM*~~
84.116 FUND FOR THE IMPROVEMENT OF POSTSECONDARY EDUCATION
84.120 MINORITY SCIENCE & ENGINEERING IMPROVEMENT
84.126 REHAB SVCS - VOC. REHAB GRANTS TO STATES
84.128 REHABILITATION SERVICES - SERVICE PROJECTS
84.129 REHABILITATION LONG-TERM TRAINING
84.132 CENTERS FOR INDEPENDENT LIVING
84.141 MIGRANT EDUCATION-HIGH SCHOOL EQUIVALENCY PROGRAM
84.144 MIGRANT EDUCATION -- COORDINATION PROGRAM
84.145 FEDERAL REAL PROPERTY ASSISTANCE PROGRAM
84.149 MIGRANT EDUCATION--COLLEGE ASSISTANCE MIGRANT PROGRAM
84.160 TRAINING INTERPRETERS FOR INDIVIDUALS WHO ARE DEAF AND/OR DEAF-BLIND
84.161 REHABILITATION SERVICES--CLIENT ASSIS. PROGRAM
84.162 IMMIGRANT EDUCATION

84.165 MAGNET SCHOOLS ASSISTANCE
84.168 EISENHOWER PROFESSIONAL DEVELOPMENT-FEDERAL ACTIVITIES
84.169 INDEPENDENT LIVING-STATE GRANTS
84.173 SPECIAL EDUCATION-PRESCHOOL GRANTS
84.177 REHAB SVCS--INDEPEND. LIVING SVCS FOR OLDER BLIND
84.181 SPECIAL EDUCATION-GRANTS FOR INFANTS & FAMILIES WITH DISABILITIES
84.184 SAFE & DRUG-FREE SCHOOLS & COMMUNITIES - NATIONAL PROGRAMS
84.186 SAFE & DRUG-FREE SCHOOLS & COMMUNITIES - STATE GRANTS
84.187 SUPPORTED EMPLOYMENT SVCS FOR INDIVID. W/SEVERE DISABILITIES
84.191 ADULT EDUCATION - NATIONAL LEADERSHIP ACTIVITIES
84.194 BILINGUAL EDUCATION SUPPORT SERVICES
84.195 BILINGUAL EDUCATION-PROFESSIONAL DEVELOPMENT
84.196 EDUCATION FOR HOMELESS CHILDREN & YOUTH
84.200 GRADUATE ASSISTANCE IN AREAS OF NATIONAL NEED
84.203 STAR SCHOOLS
84.206 JAVITS GIFTED & TALENTED STUDENTS EDUCATION GRANT PROGRAM
84.209 NATIVE HAWAIIAN FAMILY BASED EDUCATION CENTERS
84.214 EVEN START--MIGRANT EDUCATION
84.215 FUND FOR THE IMPROVEMENT OF EDUCATION
84.217 MCNAIR POST-BACCALAUREATE ACHIEVEMENT
84.221 NATIVE HAWAIIAN SPECIAL EDUCATION
84.224 ASSISTIVE TECHNOLOGY
84.234 PROJECTS WITH INDUSTRY
84.235 REHAB SVCS DEMO & TRNG - SPECIAL DEMO PROGRAMS
84.240 PROGRAM OF PROTECTION & ADVOCACY OF INDIVIDUAL RIGHTS
84.243 TECH--PREP EDUCATION
84.246 REHABILITATION SHORT-TERM TRAINING
84.255 LITERACY PROGRAMS FOR PRISONERS
84.256 FREELY ASSOCIATED STATES - EDUCATION GRANT PROGRAM
84.257 NATIONAL INSTITUTE FOR LITERACY
84.263 REHABILITATION TRAINING - EXPERIMENTAL & INNOVATIVE TRAINING
84.264 REHAB TRAINING -- CONTINUING EDUCATION
84.265 REHAB TRAINING - STATE VOC. REHAB UNIT IN-SERVICE TRAINING
84.269 INSTITUTE FOR INTERNATIONAL PUBLIC POLICY
84.274 AMERICAN OVERSEAS RESEARCH CENTERS
84.275 REHABILITATION TRAINING - GENERAL TRAINING
84.281 EISENHOWER PROFESSIONAL DEVELOPMENT STATE GRANTS
84.286 TELECOMMUNICATIONS DEMONSTRATION PROJECT FOR MATHEMATICS
84.287 TWENTY-FIRST CENTURY COMMUNITY LEARNING CENTERS
84.288 BILINGUAL EDUCATION-PROGRAM DEV. & IMPLEM.
84.289 BILINGUAL EDUCATION-PROGRAM ENHANCEMENT GRANTS
84.290 BILINGUAL EDUCATION-COMPREHENSIVE SCHOOL GRANTS
84.291 BILINGUAL EDUCATION-SYSTEMWIDE IMPROVEMENT GRANTS
84.292 BILINGUAL EDUCATION-RESEARCH PROGRAMS
84.293 FOREIGN LANGUAGE ASSISTANCE
84.295 READY TO LEARN TELEVISION
84.296 NATIVE HAWAIIAN COMMUNITY-BASED EDUCATION LEARNING CENTERS
84.297 NATIVE HAWAIIAN CURRICULUM DEVELOPMENT, TEACHER TRNG & RECRUITMENT
84.298 INNOVATIVE EDUCATION PROGRAM STRATEGIES
84.302 REGIONAL TECHNICAL SUPPORT & PROF. DEVELOPMENT CONSERTIA

84.303 TECHNOLOGY INNOVATION-CHALLENGE GRANTS
84.304 INTERNATIONAL EDUCATION EXCHANGE
84.310 GOALS 2000: PARENTAL ASSISTANCE
84.315 CAPACITY BUILDING FOR TRADITIONALLY UNDERSERVED POPULATIONS
84.316 NATIVE HAWAIIAN HIGHER EDUCATION PROGRAM
84.319 EISENHOWER REGIONAL MATHEMATICS & SCIENCE EDUCATION CONSORTIA
84.323 SPECIAL EDUCATION-STATE PROGRAM IMPROVEMENT GRANTS FOR CHILDREN WITH DISABILITIES
84.324 SPECIAL EDUCATION-RESEARCH & INNOVATION SVCS & RESULTS FOR CHILDREN WITH DISABILITIES
84.325 SPECIAL EDUCATION-PERSONNEL PREPARATION TO IMPROVE SVCS & RESULTS FOR CHILDREN WITH DISABILITIES
84.326 SPECIAL EDUCATION-TECHNICAL ASSISTANCE & DISSEMINATION TO IMPROVE SVCS & RESULTS FOR CHILDREN WITH DISABILITIES
84.327 SPECIAL EDUCATION-TECHNOLOGY & MEDIA SVCS FOR INDIVIDUALS WITH DISABILITIES
84.328 SPECIAL EDUCATION- PARENT INFORMATION CENTERS
84.329 SPECIAL EDUCATION - STUDIES & EVALUATIONS
84.330 ADVANCED PLACEMENT INCENTIVE PROGRAM
84.332 COMPREHENSIVE SCHOOL REFORM DEMONSTRATION
84.333 DEMONSTRATION PROJECTS TO ENSURE STUDENTS WITH DISABILITIES RECEIVE A HIGHER EDUCATION
84.334 GAINING EARLY AWARENESS & READINESS FOR UNDERGRADUATE PROGRAMS
84.335 CHILD CARE ACCESS MEANS PARENTS IN SCHOOL
84.336 TEACHER QUALITY ENHANCEMENT GRANTS
84.337 TECHNOLOGICAL INNOVATION & COOPERATION FOR FOREIGN INFO ACCESS
84.338 READING EXCELLENCE
84.339 LEARNING ANYTIME ANYWHERE PARTNERSHIPS
84.340 CLASS SIZE REDUCTION
84.341 COMMUNITY BASED TECHNOLOGY CENTERS
84.342 PREPARING TOMORROW'S TEACHERS TO USE TECHNOLOGY
84.343 ASSISTIVE TECHNOLOGY-STATE GRANTS FOR PROTECTION & ADVOCACY
84.344 TRIO - DISSEMINATION PARTNERHIP GRANTS
84.346 OCCUPATIONAL & EMPLOYMENT INFORMATION STATE GRANTS
84.347 COMMUNITY SCHOLARSHIP MOBILIZATION
84.349 EARLY CHILDHOOD EDUCATOR PROFESSIONAL DEVELOPMENTS PROGRAMS
84.350 TRANSITION TO TEACHING PROGRAM
84.351 ARTS IN EDUCATION MODEL DEVELOPMENT & DISSEMINATION GRANT PROGRAM

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

89.003 NATIONAL HISTORICAL PUBLICATIONS & RECORDS GRANTS

DEPARTMENT OF HEALTH AND HUMAN SERVICES

93.003 PUBLIC HEALTH AND SOCIAL SERVICES EMERGENCY FUND
93.005 PROJECT GRANTS FOR FACILITIES TO IMPROVE STATUS OF MINORITY POPULATIONS

93.006 STATE & TERRITORIAL & TECHNICAL ASSISTANCE CAPACITY DEV. MINORITY HIV/AIDS DEMONSTRATION PROGRAM
93.041 SPECIAL PROGRAMS FOR THE AGING - TITLE VII, CHAPTER 3 - PROGRAMS TO PREVENT ELDER ABUSE, NEGLECT & EXPLOITATION
93.042 SPECIAL PROGRAMS FOR THE AGING -TITLE VII, CHAPTER 2 -LONG TERM CARE OMBUDSMAN SERVICES FOR OLDER INDIVIDUALS
93.043 SPECIAL PROGRAMS FOR THE AGING - TITLE III, PART F - DISEASE PREVENTION & HEALTH PROMOTION SERVICES
93.044 SPECIAL PROGRAM FOR THE AGING - TITLE III, PART B - GRANTS FOR SUPPORTIVE SERVICES & SENIOR CENTERS
93.045 SPECIAL PROGRAMS FOR THE AGING - TITLE III, PART C - NUTRITION SERVICES
~~*93.049 SPCL PROGS. FOR AGING-TITLE VII, CHAP. 6-VUL. ELDERS*~~
93.100 HEALTH DISPARITIES GRANTS IN MINORITY HEALTH
93.101 GRANTS FOR RESIDENTIAL TRTMNT PROGS. FOR PREG. & POSTPRTM WOMEN
~~*93.102 DEMO GRANTS FOR RESIDENTIAL TRTMNT/WOMEN & CHILDREN*~~
93.104 COMP. MENTAL HEALTH SVCS FOR CHILDREN W/SERIOUS EMOT. DISTURB
93.105 BILINGUAL/BICULTURAL SVC PROJECTS IN MINORITY HEALTH
93.116 PROJECT GRANTS AND COOP. AGREEMENTS FOR TB CONT. PROGRAM
93.118 AIDS ACTIVITIES
~~*93.122 CO-OP AGRMNTS:RURAL REMOTE SUBSTANCE ABUSE TRTMNT & RECOVERY*~~
93.125 MENTAL HEALTH PLANNING AND DEMONSTRATION
93.127 EMERGENCY MEDICAL SERVICES FOR CHILDREN
93.129 TECHNICAL AND NON-FINANCIAL ASSISTANCE TO HEALTH CENTERS & NATIONAL HEALTH SERVICE CORPS (NHSC) DELIVER SITES
93.134 GRANTS TO INCREASE ORGAN DONATIONS
93.137 COMMUNITY PROGRAMS TO IMPROVE MINORITY HEALTH GRANT PROGRAM
93.144 DEMON. GRANTS FOR PREVENTION OF ALCOHOL/DRUG ABUSE, ON HIGH RISK POPULATIONS
93.145 AIDS EDUCATION AND TRAINING CENTERS
93.151 HEALTH CENTER GRANTS FOR HOMELESS POPULATIONS
93.153 HIV SVC & ACCESS TO RESEARCH FOR CHILDREN, ADOLESCENTS, WOMEN & FAM
93.161 HEALTH PROGRAM FOR TOXIC SUBSTANCES AND DISEASE REGISTRY
93.165 GRANTS FOR STATE LOAN REPAYMENT
~~*93.169 SUBS. ABUSE DEMO.:MODEL PROJS/ PREGNANT & POSTPARTUM*~~
~~*93.174 KNOWLEDGE DISSEMINATION GRANTS (SUBSTANCE ABUSE)*~~
93.184 DISABILITIES PREVENTION
93.185 IMMUNIZATION RESEARCH, DEMO. PUBLIC INFO. & EDUC.-TRNG & CLINICAL SKILLS IMPROVEMENT PROJECTS
93.186 NATIONAL RESEARCH SERVICES AWARDS
93.194 COMMUNITY PREVENTION COALITIONS (PARTNERSHIP) DEMONS. GRANT
~~*93.196 CO-OP AGRMNTS FOR DRUG ABUSE TRTMT/TARGET CITIES*~~
93.197 CHILDHOOD LEAD POISONING PREVENTION PROJECTS- STATE & LOCAL CHILDHOOD LEAD POISONING PREVENTION & SURVEILLANCE OF BLOOD LEVELS IN CHILDREN
93.204 SURVEILLANCE OF HAZARDOUS SUBSTANCE EMERGENCY EVENTS
93.206 HUMAN HEALTH STUDIES - APPLIED RESEARCH & DEVELOPMENT
93.211 RURAL TELEMEDICINE GRANTS
93.215 HANSEN'S DISEASE NATIONAL AMBULATORY CARE PROGRAM
~~*93.216 HIV/AIDS MENTAL HEALTH SERVICES DEMO PROGRAM*~~
93.217 FAMILY PLANNING -- SERVICES

93.223 DEVELOPMENT & COORDINATION OF RURAL HEALTH SERVICES
93.224 COMMUNITY HEALTH CENTERS
93.229 DEMONSTRATION COOP. AGREEMENTS FOR DEVELOP. & IMPLEMENT. CRIMINAL JUSTICE TREATMENT NETWORKS
93.230 CONSOLIDATED KNOWLEDGE DEVELOPMENT & APPLICATION (KD&A) PROGRAM
93.234 TRAUMATIC BRAIN INJURY - STATE DEMONSTRATION GRANT PROGRAM
93.238 CO-OP AGREEMENTS FOR STATE TREATMENT OUTCOMES & PERFORMANCE PILOT STUDIES ENHANCEMENT
93.240 STATE CAPACITY BUILDING
93.245 INNOVATIVE FOOD SAFETY PROJECTS
93.246 HEALTH CENTERS GRANTS FOR MIGRATORY AND SEASONAL FARM WORKERS
93.251 UNIVERSAL NEWBORN HEARING SCREENING
93.260 FAMILY PLANNING - PERSONNEL TRAINING
93.268 IMMUNIZATION GRANTS
93.283 CENTERS FOR DISEASE CONTROL AND PREVENTION-INVEST. & TA
93.290 NATIONAL COMMUNITY CENTERS OF EXCELLENCE IN WOMEN'S HEALTH
93.333 CLINICAL RESEARCH
93.389 RESEARCH INFRASTRUCTURE
93.392 CANCER CONSTRUCTION
93.550 TRANSITIONAL LIVING FOR HOMELESS YOUTH
~~*93.551 ABANDONED INFANTS*~~
93.557 EDUCATION & PREVENTION TO REDUCE SEXUAL ABUSE OF RUNAWAY, HOMELESS & STREET YOUTH
93.563 CHILD SUPPORT ENFORCEMENT
93.570 COMMUNITY SERVICES BLOCK GRANT--DSCRTNRY AWARDS
93.571 COMMUNITY SVCS BLCK GRNT DISCRET. AWARDS-FOOD & NTRTN
93.576 REFUGEE AND ENTRANT ASSISTANCE--DISCRETIONARY GRANTS
93.583 REFUGEE & ENTRANT ASSISTANCE-WILSON/FISH PROGRAMS
93.592 FAMILY VIOLENCE PREVENTION AND SERVICES/GRANTS FOR BATTERED WOMEN'S SHELTERS - DISCRETIONARY GRANTS
93.593 JOB OPPORTUNITIES FOR LOW-INCOME INDIVIDUALS
93.595 WELFARE REFORM RESEARCH, EVALUATIONS & NATIONAL STUDIES
93.600 HEAD START
93.602 NEW ASSETS FOR INDEPENDENCE DEMONSTRATION PROGRAM
93.604 ASSISTANCE TO TORTURE VICTIMS
93.623 RUNAWAY AND HOMELESS YOUTH
93.631 DEVEL DISABILITIES PROJECTS OF NATIONAL SIGNIFICANCE
93.647 SOCIAL SERVICES RESEARCH AND DEMONSTRATION
93.669 CHILD ABUSE AND NEGLECT STATE GRANTS
93.670 CHILD ABUSE AND NEGLECT DISCRETIONARY ACTIVITIES
93.671 FAMILY VIOLENCE PREVENTION & SERVICES/GRANTS FOR BATTERED WOMEN'S SHELTERS - GRANTS TO STATES & INDIAN TRIBES
~~*93.887 PROJECT GRANTS FOR RENOV. OR CONST. OF NON-ACUTE HEALTH CARE FACILITIES*~~
~~*93.901 PREVENTION OF ALCOHOL, TOBACCO & OTHER DRUGS*~~
~~*93.902 MODEL DRUG ABUSE TRTMNT FOR CRITICAL POPS.*~~
93.910 FAMILY & COMMUNITY VIOLENCE PREVENTION PROGRAM
93.912 RURAL HEALTH OUTREACH & RURAL NETWORK DEV. PROGRAM
93.913 GRANTS TO STATES FOR OPERATION OF OFFICES OF RURAL HEALTH
93.914 HIV EMERGENCY RELIEF PROJECT GRANTS

~~*93.915 HIV EMERGENCY RELIEF FORMULA GRANTS*~~
93.918 OUTPATIENT EARLY INTERVENTION HIV SERVICES
93.919 CO-OP AGREEMENTS FOR STATE-BASED COMPREHENSIVE BREAST & CERV. CANCER EARLY DETECTION PROGRAMS
93.926 HEALTHY START INITIATIVE
93.927 HEALTH CENTERS GRANTS FOR RESIDENTS OF PUBLIC HOUSING
93.928 SPECIAL PROJECTS OF NATIONAL SIGNIFICANCE
~~*93.931 DEMON. GRANTS TO STATES FOR COMMUNITY SCHOLARSHIPS*~~
93.932 NATIVE HAWAIIAN HEALTH SYSTEMS
~~*93.937 COMP. RESIDENTIAL DRUG PREVENTION AND TRTMNT:SUBS-USING WOMEN & CHILDREN*~~
93.938 CO-OP AGREEMENTS TO SUPPORT COMPREHENSIVE SCHOOL HEALTH PROGRAMS TO PREVENT THE SPREAD OF HIV & OTHER IMPORTANT HEALTH PROBLEMS
93.939 HIV PREVENTION ACTIVITIES--NON-GOVERNMENTAL ORG.-BASED
93.940 HIV PREVENTION ACTIVITIES--HEALTH DEPARTMENT BASED
93.941 HIV DEMONSTRATION, RESEARCH, PUBLIC AND PROFESSIONAL EDUCATION
93.944 HIV / AIDS SURVEILLANCE
93.945 ASSISTANCE PROGRAMS FOR CHRONIC DISEASE PREVENTION & CONTROL
93.946 CO-OP AGREEMENTS TO SUP. STATE-BASED INFANT HEALTH
93.947 TUBERCULOSIS DEMONSTRATION, RESEARCH, PUBLIC & PROFESSIONAL EVAL
~~*93.949 COMMUNITY-BASED COMP. HIV/STD/TB OUTREACH SVCS FOR HIGH RISK USERS*~~
~~*93.951 DEMON. GRANTS TO STATES: ALZHEIMER'S DISEASE*~~
93.955 HEALTH AND SAFETY PROGRAMS FOR CONSTRUCTION WORK
93.957 OCCUP HEALTH & SURVEILLANCE FATALITY ASSESSMENT & CONTROL GRANTS
93.965 COAL MINERS RESPIRATORY IMPAIRMENT TREATMENT CLINICS & SERVICES
93.977 PREV. HEALTH SVCS -- SEXUALLY TRANSMITTED DISEASES CONTROL GRANTS
93.988 COOP. AGREEMENTS FOR STATE-BASED DIABETES CONTROL
93.990 NATIONAL HEALTH PROMOTION
93.995 ADOLESCENT FAMILY LIFE DEMONSTRATION PROJECTS

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

94.002 RETIRED SENIOR VOLUNTEERS
94.011 FOSTER GRANDPARENT PROGRAM
94.013 VOLUNTEERS IN SERVICE TO AMERICA
94.016 SENIOR COMPANION PROGRAM

ALL FEDERAL AGENCIES: All federal direct development not specifically excluded by law from review is subject to TRACS review.

Figure 2: 1 TAC §5.195(c)

Table II

STATE PROGRAMS REQUIRING TRACS REVIEW

Housing & Urban Development

TDHCA PLANNING/CAPACITY BUILDING PROGRAM
TDHCA SPECIAL IMPACT FUND
TDHCA/TDED TEXAS CAPITAL FUND
TEXAS RENTAL REHAB PROGRAM

Reclamation, Historic Preservation and Recreation

TEXAS HISTORIC PRESERVATION GRANTS
TEXAS RECREATION & PARKS ACCOUNT

Workforce Development

STATE INDUSTRIAL START-UP TRAINING
STATE APPRENTICESHIP TRAINING
WORKFORCE DEVELOPMENT INCENTIVES

Arts

TEXAS COMMISSION ON THE ARTS FINANCIAL ASSIS.

Environmental Protection

MUNICIPAL SOLID WASTE TIPPING FEE-FUNDED PROJECTS (TNRCC)

Energy

STATE OF TEXAS OIL OVERCHARGE PROGRAM

Education

LIBRARY SYSTEMS ACT
TELECOMMUNICATIONS INFRASTUCTURE FUND

Health and Human Services

STATE FUNDS FOR COMMUNITY-BASED ALCOHOL/DRUG PROBLEMS

ALL STATE AGENCIES: All federal programs covered in Table I administered by state agencies are subject to TRACS review.

ALL STATE AGENCIES: All direct state development that meets TRACS threshold criteria and is not specifically excluded by law from review is subject to TRACS review.

Figure: 1 TAC §81.117(a)

The formula for estimating turnout for the 2002 primary elections is:

$$A \times B + C = D$$

Where:

A = the percentage of voter turnout for governor or another statewide race in the 1998 party primary (percentage is the sum of all votes cast for all candidates for governor or other statewide office in the 1998 primary divided by the number of registered voters).

B = the number of registered voters as of October 2001.

C = 25% of the number resulting when you multiply A x B.

D = Preliminary Estimated 2002 Turnout.

Figure: 1 TAC §81.152(a)

The formula for estimating turnout for the 2002 joint primary elections is:

$$(A \times B) + C + D = E$$

Where:

A = the percentage of voter turnout for governor or another statewide race in the 1998 party primary (percentage is the sum of all votes cast for all candidates for governor or other statewide office in the 1998 primary divided by the number of registered voters).

B = the number of registered voters as of December 2001.

C = 25% of the number resulting when you multiply A x B.

D = Other party's estimated turnout figure.

E = Preliminary Estimated 2002 Turnout for Joint-Primary Election.

Figure: 4 TAC §20.22(a)

Pest Mgmt Zone	Planting Dates	Destruction Deadline	Destruction Method (also see footnotes)
1	Feb. 1 - March 31	September 1	shred and plow a,b
2 - Area 1	No dates set	September 1	shred and plow a,b
2 - Area 2	No dates set	September 1	shred and plow a,b
2 - Area 3	No dates set	September 1	shred and plow a,b
2 - Area 4	No dates set	October 1	shred and plow a
3 - Area 1 (Matagorda County)	March 5 - May 15	October 1	shred and plow a,b
3 - Area 1 (Jackson County)	March 5 - May 15	October 29	shred and plow a,b
3 - Area 1 (Wharton County)	March 5 - May 15	November 12	shred and plow a,b
3 - Area 2	March 5 - May 15	November 12	shred and plow a,b
4	No dates set	October 10	shred and plow a,b
5	No dates set	November 19	shred and/or plow a,c
6	No dates set	October 31	shred and/or plow a,c
7	March 20 - May 31	November 30	shred and/or plow a,c
8	March 20 - May 31	November 30	shred and/or plow a,c
9	No dates set	March 15	shred and plow b,d
10	No dates set	February 1	shred and plow b,d

a/ Alternative destruction methods are allowed (see paragraph (b)).

b/ Destruction shall be performed in a manner to prohibit the presence of live cotton plants.

c/ Destruction shall periodically be performed to prevent presence of fruiting structures.

d/ Soil shall 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: 16 TAC §1.201(a)

Table 1. Initial and Final Review Periods for Permits Issued by the Railroad Commission of Texas, For Which Median Permit Processing Time Exceeds Seven Days

A	B	C	D	E	F	G
Rule and Permit All references are to Title 16, Tex. Admin. Code	**Division, Section Receiving Application**	**Application Form Title or Number**	**Form P-5 Required?**	**Fee**	**Initial Review Period**	**Final Review Period**
§3.6 (SWR 6), Application for Multiple Completion-**Multiple Completion Authorization**	Oil and Gas Division, Production and Permitting Section	W-4; W-4A; W-5; W-6	Yes	None	60	10
§3.8 (SWR 8), Water Protection-**Non-Commercial, Non-Centralized Pit Permit**	Oil and Gas Division, Environmental Services Section	H-11	Yes	None	30	30
§3.8 (SWR 8), Water Protection-**Commercial or Centralized Pit Permit**	Oil and Gas Division, Environmental Services Section	H-11 and Supplemental Information Sheet for Commercial Facilities	Yes	None	45	45
§3.8 (SWR 8), Water Protection-**Non-Commercial, Non-Centralized Land Spreading**	Oil and Gas Division, Environmental Services Section	Application Information for Land Spreading Permit (Water Based Drilling Fluid and Associated Cuttings Only)	Yes	None	30	30
§3.8 (SWR 8), Water Protection-**Non-Commercial, Non-Centralized Land Treatment Permit**	Oil and Gas Division, Environmental Services Section	Application Information for Land Treatment	Yes	None	30	30
§3.8 (SWR 8), Water Protection-**Commercial or Centralized Land Spreading**	Oil and Gas Division, Environmental Services Section	Application Information for Land Spreading Permit (Water Based Drilling Fluid and Associated Cuttings Only)	Yes	None	45	45
§3.8 (SWR 8), Water Protection-**Commercial or Centralized or Land Treatment Permit**	Oil and Gas Division, Environmental Services Section	Application Information for Land Treatment	Yes	None	45	45
§3.8 (SWR 8), Water Protection-**Waste Hauler Permit**	Oil and Gas Division, Environmental Services Section	WH-1 WH-2 WH-3	Yes	$100	30	15
§3.8 (SWR 8), Water Protection-**Hydrostatic Test Discharge Permit**	Oil and Gas Division, Environmental Services Section	Permit Application for Discharge of Hydrostatic Test Water	Yes	$300[1]	15	15
§3.8 (SWR 8), Water Protection-All other	Oil and Gas Division,	Application for a Permit to	Yes	$300 (see fn. 1)	30	30

[1] For discharges to waters of the state.

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Rule and Permit All references are to Title 16, Tex. Admin. Code	**Division, Section Receiving Application**	**Application Form Title or Number**	**Form P-5 Required?**	**Fee**	**Initial Review Period**	**Final Review Period**
discharges	Environmental Services Section	Discharge Produced Water to Inland Waters				
§3.8 (SWR 8), Water Protection-All other discharges	Oil and Gas Division, Environmental Services Section	Application for a Permit to Discharge Produced Water to the Gulf of Mexico from a Non-Land Based Facility	Yes	$300 (see fn. 1)	30	30
§3.8 (SWR 8), Water Protection-All other discharges	Oil and Gas Division, Environmental Services Section	Application for a Permit to Discharge Gas Plant Effluent	Yes	$300 (see fn. 1)	30	30
§3.8 (SWR 8), Water Protection-**Minor Permit for One-Time Annular Disposal of Drilling Fluid**	Oil and Gas Division, Field Operations Section	Written request	Yes	None	16	15
§3.9 (SWR 9), Disposal Wells-**Disposal Well Permits**	Oil and Gas Division, Environmental Services Section	W-14	Yes	$100; $150 per exception	30	15
§3.10 (SWR 10), Restriction of Production of Oil and Gas from Different Strata-**Authority to Commingle**	Oil and Gas Division,Production and Permitting Section	Rule 10 Exception Data Sheet	Yes	$50	14	21
§3.23 (SWR 23), Vacuum Pumps-**Authorization to Use Vacuum Pump**	Oil and Gas Division, Production and Permitting Section	Written request	Yes	None	7	21
§3.38 (SWR 38), Well Densities-**Density Exception**	Oil and Gas Division, Production and Permitting Section	Written request	Yes	$200	7	21
§3.41 (SWR 41), Application for New Oil or Gas Field Designation And/or Allowable-**New Oil or Gas Field Designation and/or Allowable**	Oil and Gas Division, Production and Permitting Section	P-7	Yes	None	14	7
§3.43 (SWR 43), Application for Temporary Field Rules-**Temporary Field Rules**	Oil and Gas Division, Production and Permitting Section	Written request	Yes	None	7	30
§3.46 (SWR 46), Fluid Injection into Productive Reservoirs- **Injection Permit**	Oil and Gas Division, Environmental Services Section	H-1 H-1A	Yes	$200; $150 per exception	30	15
§3.46 (SWR 46), Fluid Injection into Productive Reservoirs- **Injection Permit with Authorization to Inject Fresh Water**	Oil and Gas Division, Environmental Services Section	H-7	Yes	$200; $150 per exception	30	15
§3.46 (SWR 46), Fluid	Oil and Gas	H-1S	Yes	$200;	45	45

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Rule and Permit All references are to Title 16, Tex. Admin. Code	**Division, Section Receiving Application**	**Application Form Title or Number**	**Form P-5 Required?**	**Fee**	**Initial Review Period**	**Final Review Period**
Injection into Productive Reservoirs- **Area Permit**	Division, Environmental Services Section			$150 per exception		
§3.48 (SWR 48), Capacity Oil Allowables for Secondary or Tertiary Recovery Projects- **Capacity Oil Allowables**	Oil and Gas Division, Production and Permitting Section	Written request	Yes	None	7	21
§3.50 (SWR 50), Enhanced Oil Recovery Projects- Approval and Certification for Tax Incentive- **Certificate for Recovered Oil Tax Rate**	Oil and Gas Division, Production and Permitting Section	H-12	Yes	None	7	25
§3.50 (SWR 50) Enhanced Oil Recovery Projects - Approval and Certification for Tax Incentive-**Approval Concurrent With Recovered Oil Tax Rate**	Oil and Gas Division, Production and Permitting Section	H-12	Yes	None	7	25
§3.50 (SWR 50), Enhanced Oil Recovery Projects - Approval and Certification for Tax Incentive-**Positive Production Response Certificate**	Oil and Gas Division, Production and Permitting Section	H-13	Yes	None	7	25
§§3.57 (SWR 57), Reclaiming Tank Bottoms, Other Hydrocarbon Wastes, and Other Waste Materials, and 3.78 (SWR 78), Fees, Performance Bonds and Alternate Forms of Financial Security Required to Be Filed- **Reclamation Plant Permit and Associated Financial Assurance**	Oil and Gas Division, Production and Permitting Section	R-9	Yes	None	30	90
§3.65 (SWR 70), Pipeline Permits Required- **Permit to Operate a Pipeline**	Gas Services Division, Pipeline Safety Section	Form T-4	Yes	None	21	15
§3.77 (SWR 81), Brine Mining Injection Wells (rule not in effect until EPA authorization)- **Brine Mining Injection Permit**	Oil and Gas Division, Environmental Services Section	H-2	Yes	$100	30	30
§3.78 (SWR 78), Fees, Performance Bonds and Alternate Forms of Financial Security Required to Be Filed- **Financial Assurance for Commercial Facility Permitted Under Rule 8**	Oil and Gas Division, Environmental Services Section	None	Yes	None	45	45
§3.83 (SWR 83), Tax Exemption for Two-and Three-year Inactive Wells- **Certification of Inactivity**	Oil and Gas Division, Production and Permitting Section	Written request	Yes	None	20	45

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Rule and Permit All references are to Title 16, Tex. Admin. Code	**Division, Section Receiving Application**	**Application Form Title or Number**	**Form P-5 Required?**	**Fee**	**Initial Review Period**	**Final Review Period**
	Division					
§§11.131-11.137, Notice of Exploration Through Overburden Removal; Content of Notice; Extraction of Minerals; Removal of Minerals; Lands Unsuitable for Surface Mining; Notice of Exploration Involving Hole Drilling; Permit-**Uranium Exploration**	Surface Mining and Reclamation Division	SMRD Form 3U	No	None	30	30
§11.138 and §11.139, Reclamation and Plugging Requirements; Reporting-**Test-Hole Transfer**	Surface Mining and Reclamation Division	SMRD Form 36U	No	None	30	30
§11.205, §11.206, Changes in Coverage; Release or Reduction of Bonds-**Bond Adjustment**	Surface Mining and Reclamation Division	SMRD Form 42U, 43U, 44U, 46U	No	None	60	30
§11.1038, Safety Certificate Required-**Quarry & Pit Safety Certificate**	Surface Mining and Reclamation Division	SMRD Form SC1 (RR-1)	No	$500; $350 for gov't entities	15	5
§11.1038, Safety Certificate Required-**Waiver of Safety Certificate**	Surface Mining and Reclamation Division	SMRD Form WSC-1	No	None	20	15
§11.1043, Transfer of Certificate After Transfer of Title-**Safety Certificate Transfer**	Surface Mining and Reclamation Division	SMRD Form TSC-1	No	$250	10	5
§11.1045, Cessation of Operations-**Quarry & Pit Cessation**	Surface Mining and Reclamation Division	SMRD Form CSC-1	No	$500	20	15
§12.110, General Requirements: Exploration of less than 250 Tons- **Coal Exploration < 250 Tons**	Surface Mining and Reclamation Division	SMRD-3C	No	None	30	30
§12.111, General Requirements: Exploration of More than 250 Tons-**Coal Exploration > 250 Tons**	Surface Mining and Reclamation Division	SMRD-4C	No	None	120	30
§12.148, Reclamation Plan: Ponds, Impoundments, Banks, Dams, and Embankments-**Design Plans**	Surface Mining and Reclamation Division	None	No	None	120	30
§12.205, In Situ Processing Activities- **In Situ Coal Gasification**	Surface Mining and Reclamation Division	SMRD-5C	No	None	120	30
§12.216, Criteria for Permit Approval or Denial-**New Mine Permit**	Surface Mining and Reclamation Division	SMRD-1C	No	$5000	120	30
§12.226, Permit Revisions-	Surface Mining and	SMRD-1C	No	None[2]	120	30

[2] Commission rules provide for a permit revision fee of $500. *See* 16 TAC §12.108. In practice, this fee is not collected for permit revisions processed administratively (*i.e.*, non-significant permit revisions).

A	B	C	D	E	F	G
Rule and Permit All references are to Title 16, Tex. Admin. Code	**Division, Section Receiving Application**	**Application Form Title or Number**	**Form P-5 Required?**	**Fee**	**Initial Review Period**	**Final Review Period**
§3.93 (SWR 93), Water Quality Certification-**401 Certification**	Oil and Gas Division, Environmental Services Section	None. Application made pursuant to requirements of federal permitting entity.	Yes	None	30	15
§3.95 (SWR 95), Under-ground Storage of Liquid or Liquified Hydrocarbons in a Salt Formation-**Permit to Create, Operate, and Maintain an Under-ground Hydrocarbon Storage Facility**	Oil and Gas Division, Environmental Services Section	H-4	Yes	$100 per well	45	45
§3.96 (SWR 96), Under-ground Storage of Gas in Production or Depleted Reservoirs- **Permit to Operate a Gas Storage Project**	Oil and Gas Division, Environmental Services Section	H-1 H-4	Yes	$100 per well	45	45
§3.97 (SWR 97), Under-ground Storage of Gas in Salt Formations-**Permit to Create, Operate, and Maintain an Under-ground Gas Storage Facility**	Oil and Gas Division, Environmental Services Section	H-4	Yes	$100 per well	45	45
§3.101 (SWR 101), Certification for Severance Tax Exemption for Gas Produced from High-cost Gas Wells-**Area Designation**	Oil and Gas Division, Production and Permitting Section	Written Request	Yes	None	7	45
§9.6, Examination Requirements and Renewal of Certified Status-**LPG Employee Exam**	Gas Services Division, LP-Gas Section	LPG Form 16	No	$20 per exam	10	N/A
§9.20, Filings Required for Stationary LP-Gas Installations-**LPG Plan Review**	Gas Services Division, LP-Gas Section	LPG Form 500	No	Original-$50; re-submission-$30	21	21
§9.29, Application for an Exception to a Safety Rule-**LPG Rule Exception**	Gas Services Division, LP-Gas Section	LPG Form 25 or individual application	No	Original-$50; re-submission-$30	21	21
§11.93, Elements of Permit Application-**New Permit Application**	Surface Mining and Reclamation Division	SMRD Form 1U	No	$200	120	30
§11.97, Renewal-**Permit Renewal**	Surface Mining and Reclamation Division	SMRD Form 1U	No	None	60	30
§11.98, Transfer-**Permit Transfer**	Surface Mining and Reclamation Division	SMRD Form 2U	No	None	60	30
§11.114, Revision on Motion or with Consent-**Permit Revision**	Surface Mining and Reclamation	SMRD Form 1U	No	$200	120	30

A	B	C	D	E	F	G
Rule and Permit All references are to Title 16, Tex. Admin. Code	**Division, Section Receiving Application**	**Application Form Title or Number**	**Form P-5 Required?**	**Fee**	**Initial Review Period**	**Final Review Period**
Permit Revision-Administrative	Reclamation Division					
§12.226, Permit Revisions-**Permit Revision-Significant**	Surface Mining and Reclamation Division	SMRD-1C	No	$500	120	30
§§12.227-12.230, Permit Renewals: General Requirements; Permit Renewals: Completed Applications; Permit Renewals: Terms; Permit Renewals: Approval or Denial-**Permit Renewal**	Surface Mining and Reclamation Division	SMRD-1C	No	$3000	60	30
§§12.227-12.230, Permit Renewals: General Requirements; Permit Renewals: Completed Applications; Permit Renewals: Terms; Permit Renewals: Approval or Denial-**Permit Renewal/Revision**	Surface Mining and Reclamation Division	SMRD-1C	No	$3000	120	30
§§12.231-12.233, Transfer, Assignment, or Sale of Permit Rights: General Requirements; Transfer, Assignment or Sale of Permit Rights: Obtaining Approval; Requirements for New Permits for Persons Succeeding to Rights Granted under a Permit-**Permit Transfer**	Surface Mining and Reclamation Division	SMRD-1C	No	None	60	30
§12.307, Adjustment of Amount-**Bond Adjustment**	Surface Mining and Reclamation Division	SMRD-42(C), 43(C), 44(C), 45(C), 46(C), 47(C)	No	None	60	30
§12.351, Hydrologic Balance: Transfer of Wells-**Test-Hole Transfer**	Surface Mining and Reclamation Division	SMRD-36C	No	None	30	30
§12.707, Certification-**Blaster Certification**	Surface Mining and Reclamation Division	Blaster Certificate Application	No	None	60	30
§13.35, Application for an Exception to a Safety Rule-**CNG Rule Exception**	Gas Services Division, LP-Gas Section	CNG Form 1025 or individual application	No	Original-$50; re-submission-$30	21	21
§13.70, Examination and Notification Generally-**CNG Employee Exam**	Gas Services Division, LP-Gas Section	CNG Form 1016	No	$20 per exam	10	N/A
§13.2019, Examination and Course of Instruction-**LNG Employee Exam**	Gas Services Division, LP-Gas Section	LNG Form 2016	No	$20 per exam	10	N/A

A	B	C	D	E	F	G
Rule and Permit All references are to Title 16, Tex. Admin. Code	**Division, Section Receiving Application**	**Application Form Title or Number**	**Form P-5 Required?**	**Fee**	**Initial Review Period**	**Final Review Period**
§13.2040, Filings and Notice Requirements for Stationary LNG Installations-**LNG Plan Review**	Gas Services Division, LP-Gas Section	LNG Form 2500	No	Original-$50; re-submission-$30	21	21
§13.2052, Application for an Exception to a Safety Rule-**LNG Rule Exception**	Gas Services Division, LP-Gas Section	LNG Form 2025 or individual application	No	Original-$50; re-submission-$30	21	21
Tex. Rev. Civ. Stat. Ann. art. 6559f-**Clearance Deviation Authorization**	Rail Division	Application for Authorization to Deviate from Terms of the Texas Clearance Laws	No	$25	30	30

Figure: 16 TAC §105.10(c)(1)

MSRP	$20,000
Less Dealer Discount	1,000
Sale Price	$19,000

Figure: 16 TAC §105.10(c)(2)

Advertised Price	$18,000
Less Rebate	500
Sale Price	$17,500

Figure: 16 TAC §105.10(c)(3)

MSRP	$20,000
Less Rebate	500
Less Dealer Discount	500
Sale Price	$19,000

Figure: 28 TAC §3.3832(b)(15)(A)

Example
$1000 Annual Premium

Age	Total Premium Paid (No claims)	Rider Premium	Shortened Benefit $50/day	Shortened Benefit $100/day
50	$10,000	$1,500	200 days	100 days
60	$20,000	$3,000	400 days	200 days
70	$30,000	$4,500	600 days	300 days
80	$40,000	$6,000	800 days	400 days

Figure: 28 TAC §3.3844(g)(1)

Triggers for a Substantial Premium Increase

Issue Age	Percent Increase Over Initial Premium
29 and under	200%
30-34	190%
35-39	170%
40-44	150%
45-49	130%
50-54	110%
55-59	90%
60	70%
61	66%
62	62%
63	58%
64	54%
65	50%
66	48%
67	46%
68	44%
69	42%
70	40%
71	38%
72	36%
73	34%
74	32%
75	30%
76	28%
77	26%
78	24%
79	22%
80	20%
81	19%
82	18%
83	17%
84	16%
85	15%
86	14%
87	13%
88	12%
89	11%
90 and over	10%

Figure: 30 TAC §305.69(k)

Modifications	Class
A. General Permit Provisions	
1. Administrative and informational changes	1
2. Correction of typographical errors	1
3. Equipment replacement or upgrading with functionally equivalent components (e.g., pipes, valves, pumps, conveyors, controls)	1
4. Changes in the frequency of or procedures for monitoring, reporting, sampling, or maintenance activities by the permittee:	
a. To provide for more frequent monitoring, reporting, sampling, or maintenance	1
b. Other changes	2
5. Schedule of compliance	
a. Changes in interim compliance dates, with prior approval of the executive director	1[1]
b. Extension of final compliance date	3
6. Changes in expiration date or permit to allow earlier permit expiration, with prior approval of the executive director	1[1]
7. Changes in ownership or operational control of a facility, provided the procedures of §305.64(g) of this title (relating to Transfer of Permits) are followed	1[1]
8. Six months or less extension of the construction period time limit applicable to commercial hazardous waste management units in accordance with §305.149(b)(2) or (4) of this title (relating to Time Limitation for Construction of Commercial Hazardous Waste Management Units)	2
9. Greater than six-month extension of the commercial hazardous waste management unit construction period time limit in accordance with §305.149(b)(3) or (4) of this title	3
10. Any extension in accordance with §305.149(b)(3) of this title of a construction period time limit for commercial hazardous waste management units which has been previously authorized under §305.149(b)(2) of this title	3
11. Changes to remove permit conditions that are no longer applicable (i.e., because the standards upon which they are based are no longer applicable to the facility)	1[1]
B. General Facility Standards	
1. Changes to waste sampling or analysis methods:	
a. To conform with agency guidance or regulations	1
b. To incorporate changes associated with F039 (multi-source leachate) sampling or analysis methods	1[1]
c. To incorporate changes associated with underlying hazardous	

constituents in ignitable or corrosive wastes.....1[1]
d. Other changes.....2

2. Changes to analytical quality assurance/control plan:

a. To conform with agency guidance or regulations.....1
b. Other changes.....2

3. Changes in procedures for maintaining the operating record.....1

4. Changes in frequency or content of inspection schedules.....2

5. Changes in the training plan:

a. That affect the type or decrease the amount of training given to employees.....2
b. Other changes.....1

6. Contingency plan:

a. Changes in emergency procedures (i.e., spill or release response procedures).....2
b. Replacement with functionally equivalent equipment, upgrade, or relocate emergency equipment listed.....1
c. Removal of equipment from emergency equipment list.....2
d. Changes in name, address, or phone number of coordinators or other persons or agencies identified in the plan.....1

7. Construction quality assurance (CQA) plan:

a. Changes that the CQA officer certifies in the operating record will provide equivalent or better certainty that the unity components meet the design specifications.....1
b. Other Changes.....2

Note: When a permit modification (such as introduction of a new unit) requires a change in facility plans or other general facility standards, that change shall be reviewed under the same procedures as the permit modification.

C. Groundwater Protection

1. Changes to wells:

a. Changes in the number, location, depth, or design of upgradient or downgradient wells of permitted groundwater monitoring system.....2
b. Replacement of an existing well that has been damaged or rendered inoperable, without change to location, design, or depth of the well.....1

2. Changes in groundwater sampling or analysis procedures or monitoring schedule, with prior approval of the executive director.....1[1]

3. Changes in statistical procedure for determining whether a statistically significant change in groundwater quality between upgradient and downgradient wells has occurred, with prior approval of the executive director.....1[1]

4. Changes in point of compliance.....2

5. Changes in indicator parameters, hazardous constituents, or concentration limits (including alternate concentration limits (ACLs)):

   a. As specified in the groundwater protection standard 3
   b. As specified in the detection monitoring program 2

6. Changes to a detection monitoring program as required by §335.164(10) of this title (relating to Detection Monitoring Program), unless otherwise specified in this appendix 2

7. Compliance monitoring program:

   a. Addition of compliance monitoring program pursuant to §335.164(7)(D) of this title, and §335.165 of this title (relating to Compliance Monitoring Program) 3
   b. Changes to a compliance monitoring program as required by §335.165(11) of this title, unless otherwise specified in this appendix 2

8. Corrective action program:

   a. Addition of a corrective action program pursuant to §335.165(9)(B) of this title and §335.166 of this title (relating to Corrective Action Program) 3
   b. Changes to a corrective action program as required by §335.166(8) of this title, unless otherwise specified in this appendix 2

D. Closure

1. Changes to the closure plan:

   a. Changes in estimate of maximum extent of operations or maximum inventory of waste on-site at any time during the active life of the facility, with prior approval of the executive director ..... 1[1]
   b. Changes in the closure schedule for any unit, changes in the final closure schedule for the facility, or extension of the closure period, with prior approval of the executive director ..... 1[1]
   c. Changes in the expected year of final closure, where other permit conditions are not changed, with prior approval of the executive director ..... 1[1]
   d. Changes in procedures for decontamination of facility equipment or structures, with prior approval of the executive director ..... 1[1]
   e. Changes in approved closure plan resulting from unexpected events occurring during partial or final closure, unless otherwise specified in this appendix 2
   f. Extension of the closure period to allow a landfill, surface impoundment or land treatment unit to receive nonhazardous wastes after final receipt of hazardous wastes under 40 Code of Federal Regulations (CFR), 264.113(d) and (e). 2

2. Creation of a new landfill unit as part of closure 3

3. Addition of the following new units to be used temporarily for closure activities:

   a. Surface impoundments 3
   b. Incinerators 3
   c. Waste piles that do not comply with 40 CFR 264.250(c) 3
   d. Waste piles that comply with 40 CFR 265.250(c) 2

e. Tanks or containers (other than specified below) 2
f. Tanks used for neutralization, dewatering, phase separation, or component separation, with prior approval of the executive director ..... 1[1]
g. Staging Pile 2

E. Post-Closure

1. Changes in name, address, or phone number of contact in post-closure plan 1
2. Extension of post-closure care period 2
3. Reduction in the post-closure care period 3
4. Changes to the expected year of final closure, where other permit conditions are not changed 1
5. Changes in post-closure plan necessitated by events occurring during the active life of the facility, including partial and final closure 2

F. Containers

1. Modification or addition of container units:

a. Resulting in greater than 25% increase in the facility's container storage capacity, except as provided in F(1)(c) and F(4)(a) of this appendix 3
b. Resulting in up to 25% increase in the facility's container storage capacity, except as provided in F(1)(c) and F(4)(a) of this appendix 2
c. Or treatment processes necessary to treat wastes that are restricted from land disposal to meet some or all of the applicable treatment standards or to treat wastes to satisfy (in whole or in part) the standard of "use of practically available technology that yields the greatest environmental benefit" contained in 40 CFR 268.8(a)(2)(ii), with prior approval of the executive director. This modification may also involve addition of new waste codes or narrative descriptions of wastes. It is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028) ..... 1[1]

2. Modification of container units, as follows:

a. Modification of a container unit without increasing the capacity of the unit 2
b. Addition of a roof to a container unit without alteration of the containment system 1

3. Storage of different wastes in containers, except as provided in F(4) of this appendix:

a. That require additional or different management practices from those authorized in the permit 3
b. That do not require additional or different management practices from those authorized in the permit 2

Note: See §305.69(g) of this title (relating to Solid Waste Permit Modification at the Request of the Permittee) for modification procedures to be used for the management of newly listed or identified wastes.

4. Storage or treatment of different wastes in containers:

a. That require addition of units or change in treatment process or management standards, provided that the wastes are restricted from land disposal and are to be treated to meet some or all of the applicable treatment standards, or that are to be treated to satisfy (in whole or in part) the standard of "use of practically available technology that yields the greatest environmental benefit" contained in 40 CFR 268.8(a)(2)(ii), with prior approval of the executive director. This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028) ..... 1[1]

b. That do not require the addition of units or a change in the treatment process or management standards, and provided that the units have previously received wastes of the same type (e.g., incinerator scrubber water). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028) 1

5. Other changes in container management practices (e.g., aisle space, types of containers, segregation)..... 2

G. Tanks

1. Modification or addition of tank units or treatment processes, as follows:

a. Modification or addition of tank units resulting in greater than 25% increase in the facility's tank capacity, except as provided in G(1)(c), G(1)(d), and G(1)(e) of this appendix..... 3

b. Modification or addition of tank units resulting in up to 25% increase in the facility's tank capacity, except as provided in G(1)(d) and G(1)(e) of this appendix 2

c. Addition of a new tank (no capacity limitation) that will operate for more than 90 days using any of the following physical or chemical treatment technologies: neutralization, dewatering, phase separation, or component separation 2

d. After prior approval of the executive director, addition of a new tank (no capacity limitation) that will operate for up to 90 days using any of the following physical or chemical treatment technologies: neutralization, dewatering, phase separation, or component separation ..... 1[1]

e. Modification or addition of tank units or treatment processes necessary to treat wastes that are restricted from land disposal to meet some or all of the applicable treatment standards or to treat wastes to satisfy (in whole or in part) the standard of "use of practically available technology that yields the greatest environmental benefit" contained in 40 CFR 268.8(a)(2)(ii), with prior approval of the executive director. This modification may also involve addition of new waste codes. It is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028) ..... 1[1]

2. Modification of a tank unit or secondary containment system without increasing the capacity of the unit..... 2

3. Replacement of a tank with a tank that meets the same design standards and has a capacity within +/-10% of the replaced tank provided:..... 1

a. The capacity difference is no more than 1,500 gallons;
b. The facility's permitted tank capacity is not increased; and
c. The replacement tank meets the same conditions in the permit.

4. Modification of a tank management practice 2

5. Management of different wastes in tanks:

   a. That require additional or different management practices, tank design, different fire protection specifications, or significantly different tank treatment process from that authorized in the permit, except as provided in G(5)(c) of this appendix 3

   b. That do not require additional or different management practices, tank design, different fire protection specifications, or significantly different tank treatment process from that authorized in the permit, except as provided in G(5)(d) of this appendix 2

   c. That require addition of units or change in treatment processes or management standards, provided that the wastes are restricted from land disposal and are to be treated to meet some or all of the applicable treatment standards or that are to be treated to satisfy (in whole or in part) the standard of "use of practically available technology that yields the greatest environmental benefit" contained in 40 CFR 268.8(a)(1)(ii), with prior approval of the executive director. The modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027,and 028) ..... 1[1]

   d. That do not require the addition of units or a change in the treatment process or management standards, and provided that the units have previously received wastes of the same type (e.g., incinerator scrubber water). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028) 1

Note: See §305.69(g) of this title for modification procedures to be used for the management of newly listed or identified wastes.

H. Surface Impoundments

1. Modification or addition of surface impoundment units that result in increasing the facility's surface impoundment storage or treatment capacity 3

2. Replacement of a surface impoundment unit 3

3. Modification of a surface impoundment unit without increasing the facility's surface impoundment storage or treatment capacity and without modifying the unit's liner, leak detection system, or leachate collection system 2

4. Modification of a surface impoundment management practice 2

5. Treatment, storage, or disposal of different wastes in surface impoundments:

   a. That require additional or different management practices or different design of the liner or leak detection system than authorized in the permit 3

   b. That do not require additional or different management practices or different design of the liner or leak detection system than authorized in the permit..... 2

c. That are wastes restricted from land disposal that meet the applicable treatment standards or that are treated to satisfy the standard of "use of practically available technology that yields the greatest environmental benefit" contained in 40 CFR 268.8(a)(2)(ii), and provided that the unit meets the minimum technological requirements stated in 40 CFR 268.5(h)(2). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028) 1

d. That are residues from wastewater treatment or incineration, provided that disposal occurs in a unit that meets the minimum technological requirements stated in 40 CFR 268.5(h)(2), and provided further that the surface impoundment has previously received wastes of the same type (for example, incinerator scrubber water). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028) 1

6. Modifications of unconstructed units to comply with §§264.221(c), 264.222, 264.223, and 264.226(d) of this title ..... 1[1]

7. Changes in response action plan:

a. Increase in action leakage rate 3
b. Change in a specific response reducing its frequency or effectiveness 3
c. Other Changes 2

Note: See §305.69(g) of this title for modification procedures to be used for the management of newly listed or identified wastes.

I. Enclosed Waste Piles. For all waste piles except those complying with 40 CFR 264.250(c), modifications are treated the same as for a landfill.

The following modifications are applicable only to waste piles complying with 40 CFR 264.250(c).

1. Modification or addition of waste pile units:

a. Resulting in greater than 25% increase in the facility's waste pile storage or treatment capacity 3
b. Resulting in up to 25% increase in the facility's waste pile storage or treatment capacity 2

2. Modification of waste pile unit without increasing the capacity of the unit 2

3. Replacement of a waste pile unit with another waste pile unit of the same design and capacity and meeting all waste pile conditions in the permit 1

4. Modification of a waste pile management practice 2

5. Storage or treatment of different wastes in waste piles:

a. That require additional or different management practices or different design of the unit 3
b. That do not require additional or different management practices or different design of the unit 2

Note: See §305.69(g) of this title for modification procedures to be used for the management of newly listed or identified wastes.

6. Conversion of an enclosed waste pile to a containment building unit 2

J. Landfills and Unenclosed Waste Piles

1. Modification or addition of landfill units that result in increasing the facility's disposal capacity 3

2. Replacement of a landfill 3
3. Addition or modification or a liner, leachate collection system, leachate detection system, run-off control, or final cover system 3

4. Modification of a landfill unit without changing a liner, leachate collection system, leachate detection system, run-off control, or final cover system 2

5. Modification of a landfill management practice 2

6. Landfill different wastes:

a. That require additional or different management practices, different design of the liner, leachate collection system, or leachate detection system 3
b. That do not require additional or different management practices, different design of the liner, leachate collection system, or leachate detection system 2
c. That are wastes restricted from land disposal that meet the applicable treatment standards or that are treated to satisfy the standard of "use of practically available technology that yields the greatest environmental benefit" contained in 40 CFR 268.8(a)(2)(ii), and provided that the landfill unit meets the minimum technological requirements stated in 40 CFR 268.5(h)(2). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028) 1
d. That are residues from wastewater treatment or incineration, provided that disposal occurs in a landfill unit that meets the minimum technological requirements stated in 40 CFR 268.5(h)(2), and provided further that the landfill has previously received wastes of the same type (for example, incinerator ash). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028) 1

Note: See §305.69(g) of this title for modification procedures to be used for the management of newly listed or identified wastes.

7. Modifications of unconstructed units to comply with §§264.251(c), 264.252, 264.253, 264.254(c), 264.301(c), 264.302, 264.303(c), and 264.304 of this title ..... 1[1]

8. Changes in response action plan:

a. Increase in action leakage rate 3
b. Change in a specific response reducing its frequency or effectiveness 3
c. Other changes 2

K. Land Treatment

1. Lateral expansion of or other modification of a land treatment unit to increase areal extent 3

2. Modification of run-on control system 2

3. Modify run-off control system 3

4. Other modifications of land treatment unit component specifications or standards required in the permit 2

5. Management of different wastes in land treatment units:

   a. That require a change in permit operating conditions or unit design specifications 3
   b. That do not require a change in permit operating conditions or unit design specifications 2

Note: See §305.69(g) of this title for modification procedures to be used for the management of newly listed or identified wastes.

6. Modification of a land treatment management practice to:

   a. Increase rate or change method of waste application 3
   b. Decrease rate of waste application 1

7. Modification of a land treatment unit management practice to change measures of pH or moisture content, or to enhance microbial or chemical reactions 2

8. Modification of a land treatment unit management practice to grow food chain crops, or add to or replace existing permitted crops with different food chain crops, or to modify operating plans for distribution of animal feeds resulting from such crops 3

9. Modification of operating practice due to detection of releases from the land treatment unit pursuant to 40 CFR 264.278(g)(2) 3

10. Changes in the unsaturated zone monitoring system, resulting in a change to the location, depth, or number of sampling points, or that replace unsaturated zone monitoring devices or components thereof with devices or components that have specifications different from permit requirements 3

11. Changes in the unsaturated zone monitoring system that do not result in a change to the location, depth, or number of sampling points, or that replace unsaturated zone monitoring devices or components thereof with devices or components having specifications not different from permit requirements 2

12. Changes in background values for hazardous constituents in soil and soil-pore liquid 2

13. Changes in sampling, analysis, or statistical procedure 2

14. Changes in land treatment demonstration program prior to or during the demonstration 2

15. Changes in any condition specified in the permit for a land treatment unit to reflect results of the land treatment demonstration, provided performance standards are met, and the executive director's prior approval has been received ..... 1[1]

16. Changes to allow a second land treatment demonstration to be conducted when the results of the first demonstration have not shown the conditions under which the wastes can be treated completely, provided the conditions for the second demonstration are substantially the same as the conditions for the first demonstration and have received the prior approval of the executive director ..... 1[1]

17. Changes to allow a second land treatment demonstration to be conducted when the results of the first demonstration have not shown the conditions under which the waste can be treated completely, where the conditions for the second demonstration are not substantially the same as the conditions for the first demonstration 3

18. Changes in vegetative cover requirements for closure 2

L. Incinerators, Boilers and Industrial Furnaces

1. Changes to increase by more than 25% any of the following limits authorized in the permit: A thermal feed rate limit; a feedstream feed rate limit; a chlorine feed rate limit, a metal feed rate limit, or an ash feed rate limit. The executive director will require a new trial burn to substantiate compliance with the regulatory performance standards unless this demonstration can be made through other means 3

2. Changes to increase by up to 25% any of the following limits authorized in the permit: A thermal feed rate limit; a feedstream feedrate limit; chlorine/chloride feed rate limit, a metal feed rate limit, or an ash feed rate limit. The executive director will require a new trial burn to substantiate compliance with the regulatory performance standards unless this demonstration can be made through other means 2

3. Modification of an incinerator, boiler, or industrial furnace unit by changing the internal size of geometry of the primary or secondary combustion units, by adding a primary or secondary combustion unit, by substantially changing the design of any component used to remove HCl/Cl_2, metals or particulate from the combustion gases, or by changing other features of the incinerator, boiler, or industrial furnace that could affect its capability to meet the regulatory performance standards. The executive director will require a new trial burn to substantiate compliance with the regulatory performance standards unless this demonstration can be made through other means 3

4. Modification of an incinerator, boiler, or industrial furnace unit in a manner that would not likely affect the capability of the unit to meet the regulatory performance standards but which would change the operating conditions or monitoring requirements specified in the permit. The executive director may require a new trial burn to demonstrate compliance with the regulatory performance standards 2

5. Operating requirements:

a. Modification of the limits specified in the permit for minimum or maximum combustion gas temperature, minimum combustion gas residence time, oxygen concentration in the secondary combustion chamber, flue gas carbon monoxide and hydrocarbon concentration, maximum temperature at the inlet to the particulate matter emission control system, or operating parameters for the air pollution control system. The executive director will require a new trial burn to substantiate compliance with the regulatory performance standards unless this demonstration can be made through other means 3

b. Modification of any stack gas emission limits specified in the permit, or modification of any conditions in the permit concerning emergency shutdown or automatic waste feed cutoff procedures or controls 3

c. Modification of any other operating condition or any inspection or recordkeeping requirement specified in the permit 2

6. Burning different wastes:

a. If the waste contains a principal organic hazardous constituent (POHC) that is more difficult to burn than authorized by the permit or if burning of the waste requires compliance with different regulatory performance standards than specified in the permit. The executive director will require a new trial burn to substantiate compliance with the regulatory performance standards unless this demonstration can be made through other means 3

b. If the waste does not contain a POHC that is more difficult to burn than authorized by the permit and if burning of the waste does not require compliance with different regulatory performance standards than specified in the permit 2

Note: See §305.69(g) of this title for modification procedures to be used for the management of newly regulated wastes and units.

7. Shakedown and trial burn:

a. Modification of the trial burn plan or any of the permit conditions applicable during the shakedown period for determining operational readiness after construction, the trial burn period, or the period immediately following the trial burn 2

b. Authorization of up to an additional 720 hours of waste burning during the shakedown period for determining operational readiness after construction, with the prior approval of the executive director ..... 1[1]

c. Changes in the operating requirements set in the permit for conducting a trial burn, provided the change is minor and has received the prior approval of the executive director ..... 1[1]

d. Changes in the ranges of the operating requirements set in the permit to reflect the results of the trial burn, provided the change is minor and has received the prior approval of the executive director ..... 1[1]

8. Substitution of an alternate type of nonhazardous waste fuel that is not specified in the permit 1

9. Technology changes needed to meet standards under Title 40 CFR Part 63 (Subpart EEE - National Emission Standards for Hazardous Air Pollutants from Hazardous Waste Combustors), provided the procedures of §305.69(i) of this title are followed ..... 1[1]

M. Corrective Action

1. Approval of a corrective action management unit pursuant to 40 Code of Federal Regulations §264.552 3

2. Approval of a temporary unit or time extension for a temporary unit pursuant to 40 Code of Federal Regulations §264.553 2

3. Approval of a staging pile or staging pile operating term extension pursuant to 40 Code of Federal Regulations §264.554 2

N. Containment Buildings

1. Modification or addition of containment building units:

   a. Resulting in greater than 25% increase in the facility's containment building storage or treatment capacity 3
   b. Resulting in up to 25% increase in the facility's containment building storage or treatment capacity 2

2. Modification of a containment building unit or secondary containment system without increasing the capacity of the unit 2

3. Replacement of a containment building with a containment building that meets the same design standards provided:

   a. The unit capacity is not increased 1
   b. The replacement containment building meets the same conditions in the permit 1

4. Modification of a containment building management practice 2

5. Storage or treatment of different wastes in containment buildings:

      a. That require additional or different management practices 3
      b. That do not require additional or different management practices 2

Figure: 30 TAC §335.1(129)(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: 40 TAC §97.602(d)(3)(C)

SEVERITY LEVEL I VIOLATIONS $100 - $250 per violation	
Rule Cite	Subject Matter
§97.13	Relating to change of ownership.
§97.212	Relating to prohibiting material alteration of a license.
§§97.215 - 97.219	Relating to changes which affect the conditions of license.
§97.242	Relating to having a current written document that identifies the agency's organizational structure.
§97.243(a)	Relating to appointing an agency administrator and an alternate or designee.
§97.243(a)(1)-(2)	Relating to the duties of an agency administrator.
§97.243(c)	Relating to adoption of a written policy for the supervision of branch offices or alternate delivery sites, if established.
§97.244(a)(1)-(2)(A)-(D)	Relating to the qualifications and conditions of the agency administrator and alternate or designee.
§97.245(1)-(9)	Relating to adoption of a written policy on an agency's staffing policies.
§97.246	Relating to an agency's personnel records and content of such records.
§97.248	Relating to the use of volunteers in an agency.
§97.249	Relating to adoption of a written policy for the reporting of abuse, neglect or exploitation of clients.
§97.250(a)(1)-(4)	Relating to adoption of a written policy for the agency's procedures for investigating complaints.
§97.251	Relating to adoption of a written policy for ensuring that all professional disciplines comply with their respective professional practice acts for reporting and peer review.
§97.252(3) or (4)	Relating to department review of an agency's financial/business records.
§97.253	If conducting drug testing, relating to adoption of a written policy on drug testing of its employees.
§97.254	Relating to adoption of a written policy for ensuring that the agency submits accurate billings and insurance claims.
§97.255	Relating to adoption of a written policy for prohibition of illegal remuneration for securing or soliciting clients or patronage.
§97.256	Relating to adoption of a written policy which describes an agency's plan for publicly known natural disaster preparedness.
§97.281	Relating to adoption of a written policy that describes the agency's client care policies.
§97.282	Relating to adoption of a written policy governing client conduct and responsibility and client rights.
§97.283(a)	Relating to adoption of a written policy for compliance with the Advance Directives Act, Health and Safety Code, Chapter 166.
§97.284	Relating to adoption of a written policy for complying with the Clinical Laboratory Improvement Amendments of 1988, 42 USC, §263a, Certification of Laboratories (CLIA 1988).
§97.285	Relating to adoption of a written policy that addresses infection control.
§97.286	Relating to adoption of a written policy for safe handling and disposal of biohazardous waste and materials, if applicable.
§97.288	Relating to adoption of a written policy that requires all service providers involved in the care of a client, including contracted health care professional or another agency, are engaged in an effective interchange, reporting, and coordination of care regarding the client.
§97.290(a)	Relating to adoption of a written policy for ensuring that back-up services are available when an employee or contractor is not available to deliver the services.

§97.290(b)	Relating to adoption of a written policy for ensuring that clients are educated in how to access care from the agency or another health care provider after regular business hours.
§97.291	Relating to adoption of a written policy for an agency's written contingency plan.
§97.292	Relating to a written agreement for services between a client and an agency and the content of the agreement.
§97.294	Relating to adoption of a written policy for establishing time frame(s) for the initiation of care or services.
§97.296(a)	Relating to adoption of a written policy that states whether physician delegation will be honored by the agency.
§97.297	Relating to adoption of a written policy for describing protocols and procedures agency staff must follow when receiving physician orders, if applicable.
§97.298	Relating to adoption of a written policy for ensuring compliance with the rules of the Board of Nurse Examiners for the State of Texas adopted at 22 TAC Chapter 218 (Delegation of Selected Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel).
§97.299	Relating to adoption of a written policy for ensuring compliance with the rules of the Board of Vocational Nurse Examiners adopted at 22 TAC Chapters 231-240 (relating to Vocational Nursing Education, Licensure and Practice in the State of Texas).
§97.300	Relating to adoption of a written policy for maintaining a current medication list and medication administration record.
§97.301	Relating to requirements for maintaining an agency's client records.
§97.301(a)(2)	Relating to adoption of a written policy that includes written procedures governing the use and removal of records, the release of information, and the incorporation of clinical, progress or other notes into the client record.
§97.301(b)	Relating to adoption of a written policy for retention of records.
§97.302	Relating to adoption of a written policy for pronouncement of death if that function is carried out by an agency registered nurse.
§97.303	Relating to adoption of a written policy that covers the possession of sterile water or saline, certain vaccines or tuberculin, and certain drugs.
§97.321(b)	Relating to branch office compliance with the rules of its parent agency.
§97.321(e)	Relating to requirements for branch offices.
§97.322(b)	Relating to alternate delivery site compliance with hospice service standards.
§97.322(c)	Relating to an alternate delivery site's independent compliance with §97.403(c), (f)(1), (i), and §97.301.
§97.322(e)(1)-(3), and §97.246(b)	Relating to requirements for alternate delivery sites, providing hospice services.
§97.401(d)	Relating to the use of home health aides.
§97.403(c)	Relating to adoption of a written policy for the provision of hospice services.
§97.403(f)(3)	Relating to professional management responsibility for arranged services.
§97.403(q)-(t)	Relating to services provided by a hospice.
§97.403(w)(5), (6), (8) or (9)	Relating to physical plant requirements in an inpatient hospice.
§97.403(w)(11)	Relating to meal service in an inpatient hospice.
§97.404(d)	Relating to ensuring that when developing the agency's operational policies, the policies are considerate of principles of individual and family choice and control, functional need, and accessible and flexible services.

§97.404(e)(1)-(3)	Relating to additional requirements for maintaining client records in an agency that provides personal assistance services.
§97.404(f)	Relating to adoption of a written policy that addresses the supervision of personnel with input from the client or family on the frequency of supervision.
§97.405(g)	Relating to a written transfer agreement with a local hospital for an agency that provides home dialysis services.
§97.405(h)	Relating to an agreement with a licensed end stage renal disease facility to provide backup outpatient dialysis services.
§97.405(s)	Relating to additional requirements for maintaining client records in an agency with a home dialysis designation.
§97.405(v)	Relating to a written preventive maintenance program for home dialysis equipment.
§97.405(z)	Relating to policies and procedures for emergencies addressing fire, natural disaster, and medical emergencies required of an agency with the home dialysis designation.
§97.406(1)	Relating to adoption of a written policy for the provision of psychoactive treatments, if applicable.
§97.501(a)(5)	Relating to providing a surveyor access to records.

Figure: 40 TAC §97.602(d)(4)(B)

SEVERITY LEVEL II VIOLATIONS $500 - $1,000 per violation	
Rule Cite	Subject Matter
§97.1(a)(2)	Relating to an agency operating without a license.
§97.220(b)	Relating to having adequate staff to provide services and supervise the provision of services within the agency's established service area.
§97.243(b) and §97.244(b)	Relating to the appointment, qualifications, and duties of a supervising nurse.
§97.247	Relating to verification of employability for unlicensed persons (criminal history checks, nurse aide registry, and employee misconduct registry).
§97.250(a)(1)-(4)	Relating to an agency's investigation of complaints made by a client or a client's family.
§97.251	Relating to compliance with the agency's written policy to ensure that all professional disciplines comply with their respective professional practice acts relating to reporting and peer review.
§97.252(1) or (2)	Relating to an agency's financial ability to carry out its functions.
§97.282	Relating to compliance with the policies on client conduct and responsibility and client rights.
§97.283(a)(2)	Relating to requirement for the provision of a written statement relating to advance directives.
§97.284	Relating to compliance with the Clinical Laboratory Improvement Amendments of 1988.
§97.286(b)	Relating to compliance with 25 TAC §§1.131 - 1.137 concerning the Definition, Treatment, and Disposition of Special Waste from Health Care-Related Facilities.
§97.287	Relating to an agency's quality assessment and performance improvement program.
§97.288	Relating to compliance with an agency's policy for coordination of services.
§97.289(a)-(b) or §97.290(a)	Relating to an agency's use of and agreement with independent contractors, arranged services, and backup services.
§97.295(a)	Relating to an agency's transfer or discharge of a client.
§97.296(b)	Relating to an agency's acceptance of physician delegation orders.
§97.300	Relating to the administration of medication.
§97.303	Relating to the possession of sterile water or saline, certain vaccines or tuberculin, and certain dangerous drugs.
§97.401(b)	Relating to acceptance of a client for home health services and the initiation of services.
§97.401(c)(1)	Relating to employing or contracting with a registered nurse to provide or supervise nursing services.
§97.402(a)	Relating to compliance with the Medicare Conditions of Participation (Social Security Act, Code of Federal Regulations, Title 42, Part 484.)
§97.403(w)(2) or (4)	Relating to a written plan in the event of a disaster.
§97.404(g)	Relating to gastrostomy tube feedings or medication administration for an agency providing personal assistance services.
§97.405(a)	Relating to agencies that provide peritoneal dialysis or hemodialysis services.
§97.405(e)(1)-(3)	Relating to the required services to be provided by an agency with the home dialysis designation.
§97.405(f)(1) or (2)	Relating to orientation and training of personnel providing direct care to clients receiving home dialysis.

§97.405(i)	Relating to an agency's provision of medical and other important information when a dialysis client is transferred to a health care facility for treatment.
§97.405(k)	Relating to routine hepatitis testing of dialysis clients and agency employees providing dialysis care.
§97.405(m)	Relating to the initial admission assessment of a client for home dialysis services.
§97.405(n)	Relating to a long-term program for clients receiving home dialysis.
§97.405(o)	Relating to conducting a history and physical of a home dialysis client.
§97.405(p)(1) or (2)	Relating to physician orders for dialysis treatment.
§97.405(q)	Relating to the care plan for a home dialysis client.
§97.405(r)	Relating to medication administration under the home dialysis designation.
§97.405(t)	Relating to water treatment in the home dialysis setting.
§97.405(w)	Relating to reuse of disposable medical devices in the home dialysis setting.
§97.405(x)(4)	Relating to the administration of blood and blood products for an agency with the home dialysis designation.
§97.405(y)	Relating to supplies for home dialysis.
§97.406	Relating to the provision of psychoactive services.
§97.407	Relating to the provision of intravenous therapy services.
§97.701	Relating to home health aides.
§95.128(a)-(n) and (q)-(r)	Relating to home health medication aides.
§95.128(o)-(p)	Relating to a home health medication aide training program.

Figure: 40 TAC §745.4027

Options to Qualify As a Level 1 Child-Placing Staff:	Must you have a license in social work or a license in another human services field?	At a minimum, you must have the following educational qualifications:	At a minimum, you must have the following professional qualifications, in addition to any field placement practicum:
Option 1	Yes	A. A master's degree from an accredited college or university in social work or other human services field; and B. Nine credit hours in graduate level courses that focus on family and individual function and interaction.	Two years of documented full-time experience in a social services or human services agency under the direct supervision of a person fully qualified to conduct level 1 child-placing activities.
Option 2	No	A. A master's degree from an accredited college or university; and B. Nine credit hours in graduate level courses that focus on family and individual function and interaction.	Three years of documented full-time experience in a social services or human services agency under the direct supervision of a person fully qualified to conduct level 1 child-placing activities.
Option 3	Yes	A. A bachelor's degree from an accredited college or university in social work or other human services field; and B. Nine credit hours in undergraduate level courses that focus on family and individual function and interaction.	Four years of documented full-time experience in a social services or human services agency under the direct supervision of a person fully qualified to conduct level 1 child-placing activities.
Option 4	No	A. A bachelor's degree from an accredited college or university; and B. Nine credit hours in undergraduate level courses that focus on family and individual function and interaction.	Five years of documented full-time experience in a social services or human services agency under the direct supervision of a person fully qualified to conduct level 1 child-placing activities.

Figure: 40 TAC §745.4029

Options For Assisting With a Screening or Report:	At a minimum, the person must have the following educational qualifications:	At a minimum, the person must have the following professional qualifications:
Option 1	A. A master's degree from an accredited college or university in social work or other human services field; and B. Nine credit hours in graduate level courses that focus on family and individual function and interaction.	None.
Option 2	A master's degree from an accredited college or university.	Two years of documented full-time experience in a child-placing agency under the direct supervision of a person fully qualified to conduct level 1 child-placing activities.
Option 3	A bachelor's degree from an accredited college or university in social work or other human services field.	Two years of documented full-time experience in a child-placing agency under the direct supervision of a person fully qualified to conduct level 1 child-placing activities.
Option 4	A bachelor's degree from an accredited college or university.	Three years of documented full-time experience in a child-placing agency under the direct supervision of a person fully qualified to conduct level 1 child-placing activities.
Option 5	A bachelor's degree from an accredited college or university.	Direct supervision from a level 1 child-placing staff.

Figure: 40 TAC §745.4061

Required Information	Description of Documentation Requirements
1. The age of the prospective adoptive parents.	All prospective adoptive parents must be at least 18 years or older. You must include documentation verifying their age.
2. The marital status of the prospective adoptive parents.	If married, A. You must record and document the parents' license or declaration of marriage; and B. Both spouses must petition to adopt.
3. The significant relationships of the prospective adoptive parents.	Each prospective adoptive parent must provide information about what emotional support system he or she has in place. You must document all marriages, divorces, deaths of former spouses, and significant relationships.
4. A history of the prospective adoptive parents' residence and their citizenship status.	You must include in the history: A. The length of time spent at each residence for the past ten years; B. An assessment of the available community resources to meet the needs of children; and C. The citizenship of the prospective adoptive parents and whether they are legal or illegal aliens. This is required to assess the stability of the home.
5. The prospective adoptive parents' motivation for adoption.	You must evaluate why the prospective adoptive parents want to adopt at this time.
6. Health status of the prospective adoptive parents.	You must include the physical, mental, and emotional status (including substance abuse history) of all persons living in the home in relation to the family's ability to provide an adoptive home and to assume parenting responsibilities. The prospective adoptive parents' life expectancy must be long enough to be able to raise the child to adulthood.
7. Any disabilities of the prospective adoptive parents.	A person must not be prohibited from adopting a child solely based on a disability. You must evaluate individuals who are disabled in relation to their adjustment to the disability and any limits the disability imposes on the prospective adoptive parents' ability to care for a child.
8. The quality of the prospective adoptive parents' marital and immediate family relationships.	You must describe the quality of the relationship in relation to the family's ability to provide an adoptive home. You should assess the stability of a couple's relationship.
9. The prospective adoptive parents' feelings about their childhood and parents.	You must include any history of abuse or neglect experienced by the prospective adoptive parents and their resolution of the experience.
10. The prospective adoptive parents' attitude about the adoptive child's religion, if applicable.	There are no religious requirements. However, you must evaluate prospective adoptive parents on: A. Their willingness to respect and encourage a child's religious affiliation, if any; B. Their willingness to provide a child opportunity for religious and spiritual development, if desired; and C. The health protection they plan to give a child if their religious beliefs prohibit certain medical treatment.

11. The prospective adoptive parents' values, feelings, and practices in regard to child discipline and care.	You must evaluate the prospective adoptive parents' discipline styles and techniques and their ability to: A. Recognize and respect differences in children; and B. Use discipline methods that suit the particular child, rather than relying on corporal punishment.
12. The prospective adoptive parents' sensitivity to and feelings about children who may have been subjected to abuse, neglect, separation from, and loss of their biological family, if the applicants are planning to adopt a child who is not a newborn.	Because there may be difficulties involved with a child who has experienced abuse, neglect, or losses, you must evaluate whether the prospective adoptive parents' environment is appropriate to nurture such a child. The environment includes the prospective adoptive parents' interest and ability to help the child deal with these experiences, and the available community resources.
13. The prospective adoptive parents' sensitivity to, and feelings about, birth families.	You must evaluate the prospective adoptive parents' expectations about any ongoing relationship with the birth family.
14. The attitude of the prospective adoptive parents' extended family regarding adoption.	You must include the extent, if any, the extended family of the adoptive parents will be involved in the child's life.
15. The prospective adoptive parents' expectations of adoptive children.	You must include the prospective adoptive parents' expectations of the child for the immediate and distant future, the flexibility of these expectations in relation to the child's actual needs and abilities, and the extent the expectations are formalized into plans.
16. Any limits of the prospective adoptive family to provide a nurturing environment for the child.	You must evaluate the behavior, background, special needs status, or other characteristics of a potential adoptive child that the family cannot or will not accept.
17. The financial status of the prospective adoptive family.	Prospective adoptive parents must be able to meet the child's basic material needs. You must include the family's ability to support a child; employment history; the parents' plan for employment (full-time or part-time) once the child is placed; and insurance coverage.
18. The results of the criminal history and central registry background checks conducted on the prospective adoptive parents.	Persons petitioning to adopt children through a child-placing agency, and each person 14 years of age or older who will regularly or frequently be staying or working at the home while children are being provided care, must obtain a criminal history and central registry background check (See Subchapter F of this chapter (relating to Background Checks)). The results of those checks must be documented.
19. The fertility of the prospective adoptive parents.	You must include information about the couple's fertility. The couple's fertility is important only in relation to unresolved feelings about their infertility and their ability to accept and parent a child not born to them.
20. Telephone numbers.	You must include telephone numbers for entities where it is appropriate for the subject of the study to file complaints about how the pre-adoptive home screening was conducted.

21. Background information from child-placing agencies that previously verified a foster home or approved an adoptive home.	An agency conducting a screening on an adoptive home must also request and evaluate the following background information from any child-placing agency that previously verified a foster home or approved an adoptive home: A. The home screening; B. Any record of deficiencies and their resolutions; and C. Current fire and health inspections.
22. Additional requirements.	A. Interviews as required by §745.4033 of this title (relating to Whom must I interview when conducting a foster home screening, a pre-adoptive home screening, or a post-placement report?); B. A visit to the home as required by §745.4037 of this title (relating to Is a visit to the home required when conducting foster home screening, a pre-adoptive home screening, or a post-placement report?); C. Information on birth parents as required by §745.4063 of this title (relating to Must the pre-adoptive home screening include information about birth parents?); and D. Updates as required by §745.4069 and §745.4071 of this title (relating to What if a child is not placed with prospective adoptive parents within six months of the completion of the pre-adoptive home screening? and What information must the pre-adoptive home screening update include?).

IN ADDITION

The ***Texas Register*** is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings, changes in interest rate and applications to install remote service units, and consultant proposal requests and awards.

To aid agencies in communicating information quickly and effectively, other information of general interest to the public is published as space allows.

Office of the Attorney General

Notice of Settlement of a Texas Solid Waste Disposal Act Enforcement Action

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Health and Safety Code. Before the State may settle a judicial enforcement action, pursuant to §7.110 of the Texas Water Code the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act.

Case Title and Court: State of Texas v. The City of Brady, Number GV-000266, in the 345th Judicial District Court of Travis County, Texas.

Background: The Texas Natural Resource Conservation Commission ("TNRCC"), issued an agreed administrative order finding that unauthorized discharges of industrial solid waste and hazardous waste had occurred at the City of Brady Power Plant, 900 West First St., Brady, McCulloch County, Texas. The order assessed an administrative penalty of $28,880 and required the City to undertake a cleanup of the plant. The City paid the administrative penalty. Subsequently, the State of Texas filed a lawsuit to enforce the technical requirements of the cleanup.

Nature of the Settlement: The case is to be settled by an agreed final judgment.

Proposed Settlement: The agreed final judgment reduces the TNRCC's administrative order to an order of the Court and awards the State its legal fees.

The Office of the Attorney General will accept written comments relating to the proposed settlement for thirty (30) days from the date of publication of this notice. Copies of the proposed agreed final judgment may be examined at the Office of the Attorney General, 300 W. 15th Street, 10th Floor, Austin, Texas. A copy of the proposed agreed final judgment may also be obtained in person or by mail at the above address for the cost of copying. Requests for copies of the judgment, and written comments on same, should be directed to Thomas H. Edwards, Assistant Attorney General, Office of the Attorney General, P.O. Box 12548, Austin, Texas 78711-2548; telephone (512) 463-2012, fax (512) 320-0052.

For further information regarding this publication, please contact A.G. Younger, Agency Liaison, at (512) 463-2110.

TRD-200106598
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: October 26, 2001

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Brazos Valley Workforce Development Board

Notice of Request for Proposals

The Brazos Valley Workforce Development Board (BVWDB) is soliciting proposals for Marketing Services and a Marketing Plan for the Brazos Valley Employer Coalition for Dependent Care (BVECDC). The RFP can be downloaded at: www.bvjobs.org or requested by contacting: Lloyd A. Behm, Program Specialist, Brazos Valley Workforce Development Board, Attn: Marketing RFP, 1706 East 29th Street, Bryan, Texas 77802, Phone: (979) 775-4244, ext 115; Fax: (979) 775-3466.

The purpose of this RFP is to procure a contractor to provide a comprehensive marketing plan and marketing services for the BVECDC. The RFP contains the necessary background, requirements, instructions, and information necessary to prepare a proposal to provide the requested services. The deadline for proposals is 4:00 P.M., CST on November 9, 2001.

TRD-200106660
Tom Wilkinson
Executive Director
Brazos Valley Workforce Development Board
Filed: October 30, 2001

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Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for these activities extends 30 days from the date published on the Coastal Coordination Council web site. Requests for federal consistency review were received for the following projects(s) during the period of October 19, 2001, through October 25, 2001. The public comment period for these projects will close at 5:00 p.m. on November 30, 2001.

FEDERAL AGENCY ACTIONS:

Applicant: Genstar Summerwood LP; Location: The project site is a 1,500 acre tract of undeveloped land located both north and south of West Lake Houston Parkway, immediately east of Sam Houston Parkway, extending east of Deussen Parkway, in northeast Harris County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Harmaston, Texas. Approximate UTM Coordinates: Zone: 15; Easting: 289154; Northing: 3312201. CCC Project No.: 01-0371-F1; Description of Proposed Action: The applicant requests authorization to discharge fill material into approximately 5.89 acres of adjacent wetland habitat for the construction of a residential development. The project site consists of 131.74 acres of wooded sloughs that are part of a surface water tributary system of Carpenter's Bayou that eventually drains into the San Jacinto River. As part of the impact minimization effort, the applicant will avoid impacting 124.06 acres of jurisdictional wetlands onsite. The applicant also proposes to construct elevated boardwalks crossing avoided wetland areas at various locations within the subdivision. The boardwalks would be 5 to 6 feet wide and would be constructed 3 feet above the vegetation line to prevent obstruction of water movement. The applicant proposes a multi-faceted compensatory mitigation plan that includes an average 30-foot wide upland buffer around the perimeter of the preserved jurisdictional areas, enhancement of preserved jurisdictional areas, grading of lots to drain to abutting wetlands, reconnection of historic drainage patterns, creation of 2.5 acres of forested wetland habitat, and the placement of a deed restriction over all mitigation areas. Additionally, two weir structures will be constructed within the proposed drainage ditches to protect hydrology in the adjacent wetlands. Type of Application: U.S.A.C.E. permit application #22461 is being evaluated under §404 of the Clean Water Act (33 U.S.C.A. §§125-1387). NOTE: The CMP consistency review for this project may be conducted by the Texas Natural Resource Conservation Commission as part of its certification under §401 of the Clean Water Act.

Applicant: Sabco Operating Company; Location: The proposed project is located in State Tract 49, approximately 6.4 miles southeast of Corpus Christi, offshore of Nueces County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Portland, Texas. Approximate UTM Coordinates: Zone: 14; Easting: 667983; Northing: 3072596. CCC Project No.: 01-0372-F1; Description of Proposed Action: The applicant proposes to install three 2-7/8 inch pipelines from State Tract (S.T.) 52, Well No. 6 surface location to production platform 49 in State Tract 49. The pipelines would be buried a minimum of 3 feet deep by disking, plowing, or jetting. Approximately 1,486 cubic yards of material would be displaced during pipeline construction. The bottom of the bay in the proposed project area is beneath 20 feet of water at Mean Low Tide and does not support any sea grass or oyster reef development. Type of Application: U.S.A.C.E. permit application #22174/006 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403). NOTE: The CMP consistency review for this project may be conducted by the Railroad Commission of Texas as part of its certification under §401 of the Clean Water Act.

Applicant: Max Brown Enterprises; Location: The project is located at the confluence of Salt Bayou and Dickinson Bay near Dickinson Bayou Marker No. 27, at Avenue R and 27th Street in San Leon, Galveston County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Texas City, Texas. Approximate UTM Coordinates: Zone: 15; Easting: 310408; Northing: 3261685. CCC Project No.: 01-0374-F1; Description of Proposed Action: The applicant requests authorization to excavate a canal through uplands. The proposed canal will measure 2,000 feet long by 250 feet wide and will be excavated to a depth of 9 feet. Two 100-foot by 100-foot wing walls will be constructed on either side of the canal opening. No fill material will be discharged below the ordinary high tide line. No bulkhead will be installed around the perimeter. The slopes will be designed to withstand erosion in the canal. The applicant also proposes to dredge a 9-foot deep channel from the canal opening, to the channel in Dickinson Bay, approximately 400 feet. The purpose of the proposed canal is to provide boat and barge access to the property, offloading of vessels, and service. No wetlands or vegetated shallows will be impacted. All material removed from the uplands or the canal construction will be placed on site on uplands to raise the elevation of the property. Type of Application: U.S.A.C.E. permit application #22384 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

Applicant: Trans Texas Gas Corporation; Location: The project is located at State Tract 331 in Galveston Bay, Galveston County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Texas City, Texas. Approximate UTM Coordinates: Zone: 15; Easting: 315422; Northing: 3261634. CCC Project No.: 01-0375-F1; Description of Proposed Action: The applicant proposes to drill a well and install a walkway and flowline between the proposed Well No. 4 and an existing production platform in approximately 8 feet of water in Galveston Bay. Type of Application: U.S.A.C.E. permit application #20643(04)/020 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403). NOTE: The CMP consistency review for this project may be conducted by the Railroad Commission of Texas as part of its certification under §401 of the Clean Water Act.

Applicant: South Shore Harbour Development, Limited; Location: The project is located in Clear Lake along the south shore in Galveston County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: League City, Texas. Approximate UTM Coordinates: Zone: 15; Easting: 299476; Northing: 3270103. CCC Project No.: 01-0376-F1; Description of Proposed Action: The applicant proposes to remove 6,450 feet of existing concrete bagwall and replace it with wooden bulkhead. For the portion of the bagwall facing Clear Lake, the remnants will be broken and placed in front of the new wooden bulkhead. The fill will consist of approximately 1,000 cubic yards of concrete along approximately 1,000 feet of bulkhead. For the portions not facing Clear Lake, the old bagwall will be removed and disposed of at an upland site once the new bulkhead is in place. Type of Application: U.S.A.C.E. permit application #15665(08) is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

Applicant: Yuma E & P Company, Inc.; Location: The project is located at State Tract 49 in Trinity Bay, Chambers County, Texas. The

project can be located on the U.S.G.S. quadrangle map entitled: Umbrella Point, Texas. Approximate UTM Coordinates: Zone: 15; Easting: 322888; Northing: 3284367. CCC Project No.: 01-0377-F1; Description of Proposed Action: The applicant proposes to relocate their previously authorized well site approximately 273 feet southwest of the permitted location in State Tract 49, Well No. 1. Type of Application: U.S.A.C.E. permit application #22392(01) is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403). NOTE: The CMP consistency review for this project may be conducted by the Railroad Commission of Texas as part of its certification under §401 of the Clean Water Act.

Applicant: Northwood Estates; Location: The project is located at the north end of Lake Jackson, Brazoria County County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Lake Jackson, Texas. Approximate UTM Coordinates: Zone: 15; Easting: 261473; Northing: 3217342. CCC Project No.: 01-0379-F1; Description of Proposed Action: The applicant proposes to modify mitigation which consists of sloping and paving around the area of outfall. The water level allowed for wetland mitigation around the lake will not change. The modification is necessary to allow proper function of the lake as a detention and retention facility. Type of Application: U.S.A.C.E. permit application #21519(02) is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information for the applications listed above may be obtained from Ms. Diane P. Garcia, Council Secretary, Coastal Coordination Council, 1700 North Congress Avenue, Room 617, Austin, Texas 78701-1495, or diane.garcia@glo.state.tx.us. Comments should be sent to Ms. Garcia at the above address or by fax at 512/475-0680.

TRD-200106727
Larry R. Soward
Chief Clerk, General Land Office
Coastal Coordination Council
Filed: October 31, 2001

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Request for Proposals for Projects Under Council's Portion of CIAP Funds

Texas Coastal Impact Assistance Program

The Coastal Impact Assistance Program (CIAP) was authorized by Congress to assist states in mitigating the impacts associated with Outer Continental Shelf (OCS) oil and gas production. Congress has appropriated $150 million to the National Oceanic Atmospheric Administration (NOAA) to be allocated to Texas and six other coastal states. This money is to be used to undertake a variety of projects for protecting and restoring coastal resources and mitigating the impacts of OCS leasing and development. The Office of the Governor has directed the Texas General Land Office to coordinate with the Coastal Coordination Council (Council) in the allocation of program funds.

Under this one-time authorization, Texas will receive $26.4 million, which has been apportioned between the state and eligible coastal counties. The state's share is approximately $17.1 million and approximately $9.2 million has been allocated for eligible coastal counties to undertake projects for protecting and restoring coastal resources. The eighteen eligible coastal counties are (from the Rio Grande to the Sabine): Cameron, Willacy, Kenedy, Kleberg, Nueces, San Patricio, Aransas, Refugio, Victoria, Calhoun, Jackson, Matagorda, Brazoria, Galveston, Harris, Chambers, Jefferson, Orange.

In order to receive these funds, Texas developed and submitted to NOAA a comprehensive CIAP plan encompassing the proposed use of both the state and local portions of the CIAP funds on August 31, 2001. The Council's portion of the CIAP plan included language to administer its portion of the CIAP funds through a trust fund.

However, at the Council meeting on October 19, 2001, Council members withdrew the proposal to create a trust fund with the Council's portion of CIAP funds and voted to move forward with a grant program. The Council has $7,454,756 in CIAP funds to be allocated. As determined by the Council, in Stage 1, 85 percent of the Council's CIAP funds ($6,336,542.60) will be awarded to larger projects using a process similar to the Coastal Management Program grants program and guided by the process used earlier this year by the Land Office in awarding the other portion of the State's CIAP funds. The Council's remaining 15 percent ($1,118,213.40) will be awarded in Stage 2.

The effort to develop the CIAP plan will require a strong collaboration between the Land Office, Council, federal and local governments, and coastal agencies. The Land Office is committed to working closely with coastal communities and coastal agencies in the identification of projects and development of the CIAP plan. Information on the CIAP is available via the Land Office's web site: http://www.glo.state.tx.us/coastal/ciap/index.html.

Apply Today: Project proposals for use of a portion of the Council's share must be submitted by December 5, 2001. A project goal summary is available on the Land Office's web site or may be obtained by contacting Sheri Land at 512-463-5058, 1-800-998-4GLO (select option 1 and then option 6), or sheri.land@glo.state. tx.us. Project goal summaries should be sent to the Texas General Land Office, Coastal Impact Assistance Program, P.O. Box 12873, Austin, Texas 78711-2873 or 1700 N. Congress Ave., Austin, Texas 78701-1495. Project goal summaries may also be faxed to 512-475-0680.

Each project goal summary should: Identify a point of contact; Provide a description of the project, its proposed location, its desired outcomes, and any benefits to the public, coastal economy, and/or coastal natural resource areas; and A projected budget for the project in as much detail as available.

No local match is required for these one-time CIAP project grants. However, in the interest of optimizing the benefits of the program, the offer of match will be favorably considered

Apply?: Most entities are eligible to apply, including local governments, river authorities, navigation districts, flood control districts, municipal utility districts, universities, and non-profit, non-governmental organizations.

Authorized Purposes for Projects: Activities which support the Coastal Zone Management Act, the National Marine Sanctuaries Act, the Magnuson-Stevens Fishery Conservation and Management Act, or the National Estuaries Program; Conservation, restoration, enhancement, or protection of coastal or marine habitats; Protection, restoration, and enhancement of coastal water quality; Watershed protection or other coastal or marine conservation needs; Mapping and monitoring of coastal or marine resources and habitats; Coastal conservation needs associated with seasonal or otherwise transient populations (i.e. Winter Texans); Protection and restoration of natural coastline protective features, including control of coastline erosion; Control of invasive exotic and harmful non-indigenous species; Assistance to local communities to assess, plan for, and manage the impacts of growth and development, including coastal community fishery

assistance programs; Research, education, and training; Conservation, protection, or restoration of wetlands; Mitigation of a discharge of oil or a hazardous substance; and Construction of onshore infrastructure projects and other public service needs intended to mitigate the environmental effects of OCS activities (These projects can total no more than 23 percent of the total Texas allocation).

Project Guidelines: Sub-awards are discouraged. Preference is for projects within the Texas CMP boundary. The intent is to allocate the funds in both amount and geographic location in a manner that will optimize regional benefits to the entire Texas coast. Large, multi-phase projects will be considered for funding, in whole or in part. Preference will be given to projects that are either ineligible for or that do not receive Land Office or CMP funding from other sources such as the Coastal Erosion Prevention and Response Act or CMP grant funds. CIAP expenditures for onshore infrastructure projects are limited to 23 percent of the total funds allocated to Texas. Funds cannot be used to condemn private property. Property should only be purchased through a willing seller transaction.

TRD-200106728
Larry R. Soward
Chief Clerk, General Land Office
Coastal Coordination Council
Filed: October 31, 2001

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Comptroller of Public Accounts

Notice of Contract Award

Notice of Award: Pursuant to Chapter 2254, Chapter B, and Sections 403.011 and 403.020 Texas Government Code, the Comptroller of Public Accounts (Comptroller) announces this notice of consulting contract award.

The notice of request for proposals (RFP #125a) was published in the September 7, 2001, issue of the *Texas Register* at 26 TexReg 6981.

The consultant will assist Comptroller in conducting a management and performance review of the Laredo Independent School District.

The contract was awarded to Resource Consultants, Inc., 3600 Bee Caves Road, Suite 201, Austin, Texas 78746. The total amount of this contract is not to exceed $190,000.00.

The term of the contract is October 23, 2001 through May 31, 2002. The final report is due on or before February 4, 2002.

TRD-200106657
Pamela Ponder
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: October 30, 2001

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Notice of Contract Award

Notice of Award: Pursuant to Chapter 2254, Chapter B, and Sections 403.011 and 403.020 Texas Government Code, the Comptroller of Public Accounts (Comptroller) announces this notice of consulting contract award.

The notice of request for proposals (RFP #126a) was published in the September 7, 2001, issue of the *Texas Register* at 26 TexReg 6981.

The consultant will assist Comptroller in conducting management and performance reviews of the Raymondville and San Perlita Independent School Districts.

The contract was awarded to Trace Consulting Services, Inc., 17460 IH-35N, Suite 160-308, Schertz, Texas 78154. The total amount of this contract is not to exceed $109,870.00.

The term of the contract is October 23, 2001 through May 31, 2002. The final report is due on or before March 7, 2002.

TRD-200106658
Pamela Ponder
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: October 30, 2001

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in Sections 303.003, 303.005, and 303.009, Tex. Fin. Code.

The weekly ceiling as prescribed by Sec. 303.003 and Sec. 303.009 for the period of 11/05/01 - 11/11/01 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 11/05/01 - 11/11/01 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by Sec. 303.005[3] for the period of 11/01/01 - 11/30/01 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The monthly ceiling as prescribed by Sec. 303.005 for the period of 11/01/01 - 11/30/01 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

[3]For variable rate commercial transactions only.

TRD-200106652
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: October 30, 2001

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Texas Education Agency

Request for Proposals Concerning Quality Journey Training, Phase 2: Design, Implementation, and Evaluation

Filing Date. October 31, 2001.

Filing Authority. State Employees Training Act (Texas Government Code, Chapter 656, Job Notices and Training, Subchapter C, Training)

Description. In August 2000, the Texas Education Agency (TEA) solicited proposals from contractors for the purpose of training and guiding staff in the Department of Quality, Compliance, and Accountability Reviews through Phase 1 of the department's Quality Journey. The Quality Journey is a two-phase collaborative approach to designing organizations intended to increase work quality using quality-based tools and processes. The department's Quality Journey seeks to focus on customer needs, to reduce or eliminate redundancy in workflow, and to examine supporting policies, procedures, and systems in light of overall

quality improvement for the department. Phase 1 of the Quality Journey included training and guidance in: delineation of planning components, definition of quality-based tools, analysis of existing department workflow, and a review of the department mission and vision. Vandermark & Associates, 201 Lark Road, Marble Falls, Texas 78654-8233, was awarded the contract in the amount of $15,000. Phase 1 has been successfully completed.

In Phase 2, the final phase of the project, the contractor will use existing data gathered from Phase 1 to train and guide the department on how to develop design options, implement the new department design, evaluate the impact of the departmental redesign, and incorporate a process for continuous improvement.

The contractor, Vandermark & Associates, successfully completed Phase 1 of the project, which included training in planning components, definition and analysis, and a review of the department's mission and vision. Under the provisions of Request for Proposals (RFP) #701-02-004, TEA intends to award a continuation contract to the current contractor, Vandermark & Associates, unless a better offer is received by 5:00 p.m. (Central Time) Tuesday, December 11, 2001, in the TEA Document Control Center, Room 6-108, Texas Education Agency, William B. Travis Building, 1701 N. Congress Avenue, Austin, Texas 78701-1494.

Dates of Project. All services and activities related to this contract will be conducted within specified dates. The continuation contractor shall plan for a starting date of no earlier than January 15, 2002, and an ending date of no later than January 15, 2003.

Project Amount. The contractor may receive funding not to exceed $14,000 during the contract period. Subsequent project funding will be based on satisfactory performance of objectives and activities, on appropriated funding being available, and authorization to continue.

Requesting the Proposal. A complete copy of RFP #701-02-004 may be obtained by calling Judy Krohn at (512) 463-9662; by faxing (512) 936-0723; or by e-mailing jkrohn@tea.state.tx.us. Please refer to the RFP number in your request.

The TEA is not obligated to execute a resulting contract, provide funds, or endorse any proposal submitted in response to this RFP. This RFP does not commit the TEA to pay any costs incurred before a contract is executed. The issuance of this RFP does not obligate the TEA to award a contract or pay any costs incurred in preparing a response.

Further Information. For clarifying information, contact Judy Krohn, Division of Accountability Development and Support, TEA, by telephone at (512) 463-9662 or by e-mail at jkrohn@tea.state.tx.us.

Deadline for Receipt of Proposals. Proposals must be received in the Document Control Center of the Texas Education Agency by 5:00 p.m. (Central Time), Tuesday, December 11, 2001, to be considered.

TRD-200106719
Cristina DeLaFuente-Valadez
Manager, Policy Planning
Texas Education Agency
Filed: October 31, 2001

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Office of the Governor

Notice of Request for Redesignation of the Lower Rio Grande Workforce Development Area

Notice is given to the public that the Governor has received a recommendation for redesignation of the Lower Rio Grande Workforce Development Area (LRGWDA) from the Texas Council on Workforce and Economic Competitiveness. The recommended redesignation would result in Starr County being removed from the South Texas Workforce Development Area and becoming part of the LRGWDA.

As mandated in Texas Government Code, §2308.101, the Governor is accepting written comments on the proposed redesignation from the public. Persons who wish to provide written comments on the proposed redesignation should submit their comments to the Office of the Governor, Attention to Royce Poinsett, Assistant General Counsel, P.O. Box 12428, Austin Texas 78711 or by email to rpoinsett@governor.state.tx.us. Written comments should be received no later than December 15, 2001.

TRD-200106661
Royce Poinsett
Assistant General Counsel
Office of the Governor
Filed: October 30, 2001

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Request for Proposals

Pursuant to Subchapter A, §§2254.001 et. seq., Texas Government Code, the Governor's Office of Budget and Planning invites professionals with demonstrated competence and qualifications and documented expertise in the field of indirect cost recovery and cost allocation plans for governmental units to submit proposals to prepare and negotiate with the federal government, under the provisions of OMB Circular A-87, the State of Texas' consolidated statewide cost allocation plan for the fiscal year ending August 31, 2003. These consultant services have been provided previously by the consulting firm of DMG/MAXIMUS. Unless a clearly superior proposal is received from a different proposer, the Governor's Office intends to award the contract for the FY 2003 plan to MAXIMUS, Incorporated, subject to negotiation of a fair and reasonable price.

Proposers will be expected to develop a cost allocation plan that enables eligible state agencies to recover the maximum indirect costs possible from federal programs. The contractor selected will be responsible for all aspects of the plan, including obtaining raw cost and statistical data, identifying allocable costs, preparing and submitting the plan, and negotiating the final plan with the federal government for state agency use during the state fiscal year beginning September 1, 2002. Proposals must include a description of the system to be used to extract allowable costs from central government agencies and for allocating such costs. Contractor may be required to prepare alternative allocation tables using different allocation bases to demonstrate maximum feasible recovery options.

As a component of the cost allocation plan, the contractor selected must also identify the costs of providing statewide support services to each state agency. This component must identify state agencies that use services from state central services agencies (for example, auditing, accounting, centralized purchasing, and legal services) in carrying out their programs and the type and dollar amount of services used. The contractor selected will be responsible for all aspects of this component, including obtaining raw cost and statistical data and identifying allocable costs. Proposals must include a description of the system to be used to extract allowable costs from central government agencies and for allocating such costs.

A complete set of the work papers used to prepare the plan must be kept and provided to the Governor's Office upon request. The contractor is required to provide 20 copies of the summary of fixed costs related to federal cost allocations from the completed plan and 20 copies of the summary of costs related to the allocation of state central service agency costs to other state agencies from the completed full cost plan.

The contractor must also provide the summaries of fixed costs for the federal and state plans in machine-readable form, preferably EXCEL, for posting on the Internet.

The Governor's Office of Budget and Planning will evaluate each proposal and reserves the right to reject any and all proposals. The state assumes no responsibility for expenses incurred in preparing responses to this solicitation. If selected, the contractor will be chosen on the basis of proposal content, the proposer's demonstrated experience, competence, knowledge and qualifications, and ability to meet the federal filing deadline of February 28, 2002.

A copy of the FY 2001 plan may be downloaded from the Internet at http://www.governor.state.tx.us/the_office/gts_tracs/Grants/guidelines.htm or obtained by contacting Denise Francis, Governor's Office of Budget and Planning, P.O. Box 12428, Austin, Texas 78711 (telephone (512) 305-9415, e-mail dfrancis@governor.state.tx.us).

All proposals must be received at the above address no later than 5:00 p.m., December 10, 2001.

TRD-200106468
Bob Pemberton
Deputy General Counsel
Office of the Governor
Filed: October 25, 2001

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Texas Department of Health

Designation of Sites Serving Medically Underserved Populations for Mission Arlington/Mission Metroplex Medical Clinic

The Texas Department of Health (department) is required under the Occupations Code, §157.052 to designate sites serving medically underserved populations. In addition, the department is required to publish notice of such designations in the Texas Register and to provide an opportunity for public comment on the designations.

Accordingly, the department has designated the following as a site serving medically underserved populations: Mission Arlington/Mission Metroplex Medical Clinic, 210 W. South Street, Arlington, Texas 76010. The designation is based on proven eligibility as a site serving a disproportionate number of clients eligible for federal, state or locally funded health care programs.

Oral and written comments on this designation may be directed to Bruce Gunn, Ph.D., Director, Health Professions Resource Center, Office of Policy and Planning, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756; telephone (512) 458-7261. Comments will be accepted for 30 days from the publication date of this notice.

TRD-200106720
Susan Steeg
General Counsel
Texas Department of Health
Filed: October 31, 2001

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Notice of Emergency Cease and Desist Order on U.S. X-Ray, Inc.

Notice is hereby given that the Bureau of Radiation Control (bureau) ordered U.S. X-Ray, Inc. (registrant-Unregistered) of Chesapeake, Ohio, to cease and desist using x-ray equipment and conducting a healing arts screening program in Texas until approval has been obtained from the bureau. The bureau determined that conducting an unauthorized healing arts screening program with x-ray equipment that has not been registered with the bureau may expose members of the public to unnecessary radiation. This constitutes an immediate threat to public health and safety, and the existence of an emergency. The order will remain in effect until the bureau authorizes the company to perform the screening program.

A copy of all relevant material is available for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200106691
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: October 30, 2001

♦ ♦ ♦

Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation on U.S. X-Ray, Inc.

Notice is hereby given that the Bureau of Radiation Control (bureau), Texas Department of Health (department), issued a notice of violation and proposal to assess an administrative penalty to U.S. X-Ray, Inc. (registrant-R26394) of Chesapeake, Ohio. A total penalty of $30,000 is proposed to be assessed to the registrant for alleged violations of 25 Texas Administrative Code, §289.226 and the Emergency Cease and Desist Order issued by the bureau on August 21, 2001.

A copy of all relevant material is available for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200106692
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: October 30, 2001

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Notice of Request for Proposals to Provide Capacity Building for Minority Community Based Organizations

INTRODUCTION

In order to assist minority community-based organizations (CBO) in the effective delivery of HIV services to people of color, the Texas Department of Health (department), Bureau of HIV and STD Prevention, wishes to identify an African-American, non-profit organization to identify and address training, technical assistance, and other organizational development needs of minority HIV/STD providers. The initial focus of the project will be to identify and assist African-American CBOs in need of such resources.

PURPOSE

The contractor will provide the following resources to African-American CBOs in Texas:

(1) Organizational assessment to identify needs for capacity building, advocacy and organizational development;

(2) Development of a training and/or technical assistance plan;

(3) Identification of existing training and/or technical assistance providers who are currently funded to provide the identified needs, and matching them with the CBOs;

(4) Acquisition of training and/or technical assistance through the hiring of consultants and experts;

(5) Direct training and/or technical assistance; and

(6) Monitoring of technical assistance provided and evaluating its effectiveness.

ELIGIBLE APPLICANTS

Eligible applicants are public or private nonprofit organizations within the state of Texas. Applicants are limited to African-American organizations. The organizations must have board of directors made up of 50% African American members. Applicants must demonstrate cultural competency with other minorities for the long-range purposes of this project. Applicants must have a proven track record in organizational development; needs assessment; working in the minority community; and collaboration with local, state and/or federal agencies. Agencies that have had state or federal contracts terminated within the last 24 months for deficiencies in fiscal or programmatic performance are not eligible to apply.

AVAILABLE FUNDS

The department has identified $150,000 in funds for the initial phase of the project. Continuation funding will be based on successful contractor performance. The department plans to select one agency to provide these services through a competitive Request for Proposal (RFP). The review and award criteria will be included in the RFP. The project is expected to start April 1, 2002.

FOR INFORMATION

Interested parties may obtain a copy of the RFP at the website:

http://www.tdh.state.tx.us/hivstd/grants/default.htm; or, contact Laura Ramos at 512/490-2525 or by e-mail at laura.ramos@tdh.state.tx.us. No copies of the RFP will be released prior to November 16, 2001. Proposals are due January 16, 2002. Request Document Number 0027.

TRD-200106730
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: October 31, 2001

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Notice of Revocation of Certificates of Registration

The Texas Department of Health, having duly filed complaints pursuant to 25 Texas Administrative Code, §289.205, has revoked the following certificates of registration: Houston Hi Tension Sales and Service Inc., Houston, R20777, October 4, 2001; Mesa Family Clinic, Houston, R21454, October 4, 2001; Arthur W. Coleman, D.D.S. & Associates, R24360, Houston, October 4, 2001; Edinburg Physicians Network, P.L.L.C., Pharr, R24449, October 4, 2001; McAllen Primary Care Associates, McAllen, R25204, October 4, 2001.

A copy of all relevant material is available for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200106690
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: October 30, 2001

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Notice of Revocation of Radioactive Material Licenses

The Texas Department of Health, having duly filed complaints pursuant to 25 Texas Administrative Code, §289.205, has revoked the following radioactive material licenses: Lead Based Paint Detection Corp., Houston, L04586, October 4, 2001; Outpatient Diagnostic Nuclear Medicine, Inc., El Paso, L05199, October 4, 2001.

A copy of all relevant material is available for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200106689
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: October 30, 2001

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Texas Health and Human Services Commission

Notice of Proposed Medicaid Provider Payment Rates, Non-State Operated ICF/MR Providers and State Operated Small Facilities ICF/MR

As single state agency for the state Medicaid program, the Health and Human Services Commission proposes a new rate for the Non-State Operated Intermediate Care Facilities for the Mentally Retarded (ICF/MR) program and State Operated Small Facilities operated by the Texas Department of Mental Health & Mental Retardation. The proposed rates will be in effect starting November 1, 2001.

Payment rates for the non-state operated facilities are proposed as follows:

Payment rates for the non-state operated facilities are proposed as follows:

Level of Need	8 or Less Beds	9-13 Beds	14+ Beds
1 Intermittent	$138.91	$116.60	$90.57
5 Limited	$154.90	$128.37	$102.46
8 Extensive	$176.99	$149.68	$114.75
6 Pervasive	$217.14	$181.40	$159.91
9 Pervasive +	$382.39	$358.59	$353.99

Payment rates for the state operated small facilities is proposed as follows:

Small Facilities $204.43

The proposed rates were determined in compliance with the rate setting methodology codified at 1 T.A.C. ch. 355, subch. D, §355.451 and §355.456.

A public hearing will be held on Monday, November 19, 2001 at 9:00a.m. in Building 2 Room 240 at the Texas Department Mental Health Mental Retardation Central Office, at 909 W. 45th St., Austin, Texas 78751.

Written comments may be submitted to Reimbursement and Analysis Section, Medicaid Administration, Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711-2668, or faxed to (512) 206-5693. Hand deliveries will be accepted at 909 West 45th Street, Austin, Texas 78751. Comments must be received by noon on November 19, 2001. Interested parties may obtain a copy of the reimbursement-briefing package by calling the Reimbursement and Analysis Section at (512) 206-5753.

Persons requiring ADA accommodation should contact Tom Wooldridge by calling (512) 206-5753, at least 72 hours prior to the hearing. Persons requiring an interpreter for the deaf or hearing impaired should contact Tom Wooldridge through the Texas Relay operator by calling 1-800-735-2988.

TRD-200106724
Marina Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Filed: October 31, 2001

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Notice of Public Hearing Proposed Medicaid Provider Payment Rates, HCS, MRLA and Consolidated Waiver

As single state agency for the state Medicaid program the Health and Human Services Commission proposes new rates for Home and Community-Based Services (HCS) effective November 1, 2001, Mental Retardation Local Authority (MRLA) effective November 1, 2001, operated by the Texas Department Mental Health Mental Retardation and the Consolidated Waiver (Supported Employment, 24-Hour Residential Habilitation, and Family Surrogate services), effective November 1, 2001, operated by the Department of Human Services.

A public hearing will be held in compliance with Title 1, Texas Administrative Code, Chapter 355, Subchapter F, §355.702(h), which requires a public hearing on proposed reimbursement rates for medical assistance programs and §355.105(g).

The public hearing will be held on Monday, November 19, 2001 at 10:00 a.m. in room 2-240 of the TDMHMR Central Office building (Building 2) at 909 West 45th Street, Austin, Texas 78751.

Written comments may be submitted to HHSC Rate Analysis, Medicaid Administration, Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711-2668, or faxed to (512) 206-5693. Hand deliveries will be accepted at 909 West 45th Street, Austin, Texas 78751. Comments must be received by noon on Monday, November 19, 2001. Interested parties may obtain a copy of the reimbursement-briefing package by calling the Reimbursement and Analysis Section at (512) 206-5753.

Persons requiring ADA accommodation should contact Tom Wooldridge by calling (512) 206-5753, at least 72 hours prior to the hearing. Persons requiring an interpreter for the deaf or hearing impaired should contact Tom Wooldridge through the Texas Relay operator by calling 1-800-735-2988.

TRD-200106725
Marina Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Filed: October 31, 2001

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Texas Department of Housing and Community Affairs

Announcement of an Additional Public Hearing for the 2002 State of Texas Consolidated Plan One Year Action Plan - Draft for Public Comment.

The Texas Department of Housing and Community Affairs (TDHCA) announces an additional public hearing for *2002 State of Texas Consolidated Plan - One Year Action Plan - Draft for Public Comment*, which describes the federal resources expected to be available for the following programs: the Community Development Block Grant Program (CDBG), the HOME Investment Partnerships Program (HOME), the Emergency Shelter Grants Program (ESG), and the Housing Opportunities for Persons with AIDS Program (HOPWA).

The public hearing will be held at the following time and location:

Tuesday, November 27, 2001, 6:00p.m.

Johnny S. Calderon Building

710 E. Main Street

Robstown, Texas

Copies of the *2002 State of Texas Consolidated Plan - One Year Action Plan- Draft for Public Comment* and the*2002 State of Texas Low Income Housing Plan and Annual Report - Draft for Public Comment* are available for review at the following locations: **ABILENE** Abilene Public Library, 915/677-2474; **ALPINE** Sul Ross State University, 915/837-8124; **AMARILLO** Amarillo Public Library, 806/378-3054; **ARLINGTON** University of Texas at Arlington, 817/273-3000; **AUSTIN** Legislative Reference Library, 512/463-1252, Texas State Library, 512/463-5455, University of Texas at Austin, 512/495-4515, University of Texas at Austin Tarlton Law Library, 512/471-7726;

BEAUMONT Beaumont Public Library, 409/838-6606, Lamar University, 409/880-8118; **BROWNSVILLE** University of Texas at Brownsville, 210/544-8220; **CANYON** West Texas A&M University, 806/651-2205; **COLLEGE STATION** Texas A&M University, 409/845-8111; **COMMERCE** Texas A&M University - Commerce, 903/886-5716; **CORPUS CHRISTI** Corpus Christi Public Library, 361/880-7000; Texas A&M University - Corpus Christi, 361/994-2623; **DALLAS** Dallas Public Library, 214/670-1400, Southern Methodist University, 214-768-2331; **DENTON** Texas Woman's University, 940/898-2665, University of North Texas, 940/565-2870; **EDINBURG** University of Texas - Pan American, 956/381-3306; **EL PASO** El Paso Public Library, 915/543-5413, University of Texas at El Paso, 915/747-5683; **FORT WORTH** Fort Worth Public Library, 817/871-7706, Texas Christian University, 817/921-7669; **HOUSTON** Houston Public Library, 713/247-2700, Rice University, 713/527-4022, Texas Southern University, 713/527-7147, University of Houston, 713/743-9800, University of Houston - Clear Lake, 281/283-3930; **HUNTSVILLE** Sam Houston State University, 409/294-1613; **KINGSVILLE** Texas A&M University - Kingsville, 361/595-3416; **LAREDO** Texas A&M International University, 956/326-2400; **LUBBOCK** Texas Tech University, 806-742-2261; **NACOGDOCHES** Stephen F. Austin State University, 409/468-4101; **ODESSA** Ector County Library , 915/332-6502, University of Texas of the Permian Basin, 915/552-2371; **PRAIRIE VIEW** Prairie View A&M University, 409/857-2012; **RICHARDSON** University of Texas at Dallas, 972/883-2950; **SAN ANGELO** Angelo State University, 915/942-2222; **SAN ANTONIO** Saint Mary's University, 210/436-3441, San Antonio Central Library, 210/207-2500, Trinity University, 210/736-8121, University of Texas at San Antonio, 210/691-4570; **SAN MARCOS** Southwest Texas State University, 512/245-2133; **STEPHENVILLE** Tarleton State University, 817/968-9246; **TYLER** University of Texas at Tyler, 903/566-7340; **VICTORIA** University of Houston at Victoria, 361/572-6421: **WACO** Baylor University, 254/710-1268; **WICHITA FALLS** Midwestern State University, 940/689-4165 **OUT-OF-STATE**Library of Congress, 202/707-5243.

The *2002 State of Texas Consolidated Plan - One Year Action Plan - Draft for Public Comment* and the *2002 State of Texas Low Income Housing Plan and Annual Report - Draft for Public Comment* can be ordered by contacting the Texas Department of Housing and Community Affairs, Housing Resource Center, P.O. Box 13941, Austin TX, 78711-3941, Phone: (512) 475-3976, Fax: (512) 475-3746, or email at clandry@tdhca.state.tx.us. These documents will be available beginning November 3, 2001, on TDHCA's website at www.tdhca.state.tx.us.

Individuals who require auxiliary aids or services should contact Gina Esteves, ADA Responsible Employee, at (512) 475-3943, or Relay Texas at 1-800-735-2989, at least two days before the scheduled hearing, so that appropriate arrangements can be made.

Written comment is also encouraged and should be addressed to the Texas Department of Housing and Community Affairs, Housing Resource Center, P.O. Box 13941, Austin TX 78711-3941. For more information on these hearings, please contact the Housing Resource Center at 512-475-3976.

TRD-200106718
Ruth Cedillo
Acting Executive Director
Texas Department of Housing and Community Affairs
Filed: October 31, 2001

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Houston-Galveston Area Council

Request for Grant Applications for Local and Regional Juvenile Justice and Delinquency Prevention (JJDP) Act Fund Programs

The Houston-Galveston Area Council is soliciting applications for local and regional projects that provide prevention, diversion, intervention and training to prevent juvenile delinquency under the fiscal year 2003 grant cycle.

Purpose: The purpose of the projects is to provide a variety of prevention, diversion, intervention, and training projects that prevent juvenile delinquency and teach young offenders how to change their lives and be accountable for their actions.

Available Funding: Federal funding is authorized under the Juvenile Justice and Delinquency Act of 1974, Section 221-223, Public Law 93-415, as amended, Public Laws 95-115, 96-509, 98-473, 100-690, and 102-586, codified as amended at 42 U.S.C. 5631-5633. In addition to the rules related to this funding source, applicants and grantees must comply with the federal regulations at 28 C.F.R. Section 31.

Standards: Grantees must comply with the applicable grant management standards adopted under Texas Administrative Code Section 3.19 and Section 3.53, which are hereby adopted by reference.

Prohibitions: (1) Grantees may not use grant funds or program income for proselytizing or sectarian worship. (2) Only applicants in the Houston-Galveston Area Council area are eligible under this RFA. These applicants may apply under the block grant program administered directly by the Houston-Galveston Area Council.

Eligible Applicants: (1) state agencies; (2) units of local government; (3) nonprofit corporations; (4) Indian tribes performing law enforcement functions; (5) crime control and prevention districts; and (6) faith-based organizations. Faith-based organizations must be tax-exempt nonprofit entities as certified by the Internal Revenue Service.

Project Period: Grant-funded projects must begin on or after September 1, 2002, unless exempted by Houston-Galveston Area Council.

Application Process: Interested applicants should call or write the Houston-Galveston Area Council for information on application deadlines and submission requirements. Applicants WILL be required by the Houston-Galveston Area Council to attend an application workshop prior to submitting their applications for funding. The applicant must contact Brett Arkinson, Criminal Justice Program Coordinator for funding and workshop information. Detailed specifications are in the application kit, which is available from the Houston-Galveston Area Council or from the Office of the Governor's web site address located at http://www.governor.state.tx.us/cjd/cjdmain.htm.

Preferences: Preference will be given to applicants who provide local and regional programs that focus on juvenile delinquency prevention and intervention.

Closing Date for Receipt of Applications: All application deadlines are set by the regional council of government. Prospective applicants must contact the H-GAC Criminal Justice Planner for relevant deadlines.

Selection Process: Applications are prioritized by the Criminal Justice Advisory Committee based on the need for the program. Priority listings will be approved by the Houston-Galveston Area Council Board of Directors. Completed applications will be reviewed for eligibility and cost effectiveness by Houston-Galveston Area Council. Houston-Galveston Area Council reserves the right to renew grants for up to two additional years without the selected applications entering into a competitive selection process. The Houston-Galveston Area Council will make all final funding decisions.

Contact Person: If additional information is needed contact Houston-Galveston Area Council, Brett Arkinson, Criminal Justice Program Coordinator at (713) 993-4542 or e-mail at barkinson@hgac.cog.tx.us.

TRD-200106627
Jack Steele
Executive Director
Houston-Galveston Area Council
Filed: October 29, 2001

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Request for Grant Applications for Local and Regional Safe and Drug-Free Schools and Communities (SDFSC) Act Fund Programs

The Houston-Galveston Area Council is soliciting applications for local and regional projects that provide services to children, youths, and families that help prevent drug use and promote safety in schools and communities under the fiscal year 2003 grant cycle.

Purpose: The purpose of the projects is to promote safe and drug-free neighborhoods, fostering individual responsibility, promote respect for the rights of others, and improve school attendance, discipline, and learning.

Available Funding: Federal funding is authorized under the Elementary and Secondary Education Act, Title IV, Part A, Subpart 1, Sections 4011-4118, as amended, Public Law 103-382, 20 U.S.C. 7111-7118. All grants awarded from this fund must comply with the requirements contained therein. In addition to the rules related to this funding source, applicants and grantees must comply with the federal regulations at 348 C.F.R. Section 76, which are hereby adopted by reference.

Standards: Grantees must comply with the applicable grant management standards adopted under Texas Administrative Code Section 3.19 and Section 3.53, which are hereby adopted by reference.

Prohibitions: (1) Grantees may not use grant funds or program income for proselytizing or sectarian worship. (2) Only applicants in the Houston-Galveston Area Council area are eligible under this RFA. These applicants may apply under the block grant program administered directly by the Houston-Galveston Area Council.

Eligible Applicants: (1) Councils of Governments (COGs); (2) cities; (3) counties; (4) universities; (5) colleges; (6) independent school districts; (7) nonprofit corporations; (8) crime control and prevention districts; (9) state agencies; (10) native American tribes; (11) faith-based organizations. Faith-based organizations must be tax exempt nonprofit entities as certified by the Internal Revenue Service; (12) regional education service centers; (13) community supervision and corrections departments; and (14) juvenile boards.

Project Period: Grant-funded projects must begin on or after September 1, 2002, unless exempted by the Houston-Galveston Area Council.

Application Process: Interested applicants should call or write the Houston-Galveston Area Council for their county for information on application deadlines and submission requirements. Applicants WILL be required by the Houston-Galveston Area Council to attend an application workshop prior to submitting their applications for funding. The applicant must contact Brett Arkinson, Criminal Justice Program Coordinator for funding and workshop information. Detailed specifications are in the application kit, which is available from the Houston-Galveston Area Council or from the Office of the Governor's web site address located at http://www.governor.state.tx.us/cjd/cjd-main.htm.

Preferences: Preference will be given to applicants who provide local and regional programs that target neighborhoods with high rates of violence, drug abuse, gang-related activities, weapons violations, truancy, and school dropouts.

Closing Date for Receipt of Applications: All application deadlines are set by the regional council of governments. Prospective applicants must contact the H-GAC Criminal Justice Planner at their regional council of governments for relevant deadlines.

Selection Process: Applications are prioritized by the Criminal Justice Advisory Committee based on the need for the program. Priority listings will be approved by the Houston-Galveston Area Council Board of Directors. Completed applications will be reviewed for eligibility and cost effectiveness by the Houston-Galveston Area Council. Houston-Galveston Area Council reserves the right to renew grants for up to two additional years without the selected applications entering a competitive selection process. The Houston-Galveston Area Council will make all final funding decisions.

Contact Person: If additional information is needed contact Houston-Galveston Area Council Brett Arkinson, Criminal Justice Program Coordinator at (713) 993-4542 or e-mail at barkinson@hgac.cog.tx.us.

TRD-200106629
Jack Steele
Executive Director
Houston-Galveston Area Council
Filed: October 29, 2001

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Request for Grant Applications for Local and Regional State Criminal Justice Planning (421) Fund Programs

The Houston-Galveston Area Council is soliciting applications for local and regional projects to provide support of programs that are designed to reduce crime and improve the criminal and juvenile justice systems under the fiscal year 2003 grant cycle.

Purpose: The purpose of the projects is to support a wide range of programs designed to reduce crime and improve the criminal and juvenile justice systems locally.

Available Funding: State funding is authorized for these projects under Section 772.006 of the Texas Government Code designating the Criminal Justice Division (CJD) of the Governor's Office as the Fund's administering agency. The Criminal Justice Planning Fund is established by §102.056 and §102.075, Texas Code of Criminal Procedure. The source of funding is a biennial appropriation by the Texas Legislature from funds collected through court costs and fees.

Standards: Grantees must comply with the applicable grant management standards adopted under Texas Administrative Code Section §3.19 as well as meet the rules set forth in Texas Administrative Code Sections §3.53 and §3.55, which are hereby adopted by reference.

Prohibitions: (1) Grantees may not use grant funds or program income for proselytizing or sectarian worship. (2) Only applicants in the Houston-Galveston Area Council area are eligible under this RFA. These applicants must apply under the block grant program administered directly by the Houston-Galveston Area Council.

Eligible Applicants: (1) state agencies; (2) units of local government; (3) school districts; (4) nonprofit corporations; (5) crime control and prevention districts; and (6) faith-based organizations. Faith-based organizations must be tax-exempt nonprofit entities as certified by the Internal Revenue Service.

Houston-Galveston Area Council may approve grants for the renovation or retrofitting of existing facilities that provide additional beds for juvenile detention in compliance with the Texas Family Code.

Project Period: Grant-funded projects must begin on or after September 1, 2002, unless exempted by the Houston-Galveston Area Council.

Application Process: Interested applicants should call or write the Houston-Galveston Area Council for information on application deadlines and submission requirements. Applicants WILL be required by the Houston-Galveston Area Council to attend an application workshop prior to submitting their applications for funding. The applicant must contact Faye K. Prevot, Criminal Justice Planner for funding and workshop information. Detailed specifications are in the application kit, which is available from the Houston-Galveston Area Council or from the Office of the Governor's web site address located at http://www.governor.state.tx.us/cjd/cjdmain.htm.

Preferences: Preference will be given to applicants who provide local and regional programs that focus on reducing crime and improving the criminal and juvenile justice systems.

Closing Date for Receipt of Applications: All application deadlines are set by the regional council of governments. Prospective applicants must contact the H-GAC Criminal Justice Planner for relevant deadlines.

Selection Process: Applications are prioritized by the Criminal Justice Advisory Committee based on the need for the program. Priority listings will be approved by the Houston-Galveston Area Council Board of Directors. Completed applications will be reviewed for eligibility and cost effectiveness by Houston-Galveston Area Council. Houston-Galveston Area Council reserves the right to renew grants for up to two additional years without the selected applications entering a competitive selection process. The Houston-Galveston Area Council will make all final funding decisions.

Contact Person: If additional information is needed contact Houston-Galveston Area Council, Faye K. Prevot, Criminal Justice Planner at (713) 993-2442 or e-mail at fprevot@hgac.cog.tx.us.

TRD-200106626
Jack Steele
Executive Director
Houston-Galveston Area Council
Filed: October 29, 2001

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Request for Grant Applications for Local and Regional Victims of Crime Act (VOCA) Fund Programs

The Houston-Galveston Area Council; is soliciting applications for local and regional projects that provide services to victims of crime under the fiscal year 2003 grant cycle.

Purpose: The purpose of the projects is to provide services and assistance directly to victims of crime to speed their recovery and aid them through the criminal justice process. Services may include the following: (1) responding to the emotional and physical needs of crime victims; (2) assisting victims in stabilizing their lives after a victimization; (3) assisting victims to understand and participate in the criminal justice system; and (4) providing victims with safety and security.

Available Funding: Federal funding is authorized under the Victims of Crime of 1984 (VOCA), as amended, Public Law 98-473, Chapter XIV, 42 U.S.C. 10601, et seq., Section 1402, Section 1404; Children's Justice and Assistance Act of 1986, as amended, Public Law 99-401, Section 102 (5)(b)(a)(ii); Anti-Drug Abuse Act of 1988, Title VII, Subtitle D, Public Law 100-690; Crime Control Act of 1990, Public Law 101-647; Federal Courts Administration Act of 1992, Public Law 102-572; Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations Act of 1994; Violent Crime Control and Law Enforcement Act of 1994, Subtitle C, Public Law 104-132; Anti-Terrorism and Effective Death Penalty Act of 1996. All grants awarded from this fund must comply with the requirements contained therein.

Standards: Grantees must comply with the applicable grant management standards adopted under Texas Administrative Code Section 3.19 and Section 3.503. All grantees, other than Native American Tribes, must provide matching funds equal to at least 20 percent of total project expenditures. Native American Tribes must provide a five percent match. Grantees must satisfy this requirement through direct funding contributions, in-kind contributions, or a combination of the two.

Prohibitions: (1) Grantees may not use grant funds or program income for proselytizing or sectarian worship. (2) Grant funds may not be used to pay for indirect costs. (3) Grantees may not use grant funds for nursing-home care (except for short-term emergencies), home health-care costs, in-patient treatment costs, hospital care, and other types of emergency and non-emergency medical or dental treatment. (4) Grant funds cannot support medical costs resulting from a crime, except for forensic medical examinations for sexual assault victims. (5) Grant funds cannot support relocation expenses for crime victims such as moving expenses, security deposits on housing, rent, and mortgage payments. (6) Grantees may not use grant funds to pay salaries, fees, and reimbursable expenses associated with administrators, board members, executive directors, consultants, coordinators, and other individuals unless the grantees incur the expenses while providing direct services to crime victims. (7) Grant funds may support administrative time to complete VOCA-required time and attendance sheets and programmatic documentation, reports, and statistics, administrative time to maintain crime victims' records, and the prorated share of audit costs. (8) Only applicants in the Houston-Galveston Area Council area are eligible under this RFA. These applicants may apply under the block grant program administered directly by Houston-Galveston Area Council.

Grantees may not use grant funds to pay for the following services, activities, and costs: (1) lobbying and administrative advocacy; (2) perpetrator rehabilitation and counseling; (3) needs assessments, surveys, evaluations, and studies; (4) prosecution activities; (5) fundraising activities; (6) property loss; (7) most medical costs; (8) relocation expenses; (9) administrative staff expenses; (10) development of protocols, interagency agreements, and other working agreements; (11) costs of sending individual crime victims to conferences; (12) activities exclusively related to crime prevention; (13) non-emergency legal representation such as for divorces or civil restitution recovery efforts; (14) victim-offender meetings that serve to replace criminal justice proceedings; and (15) management and administrative training for executive directors, board members, and other individuals that do not provide direct services.

Eligible Applicants: (a) State agencies, units of local government, nonprofit corporations, Native American tribes, crime control and prevention districts, community supervision and corrections departments, and faith-based organizations who provide direct services to victims of crime are eligible to apply for grants under this fund. Faith-based organizations must be tax-exempt nonprofit entities certified by the Internal Revenue Service. (b) All applicants must meet one of the following criteria: (1) the applicant has a record of providing effective services to crime victims; or (2) if an applicant does not have a demonstrated record of providing such services, it must show that at least 25 percent of its financial support comes from non-federal sources. (c) All applicants must meet each of the following criteria: (1) applicants must use volunteers, unless CJD /Houston-Galveston Area Council determines that a compelling reason exists to grant an exception; (2) applicants

must promote community efforts to aid crime victims; (3) applicants must help victims apply for compensation benefits; (4) applicants must maintain and display civil rights information; (5) applicants must provide services to victims of federal crimes on the same basis as victims of state and local crimes; (6) applicants must provide grant-funded services at no charge to victims, and any deviation requires prior written approval by Houston-Galveston Area Council; and (7) applicants must maintain the confidentiality of all client-counselor information and research data, as required by state and federal law.

Project Period: Grant-funded projects must begin on July 1, 2002 and end on June 30, 2003 unless exempted by Houston-Galveston Area Council.

Application Process: Interested applicants should call or write the Houston-Galveston Area Council for information on application deadlines and submission requirements. Applicants WILL be required by Houston-Galveston Area Council to attend an application workshop prior to submitting their applications for funding. The applicant must contact Mario Watkins, Criminal Justice Planner for funding and workshop information. Detailed specifications are in the application kit, which is available from the Houston-Galveston Area Council or from the Office of the Governor's web site address located at http://www.governor.state.tx.us/cjd/cjdmain.htm.

Preferences: Preference will be given to applicants who provide local and regional programs that focus on providing services and assistance to victims of crime and aiding them through the criminal justice process.

Closing Date for Receipt of Applications: All application deadlines are set by the regional council of governments. Prospective applicants must contact the H-GAC Criminal Justice Planner for relevant deadlines.

Selection Process: Applications are prioritized by the Criminal Justice Advisory Committee based on the need for the program. Priority listings will be approved by the Houston-Galveston Area Council Board of Directors. Completed applications will be reviewed for eligibility and cost effectiveness by Houston-Galveston Area Council. Houston-Galveston Area Council reserves the right to renew grants for up to two additional years without the selected applications entering a competitive selection process. The Houston-Galveston Area Council will make all final funding decisions.

Contact Person: If additional information is needed contact Houston-Galveston Area Council, Mario C. Watkins, Criminal Justice Planner at (713)993-2497 or e-mail at mwatkins@hgac.cog.tx.us.

TRD-200106628
Jack Steele
Executive Director
Houston-Galveston Area Council
Filed: October 29, 2001

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Texas Department of Human Services

Request for Proposal for Contract Registered Dietitians

The Texas Department of Human Services (DHS) is inviting proposals for contract registered dietitians.

Description of Services. Up to two additional registered dietitians are needed statewide to assist private schools and residential child care institutions (RCCIs) participating in the National School Lunch Program and/or the School Breakfast Program (NSLP/SBP) in implementing the requirements of the Healthy School Meals Initiative (HSMI). Contractors must make an on-site HSMI visit to each school food authority (SFA) for which they are responsible. The services required of each contractor for each SFA include: conducting a nutrient analysis of a one week cycle menu provided by each SFA; instructing SFAs interested in using Nutrient Standard Menu Planning system (NuMenus) in how to conduct and review a nutrient analysis; instructing SFAs interested in using assisted NuMenus or food based menu planning systems in how to review a nutrient analysis; providing instruction in how to use the nutrient analysis to adjust menus/recipes to meet nutrition goals identified in the Dietary Guidelines for Americans; providing technical assistance in menu planning and meal preparation to encourage and support the successful implementation of the HSMI; and completing HSMI review documents. In addition to the on-site visit, contractors will also be responsible for conducting a follow-up desk review for each school/RCCI visited.

Geographical Area. Dietitians are being actively sought statewide.

Procedures of Selection. A screening form will be used to select applicants. Applicants that are considered for selection will be scheduled for an interview.

Closing Date. Proposals must be received by 12:00 PM, December 14, 2001.

Terms of Contract. The contract period is February 1, 2002 through September 30, 2002.

Contact Person. To obtain a request for proposal (RFP), please write or fax Jo Anne Nelson, DHS-SNP MC Y-906, P.O. Box 149030, Austin, Texas 78714-9030, (512) 483-3940 (fax).

TRD-200106688
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Filed: October 30, 2001

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Texas Department of Insurance

Company Licensing

Application for a Certificate of Authority as a Multiple Employer Welfare Arrangement (MEWA) in the State of Texas by TEXAS AGRICULTURAL COOPERATIVE TRUST. The home office is in Austin, Texas.

Any objections must be filed with the Texas Department of Insurance, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200106714
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: October 31, 2001

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Notice of Application by Small Employer Carrier to Change to Risk-Assuming Carrier for Good Cause

Notice is given to the public of the application of the listed small employer carrier to be risk-assuming carrier under Texas Insurance Code Articles 26.51 and 26.52. A small employer carrier is defined by Chapter 26 of the Texas Insurance Code as a health insurance carrier that offers, delivers or issues for delivery, or renews small employer health benefit plans subject to the chapter. A risk-assuming carrier is defined by Chapter 26 of the Texas Insurance Code as a small employer carrier that elects not to participate in the Texas Health Reinsurance System or is approved for good cause to change its status to risk-assuming. The

following small employer carrier has applied to change its status to a risk-assuming carrier for good cause:

The Guardian Life Insurance Company of America

The application is subject to public inspection at the offices of the Texas Department of Insurance, Legal & Compliance Division- Jimmy G. Atkins, 333 Guadalupe, Hobby Tower 1, 9th Floor, Austin, Texas.

If you wish to comment on this application to be risk-assuming carriers, you must submit your written comments within 60 days after publication of this notice in the *Texas Register* to Lynda H. Nesenholtz, Chief Clerk, Mail Code 113-1C, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-91204. An additional copy of the comments must be submitted to Mike Boerner, Managing Actuary, Actuarial Division of the Financial Program, Mail Code 304-3A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104. Upon consideration of the application, if the Commissioner is satisfied that all requirements of law have been met, the Commissioner or his designee may take action to approve the application to change status to a risk-assuming carrier.

TRD-200106713
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: October 31, 2001

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Notice of Application by Small Employer Carriers to be Risk-Assuming Carriers

Notice is given to the public of the applications of the listed small employer carriers to be a risk-assuming carrier under Texas Insurance Code Article 26.52. A small employer carrier is defined by Chapter 26 of the Texas Insurance Code as a health insurance carrier that offers, delivers or issues for delivery, or renews small employer health benefit plans subject to the chapter. A risk-assuming carrier is defined by Chapter 26 of the Texas Insurance Code as a small employer carrier that elects not to participate in the Texas Health Reinsurance System. The following small employer carriers have applied to be risk-assuming carriers:

New York Life & Health Insurance Company, and Service Life & Casualty Insurance Company.

The applications are subject to public inspection at the offices of the Texas Department of Insurance, Legal & Compliance Division - Jimmy G. Atkins, 333 Guadalupe, Hobby Tower 1, 9th Floor, Austin, Texas.

If you wish to comment on these applications to be a risk-assuming carrier, you must submit your written comments within 60 days after publication of this notice in the *Texas Register* to Lynda H. Nesenholtz, Chief Clerk, Mail Code 113-1C, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-91204. An additional copy of the comments must be submitted to Mike Boerner, Managing Actuary, Actuarial Division of the Financial Program, Mail Code 304-3A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104. Upon consideration of the applications, if the Commissioner is satisfied that all requirements of law have been met, the Commissioner or his designee may take action to approve these applications to be a risk-assuming carrier.

TRD-200106712
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: October 31, 2001

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Notice of Public Hearing

The Commissioner of Insurance, at a public hearing under Docket No. 2503 scheduled for January 22, 2002 at 9:30 a.m., in Room 100 of the William P. Hobby Jr. State Office Building, 333 Guadalupe Street in Austin, Texas, will consider a proposal made in a staff petition. Staff's petition seeks amendment of the Texas Automobile Rules and Rating Manual (the Manual), to adopt new and/or adjusted 2002 model Private Passenger Automobile Physical Damage Rating Symbols and revised identification information. Staff's petition (Ref. No. A-1001-17-I), was filed on October 30, 2001.

The new and/or adjusted symbols for the Manual's Symbols and Identification Section reflect data compiled on damageability, repairability, and other relevant loss factors for the listed 2002 model vehicles.

A copy of the petition, including an exhibit with the full text of the proposed amendments to the Manual is available for review in the office of the Chief Clerk of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas. For further information or to request copies of the petition, please contact Sylvia Gutierrez at (512) 463-6327; refer to (Ref. No. A-1001-17-I).

Comments on the proposed changes must be submitted in writing within 30 days after publication of the proposal in the *Texas Register*, to the Office of the Chief Clerk, Texas Department of Insurance, P. O. Box 149104, MC 113-2A, Austin, Texas 78714-9104. An additional copy of comments is to be submitted to Marilyn Hamilton, Associate Commissioner, Property & Casualty Program, Texas Department of Insurance, P. O. Box 149104, MC 104-PC, Austin, Texas 78714-9104.

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).

TRD-200106717
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: October 31, 2001

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for admission to Texas of Greenwood International Insurance Services, Inc., a foreign third party administrator. The home office is Hopkinton, Massachusetts.

Application for admission to Texas of Family Health America, L.C., a foreign third party administrator. The home office is Wichita, Kansas.

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-200106648
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: October 30, 2001

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Texas Lottery Commission

Instant Game No. 264 "Jingle Bucks II"

1.0 Name and Style of Game.

A. The name of Instant Game No. 264 is "JINGLE BUCKS II". The play style in Game 1 and Game 2 is "match 3 of 9". The play style in Game 3 and 10 is "If total of Your Numbers equal 7 or 11 win prize for that game". The play style in Game 4 is "Get a tree symbol, win $20. Get a jingle bell symbol win $50". The play style in Game 5 is "Get 2 like symbols within a game, win prize for that game". The play style in Game 6 is "Get 3 gift box symbols in tic-tac-toe format, win prize shown in prize box". The play style in Game 7 is "Find word DOUBLE and win double the total winnings on the ticket". The play style in Game 8 & 9 is "If Your Number is higher than Their Number, win prize shown for that game".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 264 shall be $10.00 per ticket.

1.2 Definitions in Instant Game No. 264.

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: $5.00, $10.00, $15.00, $20.00, $50.00, $100, $250, $500, $1,000, $10,000, $100,000, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, FIRE SYMBOL, COOKIE SYMBOL, HOLLY SMBOL, SNOWMAN SYMBOL, JINGLE BELL SYMBOL, TREE SYMBOL, MITTENS SYMBOL, CAP SYMBOL, DRUM SYMBOL, SACK SYMBOL, CANDY CANE SYMBOL, LIGHT SYMBOL, MUFFS SYMBOL, WREATH SYMBOL, HORN SYMBOL, DEER SYMBOL, SLEIGH SYMBOL, STAR SYMBOL, GIFT SYMBOL, SNOWFLAKE SYMBOL, BALL SYMBOL, ANGEL SYMBOL, STOCKING SYMBOL, CANDLE SYMBOL, SINGLE SYMBOL, and DOUBLE 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. 264 - 1.2D

Figure 1: GAME NO. 264 - 1.2D

PLAY SYMBOL	CAPTION
$5.00	FIVE$
$10.00	TEN$
$15.00	FIFTN
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$250	TWO FTY
$500	FIV HUND
$1,000	ONE THOU
$10,000	10 THOU
$100,000	100 THOU
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
FIRE SYMBOL	FIRE
COOKIE SYMBOL	COOKIE
HOLLY SYMBOL	HOLLY
SNOWMAN SYMBOL	SNWMN
JINGLE BELL SYMBOL	WIN$50
TREE SYMBOL	WIN$20
MITTENS SYMBOL	MTTNS
CAP SYMBOL	CAP
DRUM SYMBOL	DRUM
SACK SYMBOL	SACK
CANE SYMBOL	CANE
LIGHT SYMBOL	LIGHT
MUFFS SYMBOL	MUFFS
WREATH SYMBOL	WREATH
HORN SYMBOL	HORN
DEER SYMBOL	DEER
SLEIGH SYMBOL	SLEIGH
STAR SYMBOL	STAR
GIFT SYMBOL	GIFT
SNOWFLAKE SYMBOL	SNOW
BALL SYMBOL	BALL
ANGEL SYMBOL	ANGEL
STOCKING SYMBOL	STCKNG
CANDLE SYMBOL	CANDLE
SINGLE SYMBOL	SINGLE
DOUBLE SYMBOL	DOUBLE

Figure 2: GAME NO. 264 - 1.2E

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:

CODE	PRIZE
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 $10.00, $15.00, or $20.00.

H. Mid-Tier Prize - A prize of $50.00, $100, $250, or $500.

I. High-Tier Prize - $1,000, $10,000, or $100,000.

J. Bar Code - A 22 character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A twenty-two (22) digit number consisting of the three (3) digit game number (264), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 074 within each pack. The format will be: 264-0000001-000.

L. Pack - A pack of "JINGLE BUCKS II" Instant Game tickets contain 074 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate from pack to pack. Fanfold A: ticket front 000 will be the top ticket and 074 back will be on the last page. Fanfold B: ticket back 000 will be on the top and ticket front 074 will be on the last page.

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 "JINGLE BUCKS II" Instant Game No. 264 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 "JINGLE BUCKS II" Instant Game is determined once the latex on the ticket is scratched off to expose 60 (sixty) play symbols. In Game 1, if the player gets 3 like amounts, the player will win that amount. In Game 2, if the player gets 3 like amounts, the player will win that amount. In Game 3, if the player's total of YOUR NUMBERS equals 7 or 11 within a game, the player will win the prize shown. In Game 4, if the player gets a tree symbol, the player will win $20 automatically. If the player gets a jingle bell symbol, the player will win $50 automatically. In Game 5, if the player gets 2 (two) like symbols within a game, the player will win the prize shown. In Game 6, if the player gets 3 (three) gift box symbols in any one row, column, or diagonal, the player will win the prize shown. In Game 7, if the player finds the word "DOUBLE" in the Bonus, the player will double their total winnings on the ticket. In Game 8, if the player's YOUR NUMBER is higher than THEIR NUMBER, win the prize shown for that game. In Game 9, if the player's YOUR NUMBER is higher than THEIR NUMBER, win the prize shown for that game. In Game 10, if the player's total of YOUR NUMBERS equals 7 or 11 within a game, win the prize shown. 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 60 (sixty) 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 60 (sixty) 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 60 (sixty) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 60 (sixty) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. In Games 1 and 2, there will be no 4 (four) or more like symbols in a game.

C. In Games 1 and 2, there will be no three or more pairs in a game.

D. In Games 3 and 10, there will be no duplicate non-winning games on a ticket (symbols in either order).

E. In Game 5, there will be no duplicate non-winning games on a ticket.

F. In Game 6, the gift box symbol will be the ONLY Symbol to appear in a line, diagonal or row as dictated by the prize structure.

G. In Game 6, each game will have at least 4 gift box symbols.

H. In Games 8 and 9, there will be no duplicate non-winning games on a ticket (all 4 games within 8 and 9 combined).

I. In Games 8 and 9, there will be no ties within a game.

2.3 Procedure for Claiming Prizes.

A. To claim a "JINGLE BUCKS II" Instant Game prize of $10.00, $15.00, $20.00, $50.00, $100, $250, 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, $250 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 "JINGLE BUCKS II II" Instant Game prize of $1,000, $10,000 or $10,000, 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 "JINGLE BUCKS II" 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 "JINGLE BUCKS II" 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 "JINGLE BUCKS II" 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 10,087,725 tickets in the Instant Game No. 264. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 264- 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$10.00	2,824,439	3.57
$15.00	537,833	18.76
$20.00	437,331	23.07
$50.00	201,651	50.03
$100.00	70,728	142.63
$250	16,833	599.28
$500	6,271	1,608.63
$1,000	160	63,048.28
$10,000	15	672,515.00
$100,000	8	1,260,965.63

*The number of actual prizes may vary based on sales, distribution, testing, and number of prizes claimed.

**The overall odds of winning a prize are 1 in 2.46. 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. 264 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. 264, 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-200106625
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: October 29, 2001

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Instant Game No. 266 "Break the Bank"

1.0 Name and Style of Game.

A. The name of Instant Game No. 266 is "BREAK THE BANK". The play style is a key number match with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 266 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 266.

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, MONEY 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: Table 1 of this section.

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
$30,000	30 THOU
MONEY STACK	WIN$

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: Table 2 of this section.

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 20 character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number and eight (8) digits of the Validation Number and a two (2) digit filler. 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 (266), 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 : 266-0000001-000.

L. Pack - A pack of "BREAK THE BANK" Instant Game tickets contain 250 tickets, which are packed in plastic shrink-wrapping and fanfolded 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. 266 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 the LUCKY NUMBERS, YOUR NUMBERS, and the prize amounts on the front of the ticket. 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 money stack symbol, the player will win the prize shown for that symbol 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

F. 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 51,015,250 tickets in the Instant Game No. 266. The approximate number and value of prizes in the game are as follows: Table 3 of this section

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$2.00	4,693,348	10.87
$4.00	3,009,930	16.95
$6.00	867,406	58.81
$8.00	204,061	250.00
$10.00	459,107	111.12
$12.00	509,858	100.06
$20.00	357,254	142.80
$50.00	189,187	269.66
$200	42,530	1,199.51
$1,000	1,077	47,367.92
$3,000	152	335,626.64
$30,000	24	2,125,635.42

*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. 266 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. 266, 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-200106656
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: October 30, 2001

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Texas Natural Resource Conservation Commission

Invitation to Comment

The Texas Natural Resource Conservation Commission (TNRCC or commission) announces the availability of the draft "October 2001 Update to the Water Quality Management Plan for the State of Texas" (draft October 2001 WQMP).

The Water Quality Management Plan (WQMP) is developed and promulgated pursuant to the requirements of the Federal Clean Water Act (CWA), §208. The draft October 2001 WQMP update includes projected effluent limits of indicated domestic dischargers useful for water quality management planning in future permit actions. Once the commission certifies a WQMP update, the update is submitted to the United States Environmental Protection Agency (EPA) for approval. For some Texas pollutant discharge elimination system (TPDES) permits, the EPA's approval of a corresponding WQMP update is a necessary precondition to TPDES permit issuance by the commission. The draft October 2001 WQMP update also contains service area populations for listed wastewater treatment facilities, and documentation of designated management agency resolutions.

A copy of the draft October 2001 update may be found on the commission's web page located at *http://www.tnrcc.state.tx.us/water/quality/wqmp*. A copy of the draft may also be viewed at the TNRCC Library located at Texas Natural Resource Conservation Commission, Building A, 12100 Park 35 Circle, North Interstate 35, Austin, Texas.

Written comments on the draft October 2001 Update shall be submitted to Ms. Suzanne Vargas, Texas Natural Resource Conservation Commission, Water Quality Division, MC 150, P.O. Box 13087, Austin, Texas 78711-3087. Comments may also be faxed to (512) 239-4420, but must be followed up with the submission and receipt of the written comments within three working days of when they were faxed. Written comments must be submitted no later than 5:00 p.m. on December 9, 2001. For further information or questions, please contact Ms. Vargas at (512) 239-4619 or by e-mail at *svargas@tnrcc.state.tx.us*.

TRD-200106542
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: October 26, 2001

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Notice of Availability of the Final Damage Assessment and Restoration Plan/Environmental Assessment for Ecological Injuries and Service Losses Associated with the Alcoa Point Comfort/Lavaca Bay Superfund Site, Point Comfort, Texas

AGENCIES: Texas Natural Resource Conservation Commission (commission), Texas Parks and Wildlife Department (TPWD), Texas General Land Office (GLO), United States Department of the Interior (DOI), and National Oceanic and Atmospheric Administration (NOAA) (hereafter, Trustees).

ACTION: Notice of availability of a Final Damage Assessment and Restoration Plan and Environmental Assessment for ecological injuries and service losses associated with the Alcoa Point Comfort/Lavaca Bay Superfund Site (SITE).

SUMMARY: Pursuant to 43 Code of Federal Regulations (CFR) §§11.32 and 11.81 - 11.82, notice is hereby given that a document entitled, "Final Damage Assessment and Restoration Plan and Environmental Assessment for the Point Comfort/Lavaca Bay NPL Site Ecological Injuries and Service Losses" (Final DARP/EA) is available to the public. This document has been approved by the Trustees to address natural resource injuries and resource services losses of an ecological nature attributable to hazardous substances released from the Site. The Final DARP/EA finalizes the Trustees' assessment of these natural resource injuries and service losses attributable to the Site and the plan for restoring ecological resources and services to compensate for those injuries and losses. This Final DARP/EA also contains the Trustees' evaluation of ecological losses after 1999 and all terrestrial resource injuries, and their corresponding restoration requirements, based on the proposed final remedy. If the final remedy is consistent with this evaluation, this document will also constitute the final assessment and restoration plan for these remaining ecological losses.

The development of the Final DARP/EA included release of a draft of this DARP/EA for public review and comment as published in the July 14, 2000 issue of the *Texas Register* (25 TexReg 6843); the July 14, 2000 issue of the *Federal Register* (65 FR 43739); the July 22 and 26, 2000 issues of the *Port Lavaca Wave*; and the July 25 and 27, 2000 issues of the *Victoria Advocate*. The Draft DARP/EA described the Trustees assessment of the ecological injuries and services losses attributable to hazardous substances at the Site (including the evaluation of ecological losses after 1999 and terrestrial resource injuries based on the proposed final remedy), evaluated a reasonable range of restoration actions with the potential to restore, replace, or acquire similar resource services, and identified the restoration actions which were preferred for use to compensate for the resource injuries and losses being assessed. The period for public review and comment on the Draft DARP/EA, which ended on August 14, 2000, included a public meeting in Port Lavaca, Texas, on July 27, 2000. During the public review period, no written public comments on the document were received and all verbal comments at the public meeting were supportive of the actions proposed in the Draft DARP/EA. The Final DARP/EA has not been changed due to public review and input.

To receive a copy of the Final DARP/EA, please contact Richard Seiler, Texas Natural Resource Conservation Commission, Remediation Division, MC 142, P.O. Box 13087, Austin, Texas 78711- 3087, (512) 239-2523 or send a fax to (512) 239-4814. A copy of the Final DARP/EA is also available for downloading at *http://www.darp.noaa.gov/publicat.htm*.

SUPPLEMENTARY INFORMATION: The Site is located in Point Comfort, Calhoun County, Texas and encompasses areas impacted by releases of hazardous substances from Alcoa's Point Comfort Operations facility. Between 1948 and the present, Alcoa has constructed and operated several types of manufacturing processes at this facility, including aluminum smelting, carbon paste and briquette manufacturing, gas processing, chlor-alkali processing, and alumina refining. Past operations at the facility have resulted in the release of hazardous substances into the environment, including through the discharge of mercury-containing wastewater into Lavaca Bay from 1966 to 1970 and releases of mercury into the bay through a groundwater pathway. In April 1988, the Texas Department of Health (TDH) issued a "closure" order prohibiting the taking of finfish and crabs for consumption from a specified area of Lavaca Bay near the facility due to elevated mercury concentrations found in these species.

The Site was added to the National Priorities List (NPL), pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), §105; and 42 United States Code (USC) §§9601 et seq., effective on March 25, 1994 as published in the February 23, 1994 issue of the *Federal Register* (59 FR 8724). The Site was listed primarily due to the presence of mercury in several species of finfish and crabs in Lavaca Bay, the fishing closure imposed by TDH, and the presence of mercury and other hazardous substances in bay sediments adjacent to the facility. Alcoa, the State of Texas, and the United States Environmental Protection Agency (EPA) signed an Administrative Order on Consent under CERCLA in March 1994 for the conduct of a remedial investigation and feasibility study (RI/FS) for the Site.

The Trustees are designated under CERCLA, §107(f); Federal Water Pollution Control Act (FWPCA), §311; 33 USC §1321; and other applicable federal or state laws, including National Oil and Hazardous Substances Pollution Contingency Plan (NCP), Subpart G; and 40 CFR §§300.600 - 300.615. The Trustees are authorized to act on behalf of the public under these authorities to protect and restore natural resources injured or lost as a result of discharges or releases of hazardous substances.

Paralleling the RI/FS process for the Site, the Trustees have undertaken an assessment of the natural resource injuries and services losses attributable to hazardous substances at the Site. The assessment for this Site has been aided and supported by Alcoa's cooperation pursuant to a memorandum of agreement (MOA) between Alcoa and the Trustees, which was effective January 14, 1997. The Final DARP/EA has been developed under the cooperative assessment framework outlined in the MOA.

The Final DARP/EA is focused on natural resource injuries or services losses of an ecological nature caused by the hazardous substances at or from the Site. It completes the second stage of the assessment and restoration planning process for the Site. The first stage of the assessment process focused on recreational fishing service losses resulting from the fishing closure. The Final DARP/EA covering the recreational

fishing service losses is also being released today and is the subject of a separate notice.

This Final DARP/EA finalizes the information and methods used to assess these ecological injuries and losses, including the scale of restoration actions, and the actions selected to restore, replace, or acquire resources or services equivalent to those lost. The document's principal focus is on ecological losses due to known Site contamination and response actions initiated at the Site prior to the end of 1999. However, the document also includes the Trustees' evaluation of ecological losses after 1999 and all terrestrial resource injuries and their corresponding restoration requirements, based on the proposed final remedy. If the final remedy is consistent with the proposed remedy, this document will also constitute the final assessment and restoration plan for these ecological losses as well. If not, then additional assessment analyses may be necessary and a third and final stage DARP/EA may be required.

For further information, contact Richard Seiler at (512) 239-2523 or email *rseiler@tnrcc.state.tx.us*.

TRD-200106649
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: October 30, 2001

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Notice of Availability of a Final Damage Assessment and Restoration Plan/Environmental Assessment for Recreational Fishing Service Losses Associated with the Alcoa Point Comfort/Lavaca Bay Superfund Site, Point Comfort, Texas

AGENCIES: Texas Natural Resource Conservation Commission (commission), Texas Parks and Wildlife Department (TPWD), Texas General Land Office (GLO), United States Department of the Interior (DOI), and National Oceanic and Atmospheric Administration (NOAA) (hereafter, Trustees).

ACTION: Notice of availability of the Final Damage Assessment and Restoration Plan and Environmental Assessment for recreational fishing service losses associated with the Alcoa Point Comfort/Lavaca Bay Superfund Site (Site).

SUMMARY: Pursuant to 43 Code of Federal Regulations (CFR) §§11.32 and 11.81 - 11.82, notice is hereby given that a document entitled, "Final Damage Assessment and Restoration Plan and Environmental Assessment for the Point Comfort/Lavaca Bay NPL Site Recreational Fishing Service Losses" (Final DARP/EA) is available to the public. This document has been approved by the Trustees to address the recreational fishing service losses attributable to hazardous substances released at and from the Site. This DARP/EA finalizes the restoration plan which will be used to compensate for recreational fishing service losses associated with the fishing closure at the Site.

The Trustees released a Draft DARP/EA on September 28, 1999, for public review and comment for a period of 30 days as published in the October 1, 1999 issue of the *Texas Register* (24 TexReg 8635); the September 28, 1999 issue of the *Federal Register* (64 FR 52294); and the September 20, 1999 issue of the *Port Lavaca Wave*. Based on the public comments received during this period, the Trustees finalized their assessment of the recreational fishing service losses and selected two restoration actions for inclusion in the final plan, but found it necessary to propose other restoration alternatives to complete the restoration plan for the recreational fishing service losses. These revised, preferred alternatives were presented in a Revised Draft DARP/EA released on May 12, 2000, and were also available for public review and comment for a period of 30 days as published in the May 12, 2000 issue of the *Texas Register* (25 TexReg 4379); the May 12, 2000 issue of the Federal Register (65 FR 30565); and the May 10, 2000 issue of the *Port Lavaca Wave*. The Trustees received no public comments on the Revised Draft DARP/EA. In the Final DARP/EA, the alternative restoration projects were selected to complete the restoration plan for the recreational fishing service losses.

To receive a copy of the Final DARP/EA, please contact Richard Seiler, Texas Natural Resource Conservation Commission, Remediation Division, MC 142, P.O. Box 13087, Austin, Texas 78711- 3087, (512) 239-2523 or send a fax to (512) 239-4814. A copy of the Final DARP/EA is also available for downloading at *http://www.darp.noaa.gov/publicat.htm*.

SUPPLEMENTARY INFORMATION: The Site is located in Point Comfort, Calhoun County, Texas and encompasses areas impacted by releases of hazardous substances from Alcoa's Point Comfort Operations facility. Between 1948 and the present, Alcoa constructed and operated several types of manufacturing processes at this facility, including aluminum smelting, carbon paste and briquette manufacturing, gas processing, chlor-alkali processing, and alumina refining. Past operations at the facility resulted in the release of hazardous substances into the environment, including the discharge of mercury-containing wastewater into Lavaca Bay from 1966 to 1970 and releases of mercury into the bay through groundwater. In April 1988, the Texas Department of Health (TDH) issued a "closure order" prohibiting the taking of finfish and crabs for consumption from a specific area near the facility due to elevated mercury concentrations in these resources.

The Site was added to the National Priorities List, pursuant to Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) §105; and 42 United States Code (USC) 9601, effective on March 25, 1994 as published in the February 23, 1994 issue of the *Federal Register* (59 FR 8794). The Site was listed primarily due to the presence of mercury in several species of fish and crab in Lavaca Bay, the fishing closure imposed by TDH, and the presence of mercury and other hazardous substances in bay sediments adjacent to the facility. Alcoa, the State of Texas, and the United States Environmental Protection Agency signed an Administrative Order on Consent under CERCLA in March 1994 providing for the conduct of a remedial investigation and feasibility study (RI/FS) for the Site.

The Trustees are designated under CERCLA, §107(f), Federal Water Pollution Control Act (FWPCA), §311; 33 USC §1321; and other applicable federal or state laws, including the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), Subpart G; and 40 CFR §§300.600 - 300.615. The Trustees are authorized to act on behalf of the public under these authorities to protect and restore natural resources and resource services injured or lost as a result of discharges or releases of hazardous substances.

Paralleling the RI/FS process for the Site, the Trustees have undertaken an assessment of the natural resource injuries and services losses resulting from releases of hazardous substances attributable to the Site. This assessment process has been aided and supported by Alcoa's cooperation pursuant to a memorandum of agreement (MOA) between Alcoa and the Trustees, which was effective January 14, 1997. The Final DARP/EA has been developed under the cooperative assessment framework outlined in the MOA.

The Draft DARP/EA released for public review on September 28, 1999, described the assessment procedures used to define the recreational fishing service losses, including the scaling of restoration actions, and the restoration actions preferred for use to compensate for those losses. The choice of preferred restoration actions was based on the anticipated benefits of such actions to both pier- or shore-based and boat-based anglers. None of the public comments received on the Draft DARP/EA

raised any issues regarding the identified assessment procedures or the two restoration actions proposed for use to compensate for pier- or shore-based fishing losses. Significant public comments, however, were received opposing the restoration action proposed in the Draft DARP/EA to address the boat-based fishing losses. In considering these comments, the Trustees found it necessary to revise that portion of the restoration plan. The Revised Draft DARP/EA released on May 12, 2000 summarized the public comments received, finalized the assessment procedures, finalized the selection of the restoration actions for the pier- or shore-based fishing losses, identified alternative restoration projects as preferred to address the remainder of the recreational fishing service losses, and explained the basis and rationale for that change. The Trustees received no comments on the Revised Draft DARP/EA and, therefore, have selected the alternative restoration projects for inclusion in the restoration plan for the recreational fishing service losses. The Final DARP/EA summarizes the assessment of recreational fishing service losses, summarizes this restoration planning history, and completes the final restoration plan to compensate for those losses.

The Final DARP/EA only addresses recreational fishing service losses resulting from the fishing closure. Its release completes the first stage of the assessment and restoration planning process for the Site. Natural resource injuries or service losses of an ecological nature, including those due to early or anticipated future response actions, are being addressed as a separate, second stage of the assessment and restoration planning process. The Final DARP/EA for these ecological injuries and losses is also being released today and is the subject of a separate notice.

For further information, contact Richard Seiler at (512) 239-2523 or email *rseiler@tnrcc.state.tx.us*.

TRD-200106650
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: October 30, 2001

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (TNRCC or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The TNRCC staff proposes a DO when the staff has sent an Executive Director's Preliminary Report and Petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance, and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the TNRCC pursuant to Texas Water Code (TWC), §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **December 10, 2001**. The TNRCC will consider any written comments received and the TNRCC may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that a proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the TNRCC's jurisdiction, or the TNRCC's orders and permits issued pursuant to the TNRCC's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each of the proposed DOs is available for public inspection at both the TNRCC's Central Office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable Regional Office listed as follows. Comments about the DO should be sent to the attorney designated for the DO at the TNRCC's Central Office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on December 10, 2001**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The TNRCC attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, comments on the DOs should be submitted to the TNRCC in **writing**.

(1) COMPANY: Ann Harp dba Kountry Korners; DOCKET NUMBER: 2000-0725-PST-E; TNRCC ID NUMBER: 0066706; LOCATION: 4174 U. S. Highway 180 West, Breckenridge, Stephens County, Texas; TYPE OF FACILITY: retail gas station; RULES VIOLATED: 30 TAC §334.50(a)(1)(A) and §334.50(b)(1)(A), and TWC, §26.3475, by failing to provide proper release detection for underground storage tank (UST) systems, specifically, by failing to monitor tanks for releases at a frequency of at least once every month; 30 TAC §334.48, by failing to record inventory volume measurement for regulated substance inputs, withdrawals and the amount still remaining in the tank each operating day; PENALTY: $15,000; STAFF ATTORNEY: Robert Hernandez, Litigation Division, MC 175, (210) 403-4016; REGIONAL OFFICE: Abilene Regional Office, 1977 Industrial Blvd., Abilene, Texas 79602-7833, (915) 698-9674.

(2) COMPANY: Bayou Inc. dba Bayou Food Store; DOCKET NUMBER: 2001-0201-PST-E; TNRCC ID NUMBER: 0027224; LOCATION: 1460 Highway 146, San Leon, Galveston County, Texas; TYPE OF FACILITY: retail gasoline station; RULES VIOLATED: 30 TAC §115.246(6), and Texas Health and Safety Code (THSC), §382.085(b), by failing to maintain a record of the daily inspections of the Stage II vapor recovery equipment; 30 TAC §115.242(3)(J), and THSC, §382.085(b), by failing to maintain the Stage I vapor recovery system in proper operating condition; 30 TAC §290.51(a)(3) and §334.22(a), by failing to pay outstanding public health services fees and UST fees; PENALTY: $4,500; STAFF ATTORNEY: Laurencia Fasoyiro, Litigation Division, MC R-12, (713) 422-8914; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Ave., Ste. H, Houston, Texas 77023-1486, (713) 767-3500.

(3) COMPANY: Mr. Henry Speights; DOCKET NUMBER: 2000-1323-OSI-E; TNRCC ID NUMBER: 15255; LOCATION: 16932 County Road 119, Ranger, Stephens County, Texas; TYPE OF FACILITY: on- site sewage facility (OSSF); RULES VIOLATED: THSC, §366.051(c), by failing to obtain proof of a permit and approved plan from the commission, or authorized agent, before beginning to construct an OSSF; 30 TAC §285.50(b) and (c), and THSC, §366.071, by installing an OSSF without possessing a valid certification; 30 TAC §285.30(a), and THSC, §366.053(2), by failing to conduct a soil evaluation to determine the suitable type and size of an OSSF; PENALTY: $1,500; STAFF ATTORNEY: Gitanjali Yadav, Litigation Division, MC 175, (512) 239-2029; REGIONAL OFFICE: Abilene Regional Office, 1977 Industrial Blvd., Abilene, Texas 79602-7833, (915) 698-9674.

(4) COMPANY: NJB & Sons, Inc; DOCKET NUMBER: 2000-1182-MWD-E; TNRCC ID NUMBER: 10888-001; LOCATION: 0.75 miles west of State Highway 317 and approximately 2.25 miles north of the intersection of State Highway 317 and Farm-to-Market Road 107, Moody, McLennan County, Texas; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(1), §§319.1, 319.5(b), and 319.7(d), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number

10888-001, Final Effluent Limitations & Monitoring Requirements Number 1, by failing to take effluent samples of the daily average concentrations for Biochemical Oxygen Demand (five-day) and Total Suspended Solids at a frequency of once per week; 30 TAC §§305.125(1), 319.1, and 319.7(d), and TPDES Permit Number 10888-001, Monitoring and Reporting Requirement Number 1, by failing to submit discharge monitoring reports; PENALTY: $8,125; STAFF ATTORNEY: Elisa Roberts, Litigation Division, MC R-4, (817) 588-5877; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Ave., Ste. 2500, Waco, Texas 76710-7826, (254) 751-0335.

(5) COMPANY: Oliver Tyson dba Woodland Waste and Ronald C. Wahle; DOCKET NUMBER: 2000- 0228-MLM-E; TNRCC ID NUMBER: none; LOCATION: 2847 Post Oak Road, Dallas, Dallas County, Texas; TYPE OF FACILITY: composting facility (facility); RULES VIOLATED: 30 TAC §332.4(1) and (11) and §335.4, and TWC, §26.121, by failing to prevent an unauthorized discharge of solid waste, comprised of bag house resin dust and shredded wire insulation, into and adjacent to two ponds on the property of the facility; PENALTY: $4,500; STAFF ATTORNEY: Darren Ream, Litigation Division, MC R-4, (817) 588-5878; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2301 Gravel Drive, Forth Worth, Texas 76010-6499, (817) 588-5800.

(6) COMPANY: Rodolfo Avila, Sr. dba La Moderna Grocery; DOCKET NUMBER: 2000-0988-PST-E; TNRCC ID NUMBER: 0031695; LOCATION: 14600 Montana, El Paso, El Paso County, Texas; TYPE OF FACILITY: gasoline service station; RULES VIOLATED: 30 TAC §334.50(a) and (b), and TWC, §26.3475, by failing to operate and maintain release detection methods for existing UST systems in accordance with the manufacturer's specifications and instructions; 30 TAC §334.49(a)(2), and TWC, §26.3475, by failing to operate and maintain a corrosion protection system in a manner that will ensure that corrosion protection will be continuously provided to all components of the UST system; 30 TAC §37.815(a)(2), by failing to demonstrate the required financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; 30 TAC §334.7(d)(3), by failing to amend, update or change registration information regarding system upgrades and a change in ownership; 30 TAC §334.10(b)(1)(A), by failing to have UST records available for inspection; 30 TAC §§115.226(1), 115.246(1) and (5), and 115.245, and THSC, §382.085(b), by failing to have Stage II Vapor Recovery System tests, a copy of the California Air Resources Board order, a gasoline delivery log, and a record of the Dynamic Back-Pressure and Space Manifolding tests on site; 30 TAC §115.245(2), and THSC, §382.085(b), by failing to perform annual pressure decay testing; 30 TAC §115.244(1) and (3), and THSC, §382.085(b), by failing to conduct daily and monthly inspections of the Stage II Vapor Recovery system; 30 TAC §115.242(3)(B) - (D), and THSC, §382.085(b), by failing to repair or replace a crimped vapor hose on Pump Number 3, by failing to repair the torn nozzle and damaged faceplate on Pump Number 1; 30 TAC §115.242(9), and THSC, §382.085(b), by failing to post instructions on station dispensers; 30 TAC §115.248(1), and THSC, §382.085(b), by failing to ensure that all employees receive Stage II training; 30 TAC §334.22(a), by failing to pay outstanding UST fees; PENALTY: $24,375; STAFF ATTORNEY: Elisa Roberts, Litigation Division, MC R-4, (817) 588-5877; REGIONAL OFFICE: El Paso Regional Office, 401 E. Franklin Ave., Ste. 560, El Paso, Texas 79901-1206, (915) 834-4949.

(7) COMPANY: Ronald C. Wahle; DOCKET NUMBER: 2001-0628-MSW-E; TNRCC ID NUMBER: none; LOCATION: 2847 Post Oak Road, Dallas, Dallas County, Texas; TYPE OF FACILITY: waste tire storage facility; RULES VIOLATED: 30 TAC §330.810(a), by failing to obtain a waste tire storage site registration for the storage of approximately 4,000 waste tires; PENALTY: $1,000; STAFF ATTORNEY: Darren Ream, Litigation Division, MC R-4, (817) 588-5878; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2301 Gravel Drive, Forth Worth, Texas 76010-6499, (817) 588-5800.

(8) COMPANY: Tony Torres dba Tony and Son; DOCKET NUMBER: 2000-0754-AIR-E; TNRCC ID NUMBER: DB-5148-C; LOCATION: 1202 Southwest Third Street, Grand Prairie, Dallas County, Texas; TYPE OF FACILITY: paint and body shop; RULES VIOLATED: 30 TAC §115.422(1)(A) and (C), and THSC, §382.085(b), by failing to have an enclosed gun cleaner, or a non-enclosed cleaner with a solvent vapor pressure of less than one-hundred mmHg at 68 degrees Fahrenheit draining to a remote reservoir, and failure to keep all of the solvent containers closed; 30 TAC §115.426(1)(A) and (B), and THSC, §382.085(b), by failing to maintain Material Safety Data Sheets and records of the quantity and type of each coating and solvent used; PENALTY: $2,700; STAFF ATTORNEY: Darren Ream, Litigation Division, MC R-4, (817) 588-5878; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2301 Gravel Drive, Forth Worth, Texas 76010-6499, (817) 588-5800.

(9) COMPANY: Ubaldo Gomez dba JLG Trucking; DOCKET NUMBER: 2001-0161-AIR-E; TNRCC ID NUMBER: EE-0466-Q; LOCATION: 9812 Loya, El Paso, El Paso County, Texas; TYPE OF FACILITY: trucking business (site); RULES VIOLATED: 30 TAC §119.149(b), and THSC, §382.085(b), by failing to pave, or uniformly cover with gravel, parking spaces located at the site; PENALTY: $5,000; STAFF ATTORNEY: Robert Hernandez, Litigation Division, MC 175, (512) 239-5915; REGIONAL OFFICE: El Paso Regional Office, 401 E. Franklin Ave., Ste. 560, El Paso, Texas 79901-1206, (915) 834-4949.

(10) COMPANY: Zulfiqar Enterprises, Inc. dba Mac Pac & Shabbir Ali, Individually; DOCKET NUMBER: 2000-0585-PST-E; TNRCC ID NUMBER: 0010713; LOCATION: 1215 West Shady Grove, Irving, Dallas County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §115.245(1), and THSC, §382.085(b); by failing to successfully conduct the initial compliance test of the Stage II vapor recovery system, 30 TAC §115.244(1), and THSC, §382.085(b), by failing to conduct the daily Stage II vapor recovery system inspections; 30 TAC §115.248(1), and THSC, §382.085(b), by failing to make each current employee aware of the purpose and correct operation of the Stage II vapor recovery equipment; 30 TAC §115.242(3)(K), and THSC, §382.085(b), by failing to maintain the Stage II vapor recovery system on Dispenser Number 4 in an approved condition free of defects that would impair the effectiveness of the system, by using a ripped hose; 30 TAC §115.242(9), and THSC, §382.085(b), by failing to post operating instructions conspicuously on the front of each dispenser equipped with a Stage II vapor recovery system; 30 TAC §334.7(d)(1)(a), by failing to update operational status information on the UST registration information; 30 TAC §334.48(c), by failing to reconcile inventory records monthly; 30 TAC §334.50(b)(2)(A)(i)(III), and TWC, §26.3475, by failing to perform the annual performance test on line leak detectors; 30 TAC §37.815, by failing to demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of the petroleum UST; 30 TAC §115.242(3)(K), and THSC, §382.085(b), by failing to maintain the Stage II vapor recovery system on Dispenser Numbers 1, 3, and 4 in an approved condition free of defects; 30 TAC §115.244(3), and THSC, §382.085(b), by failing to conduct the monthly Stage II vapor recovery system inspections; 30 TAC §115.245(2), and THSC, §382.085(b), by failing to conduct the annual pressure decay test of the Stage II vapor recovery system; 30

TAC §115.248(1), and THSC, §382.085(b), by failing to make each current employee aware of the purpose and correct operation of the Stage II vapor recovery equipment; 30 TAC §334.21 and §334.22, by failing to pay UST fees; PENALTY: $28,000; STAFF ATTORNEY: Shannon Strong, Litigation Division, MC 175, (512) 239-6201; REGIONAL OFFICE: Dallas- Fort Worth Regional Office, 2301 Gravel Drive, Forth Worth, Texas 76010-6499, (817) 588-5800.

TRD-200106711
Paul C. Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: October 31, 2001

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Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (TNRCC or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) pursuant to Texas Water Code (the Code), §7.075, which requires that the TNRCC may not approve these AOs unless the public has been provided an opportunity to submit written comments. Section 7.075 requires that notice of the proposed orders and of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **December 10, 2001**. Section 7.075 also requires that the TNRCC promptly consider any written comments received and that the TNRCC may withhold approval of an AO if a comment discloses facts or considerations that indicate the proposed AO is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code, the Texas Health and Safety (THSC), and/or the Texas Clean Air Act (the Act). Additional notice is not required if changes to an AO are made in response to written comments.

A copy of each of the proposed AOs is available for public inspection at both the TNRCC's Central Office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable Regional Office listed as follows. Written comments about these AOs should be sent to the enforcement coordinator designated for each AO at the TNRCC's Central Office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on December 10, 2001**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The TNRCC enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs should be submitted to the TNRCC in **writing**.

(1) COMPANY: Alcoa World Alumina Atlantic, L.L.C.; DOCKET NUMBER: 2001-1012-AIR- E; IDENTIFIER: Air Account Number CB-0003-M; LOCATION: Point Comfort, Calhoun County, Texas; TYPE OF FACILITY: bauxite refining; RULE VIOLATED: 30 TAC §101.20(1), §116.115(c), 40 Code of Federal Regulations (CFR) §§60.7(a)(3), 60.49b(a) and (g)(3), and 60.386(b), TNRCC Air Permit Number 1475 and 8166, and THSC, §382.085(b), by failing to submit a complete initial notification of start-up; satisfy the requirements for performance testing; performance test the opacity monitoring system; satisfy the requirements for opacity testing; and maintain the records of the 30 day oxides of nitrogen (NOx) emission rates; 30 TAC §116.110(a), §111.111(a)(2), and THSC, §382.085(b), by failing to maintain opacity emissions from the oxalate system vessel; PENALTY: $15,625; ENFORCEMENT COORDINATOR: Gary McDonald, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412- 5503, (361) 825-3100.

(2) COMPANY: Bass Enterprises Production Company; DOCKET NUMBER: 2001-0812-AIR- E; IDENTIFIER: Air Account Number LE-0035-K; LOCATION: Hallettsville, Lavaca County, Texas; TYPE OF FACILITY: natural gas processing; RULE VIOLATED: 30 TAC §122.146(2) and THSC, §382.085(b), by failing to submit the 2000 annual compliance certification; PENALTY: $1,500; ENFORCEMENT COORDINATOR: Carol McGrath, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(3) COMPANY: Bonar Acquisition Corporation; DOCKET NUMBER: 2001-0734-AIR-E; IDENTIFIER: Air Account Number SK-0043-P; LOCATION: Tyler, Smith County, Texas; TYPE OF FACILITY: plastic bag manufacturing; RULE VIOLATED: 30 TAC §122.130(b)(1) and THSC, §382.54 and §382.085(b), by failing to submit an initial abbreviated federal operating permit; and 30 TAC §122.121 and THSC, §382.54 and §382.085(b), by failing to obtain permit authority for continued plant operation; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Carolyn Lind, (903) 535-5100; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(4) COMPANY: Terry Memorial Hospital District dba Brownfield Regional Medical Center; DOCKET NUMBER: 2001-0834-PST-E; IDENTIFIER: Petroleum Storage Tank (PST) Facility Identification Number 71796; LOCATION: Brownfield, Terry County, Texas; TYPE OF FACILITY: hospital; RULE VIOLATED: 30 TAC §334.8(c)(4)(A)(vi)(I) and (B), by failing to submit a underground storage tank (UST) registration and self-certification form; PENALTY: $600; ENFORCEMENT COORDINATOR: Gary Shipp, (806) 796-7092; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79714-3520, (806) 796-7092.

(5) COMPANY: Caldwell/VSR, Inc.; DOCKET NUMBER: 2001-0391-AIR-E; IDENTIFIER: Air Account Number HN-0371-V; LOCATION: Weslaco, Hidalgo County, Texas; TYPE OF FACILITY: window blind manufacturing; RULE VIOLATED: 30 TAC §122.146(2) and (D), and THSC, §382.085(b), by failing to submit the annual Title V compliance certification and having the annual Title V certification identify all other terms and conditions of the permit for which compliance was not achieved; 30 TAC §122.145(2) and THSC, §382.085(b), by failing to report in writing all instances of deviations, the probably cause of the deviation, and any corrective actions or preventative measures taken for each emission unit addressed in the permit; 30 TAC §101.4 and THSC, §382.085(a) and (b), by failing to prevent the discharge of an air contaminant; 30 TAC §116.115(c), Permit Number 34971, and THSC, §382.085(b), by failing to maintain the outlet gas temperature no less than 1400 degrees Fahrenheit, establish oxidizer operating instructions and keep them posted, remove a representative core sample from the catalyst bed of the catalytic oxidizer, and label all emission points with the proper emission point number; PENALTY: $23,125; ENFORCEMENT COORDINATOR: Jaime Garza, (956) 425-6010; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(6) COMPANY: Farah Associates Inc. dba Collins Food Store; DOCKET NUMBER: 2001- 0376-PST-E; IDENTIFIER: PST Facility Identification Number 0014912; LOCATION: Arlington, Tarrant County, Texas; TYPE OF FACILITY: gasoline retail; RULE VIOLATED: 30 TAC §334.7(d)(3), by failing to amend, update, or change registration information regarding USTs; 30 TAC §334.49(a) and the Code, §26.3475, by failing to have installed a method of corrosion protection for the UST system; 30 TAC §334.50(d)(4)(A)(i) and the Code, §26.3475(c)(1), by failing to conduct inventory volume measurements; and 30 TAC §334.48(c), by failing to conduct inventory control at a retail facility; PENALTY: $600; ENFORCEMENT

COORDINATOR: Judy Fox, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(7) COMPANY: Duck Creek Water Supply Corporation; DOCKET NUMBER: 2001-0523- PWS-E; IDENTIFIER: Public Water Supply (PWS) Number 2120011; LOCATION: Lindale, Smith County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.45(b)(1)(D)(iii) and (iv), and THSC, §341.0315(c), by failing to have a service pump capacity and have pressure maintenance facilities; and 30 TAC §290.46(r) and THSC, §341.0315(c), by failing to provide a minimum pressure of 35 pounds per square inch (psi) throughout the distribution system; PENALTY: $3,500; ENFORCEMENT COORDINATOR: Carolyn Lind, (903) 535-5100; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(8) COMPANY: D. V., Inc. dba Dura Mar Bath Systems; DOCKET NUMBER: 2001-0124- AIR-E; IDENTIFIER: Air Account Number ED-0147-A; LOCATION: Red Oak, Ellis County, Texas; TYPE OF FACILITY: cultured marble products; RULE VIOLATED: 30 TAC §116.115(b) and (c), Permit Number 42581, and THSC, §382.085(b), by failing to maintain daily usage records of gel coat and resin, monthly usage records of release formula, and maintain records in a manner to demonstrate compliance, maintain emission control equipment and copies of material data sheets, and maintain material usage limit of acetone; PENALTY: $6,250; ENFORCEMENT COORDINATOR: Wendy Cooper, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118- 6951, (817) 588-5800.

(9) COMPANY: Duval County Conservation and Reclamation District; DOCKET NUMBER: 2001-0679-PWS-E; IDENTIFIER: PWS Number 0660015; LOCATION: Concepcion, Duval County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(c)(3), by failing to take the appropriate number of repeat bacteriological samples; 30 TAC §290.122(c), by failing to provide public notice of the failure to conduct repeat bacteriological sampling; 30 TAC §290.105(a)(2), §290.109(f)(3), and THSC, §341.031(a), by exceeding the maximum contaminant level (MCL) for total coliform bacteria; 30 TAC §290.103(5) and §290.122(b), by failing to provide public notice of the MCL exceedance; and 30 TAC §§ 220.21, 305.507, and 312.9, by failing to pay past due wastewater treatment inspection, water quality assessment, and waste management sludge hauler fees; PENALTY: $1,563; ENFORCEMENT COORDINATOR: Kent Heath, (512) 239-4575; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(10) COMPANY: Asif Dawood dba EZ 4 U; DOCKET NUMBER: 2001-0476-PST-E; IDENTIFIER: PST Facility Identification Number 0005429; LOCATION: Spring, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC § 334.50(d)(4)(A)(i) and the Code, §26.3475(c)(1), by failing to conduct inventory control; and 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for all UST systems; PENALTY: $600; ENFORCEMENT COORDINATOR: Rebecca Johnson, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(11) COMPANY: Inland Paperboard and Packaging, Inc.; DOCKET NUMBER: 2001-0723- AIR-E; IDENTIFIER: Air Account Number OC-0019-C; LOCATION: Orange, Orange County, Texas; TYPE OF FACILITY: linerboard manufacturing; RULE VIOLATED: 30 TAC §101.6(a)(2)(G), §101.6(b)(7), and THSC, §382.085(b), by failing to report the actions taken or being taken to correct an upset and minimize emissions; 30 TAC §101.20(3), §116.115(b)(2) and (c), TNRCC Permit 9654A/EPA Permits PSD-TX-684/PSD/TX-833, and THSC, §382.085(b), by failing to maintain an emission rate below the permit allowable emission limit and maintain opacity within authorized limits; PENALTY: $6,080; ENFORCEMENT COORDINATOR: Laura Clark, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110, Beaumont, Texas 77703-1892, (409) 898-3838.

(12) COMPANY: Iron Hill Water Corporation; DOCKET NUMBER: 2001-0761-PWS-E; IDENTIFIER: PWS Number 0370022; LOCATION: Rusk, Cherokee County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.45(b)(1)(C) and THSC, §341.0315, by failing to meet the agency's minimum water system capacity requirements; and 30 TAC §290.43(c)(8), by failing to maintain the protective coating on both the inside and outside of the Hi-Level storage tank; PENALTY: $250; ENFORCEMENT COORDINATOR: Elnora Moses, (903) 535-5100; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(13) COMPANY: Rusty Lindeman dba Jet Center Aviation; DOCKET NUMBER: 2000-1085- IHW-E; IDENTIFIER: Solid Waste Registration (SWR) Number 81343; LOCATION: Hondo, Medina County, Texas; TYPE OF FACILITY: aircraft paint stripping and painting; RULE VIOLATED: 30 TAC §335.4(1) and the Code, §26.121, by failing to collect and dispose of industrial solid waste; 30 TAC §335.9(a)(1)(G) and (2)(A) - (C), by failing to keep records of the locations of hazardous waste accumulation areas and provide correct and accurate annual waste summaries; 30 TAC §335.10(b)(22), by failing to use assigned waste codes; 30 TAC §335.62 and 40 CFR §262.11, by failing to perform a hazardous waste determination of sanding materials; 30 TAC §335.69(a)(1)(A), (a)(2) - (4), (d)(2), and (e), §335.112(a)(2), and 40 CFR §§262.34(a)(2-4), (c)(1)(ii) and (2), 262.171, 262.173, 265.35, and 265.174, by failing to maintain six containers of hazardous waste and keep closed two drums of hazardous waste and write accumulation start dates, label the words "hazardous waste" on containers of hazardous waste, and mark five drums of excess hazardous waste located in the satellite accumulation areas, provide adequate aisle space for emergency access in the container storage area, have a contingency plan and emergency procedures, dispose of a drum of hazardous waste within the 90 day accumulation time limit, and perform weekly inspections of the container storage area; 30 TAC §335.431(c) and 40 CFR §268.7(a)(7) and (8), by failing to provide one-time notice regarding the generation and disposal of wastewater; 30 TAC §335.474 and §335.479, by failing to prepare a five year source reduction and waste minimization plan; 30 TAC §335.513, by failing to retain hazardous waste determination documentation for six waste streams; and 30 TAC §335.6(c), by failing to notify the executive director of the type and use for each unit comprising the wastewater treatment system; PENALTY: $68,080; ENFORCEMENT COORDINATOR: Terry Murphy, (512) 239-5025; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(14) COMPANY: Kamping Pleasures, Inc. dba Lake Corpus Christi KOA Kampground; DOCKET NUMBER: 2001-0611-PWS-E; IDENTIFIER: PWS Number 1490004; LOCATION: Mathis, Live Oak County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.45(c)(1)(B)(i), (ii), (iii), and (iv), and THSC, §341.0315(c), by failing to provide a well capacity of 0.6 gallons per minute (gpm) per connection, provide a ground storage capacity of 35 gallons per connection, provide a service pump capacity of one gpm per connection, and provide a pressure tank capacity of 10 gallons per connection; PENALTY: $2,125; ENFORCEMENT COORDINATOR: Audra Baumgartner, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(15) COMPANY: City of Levelland; DOCKET NUMBER: 2001-0801-PST-E; IDENTIFIER: PST Facility Identification

Number 27950; LOCATION: Levelland, Hockley County, Texas; TYPE OF FACILITY: municipal airport; RULE VIOLATED: 30 TAC §334.8(c)(4)(A)(vi)(I) and (B), and (5)(A)(i), by failing to submit a UST registration and self-certification and make available a valid, current TNRCC delivery certificate; and 30 TAC §37.815(a) and (b), by failing to demonstrate financial assurance; PENALTY: $2,400; ENFORCEMENT COORDINATOR: Gary Shipp, (806) 796- 7092; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(16) COMPANY: Lufkin Industries, Incorporated; DOCKET NUMBER: 2001-0278-AIR-E; IDENTIFIER: Air Account Number AC-0015-F; LOCATION: Lufkin, Angelina County, Texas; TYPE OF FACILITY: gray and ductile iron foundry; RULE VIOLATED: 30 TAC §101.10(b)(2) and THSC, §382.085(b), by failing to report actual emissions; 30 TAC §111.201 and THSC, §382.085(b), by failing to prevent the unauthorized outdoor burning of electrical wire and batteries; 30 TAC §122.130(b)(1) and THSC, §382.085(b), by failing to submit a Title V abbreviated initial permit application; 30 TAC §122.136(c) and THSC, §382.085(b), by failing to update the Title V full permit application; 30 TAC §116.110(a), THSC, §382.085(b), and Standard Exemption 89, by failing to meet the requirements of a standard exemption or a permit by rule, and obtain a permit; the THSC, §382.085(b) and Standard Exemption Two, by failing to meet the requirements of a standard exemption by failing to post manufacturer's recommended operating instructions; 30 TAC §101.6(a)(1)(B) and (b)(2)(G), and THSC, §382.085(b), by failing to notify the agency within 24 hours of discovery of a reportable upset; 30 TAC §116.115(c), Air Permit Number 8318, and THSC, §382.085(b), by failing to maintain emissions below the permit limit for particulate matter; PENALTY: $54,000; ENFORCEMENT COORDINATOR: Susan Kelly, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 100, Beaumont, Texas 77703-1892, (409) 898-3838.

(17) COMPANY: Johns Manville International Corporation; DOCKET NUMBER: 2001-0684- AIR-E; IDENTIFIER: Air Account Number JH-0025-0; LOCATION: Cleburne, Johnson County, Texas; TYPE OF FACILITY: fiberglass insulation manufacturing; RULE VIOLATED: 30 TAC §116.115(c), Permit Number 946A, and THSC, §382.085(b), by allegedly exceeding the combined permit allowable emission level for formaldehyde and particulate matter; PENALTY: $5,000; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(18) COMPANY: Mobil Chemical Company, A Wholly Owned Subsidiary of Exxon Mobil Corporation; DOCKET NUMBER: 2001-0585-MLM-E; IDENTIFIER: Air Account Number JE-0062-S and Texas Pollutant Discharge Elimination System (TPDES) Permit Number 0000462; LOCATION: Beaumont, Jefferson County, Texas; TYPE OF FACILITY: petrochemical plant; RULE VIOLATED: 30 TAC §§101.20(1) and (3), 111.111(a)(4)(A), 113.100, 116.115(b)(2)(G) and (c), Air Permit 7799/PSD-TX-860 and 18838/PSD-TX-843, THSC, §382.085(b), and 40 CFR §60.18(c)(1) and §63.11(b)(4), by failing to maintain emission rates for volatile organic compounds (VOCs), carbon monoxide (CO), and NOx; 30 TAC §101.6(a)(1)(B) and (2)(F) and THSC, §382.085(b), by failing to notify the TNRCC no later than 24 hours after discovery of an upset and estimate opacity; and 30 TAC §305.125(1) and TPDES Permit Number 0000462, by failing to discharge wastewater in accordance with the TPDES permit; PENALTY: $20,000; ENFORCEMENT COORDINATOR: John Barry, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 100, Beaumont, Texas 77703-1892, (409) 898-3838.

(19) COMPANY: Moss Bluff Hub Partners, L.P.; DOCKET NUMBER: 2001-0613-AIR-E; IDENTIFIER: Air Account Number LH-0112-H; LOCATION: Liberty, Liberty County, Texas; TYPE OF FACILITY: natural gas storage station; RULE VIOLATED: 30 TAC §122.145(2)(B) and THSC, §382.085(b), by failing to submit a six-month deviation report; and 30 TAC §122.146(2) and THSC, §382.085(b), by failing to submit the annual compliance certification; PENALTY: $4,000; ENFORCEMENT COORDINATOR: Kevin Keyser, (713) 767- 3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(20) COMPANY: National Instruments Corporation; DOCKET NUMBER: 2001-0576-EAQ-E; IDENTIFIER: Edwards Aquifer Protection Plan Number 00111703; LOCATION: Austin, Travis County, Texas; TYPE OF FACILITY: land-clearing and excavation; RULE VIOLATED: 30 TAC §213.4(a), by failing to obtain approval of a modification to Edwards Aquifer Protection Plan Number 00111703 before initiating regulated activities; and 30 TAC §213.5(f)(2), by failing to obtain approval of the methods to be used to protest sensitive geological features at the site; PENALTY: $7,500; ENFORCEMENT COORDINATOR: Larry King, (512) 339-2929; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(21) COMPANY: New Braunfels General Store International, Inc.; DOCKET NUMBER: 2001- 0796-AIR-E; IDENTIFIER: Air Account Number CS-0024-G and General Operating Permit O-01764; LOCATION: New Braunfels, Comal County, Texas; TYPE OF FACILITY: manufacture of water park equipment; RULE VIOLATED: 30 TAC §122.146(2), General Operating Permit Number O- 01764, and THSC, §382.085(b), by failing to submit annual Title V compliance certifications; 30 TAC §122.145(2), General Operating Permit Number O-01764, and THSC, §382.085(b), by failing to submit semi-annual deviation reports; 30 TAC §116.110(a)(4) and THSC, §382.085(b), by failing to adhere to 30 TAC §106.433(7) and maintain monthly reports that represent actual hours of operation each day and emissions from each operation in pounds per hour; PENALTY: $10,100; ENFORCEMENT COORDINATOR: Rebecca Clausewitz, (210) 490-3096; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(22) COMPANY: Nico-Tyme Water Co-Op, Inc.; DOCKET NUMBER: 2001-0642-PWS-E; IDENTIFIER: PWS Number 0150486; LOCATION: Elmendorf, Bexar County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.106(a), §290.109(c)(2), and THSC, §341.033(d), by failing to collect and submit routine monthly water samples from the facility for bacteriological analysis; PENALTY: $1,563; ENFORCEMENT COORDINATOR: Subhash Jain, (512) 239-5867; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233- 4480, (210) 490-3096.

(23) COMPANY: Pecan Shadows Water Supply Corporation; DOCKET NUMBER: 2001-0490- PWS-E; IDENTIFIER: Certificate of Convenience and Necessity (CCN) Number 11930; LOCATION: Bay City, Matagorda County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §291.21(c)(7), §291.93(2)(A), and the Code, §13.136(a), by failing to ensure that its tariff includes an approved drought contingency plan; 30 TAC §288.30(3)(B) and the Code, §13.132(a)(1), by failing to make its adopted drought contingency plan available for inspection; and 30 TAC §291.76 and the Code, §5.235(n), by failing to pay regulatory assessment fees; PENALTY: $150; ENFORCEMENT COORDINATOR: Sherry Smith, (512) 239- 0572; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(24) COMPANY: Penske Truck Leasing Co., L. P. dba Texas Penske Truck Leasing Co., L.P.; DOCKET NUMBER: 2001-0513-AIR-E;

IDENTIFIER: Air Account Number EE-1312-O; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: underground storage tank and gasoline dispensing pump station; RULE VIOLATED: 30 TAC §114.100(a) and THSC, §382.085(b), by alleging having dispensed and utilized gasoline for use as a motor vehicle fuel which failed to meet the minimum oxygen content of 2.7% by weight; PENALTY: $800; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(25) COMPANY: Reliant Energy Channelview (Texas), LLC; DOCKET NUMBER: 2001-0997- AIR-E; IDENTIFIER: Air Account Number HX-2342-B; LOCATION: Channelview, Harris County, Texas; TYPE OF FACILITY: cogeneration; RULE VIOLATED: 30 TAC §101.360(a) and THSC, §382.085(b), by failing to submit their form ECT-3, Level of Activity Certification; PENALTY: $1,500; ENFORCEMENT COORDINATOR: Carl Schnitz, (512) 239-1892; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(26) COMPANY: Seacrest Company, L.L.C.; DOCKET NUMBER: 2001-0797-AIR-E; IDENTIFIER: Air Account Number BL-0321-W; LOCATION: Freeport, Brazoria County, Texas; TYPE OF FACILITY: natural gas processing; RULE VIOLATED: 30 TAC §122.146(2) and THSC, §382.085(b), by failing to submit annual compliance certification; and 30 TAC §122.145(2)(B) and THSC, §382.085(b), by failing to submit deviation reports; PENALTY: $3,600; ENFORCEMENT COORDINATOR: Rebecca Johnson, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(27) COMPANY: Seadrift Coke, L.P.; DOCKET NUMBER: 2001-0616-MLM-E; IDENTIFIER: Air Account Number CB-0042-C and SWR Identification Number 33779; LOCATION: Seadrift, Calhoun County, Texas; TYPE OF FACILITY: coke production; RULE VIOLATED: 30 TAC §335.69(d) and (f) and 40 CFR §262.34(c) and (d), by failing to mark and label containers of hazardous waste located in satellite accumulation areas; 30 TAC §335.6(c), by failing to update the notice of registration; 30 TAC §335.2(a), by failing to obtain a permit for the treatment of listed hazardous solvent contaminated rags and for the storage of hazardous waste in an on-site waste pile; 30 TAC §335.62, §335.504(1), and 40 CFR §262.11, by failing to make a hazardous waste determination for the incinerator ash waste stream; 30 TAC §335.9(a)(1) and (2), by failing to maintain records of the quantities of hazardous waste generated and submit a complete and correct annual waste summary; 30 TAC §324.12 and 40 CFR §279.51, by failing to register used oil processing activities; 30 TAC §101.6(a)(1)(b) and THSC, §382.085(b), by failing to submit notification of upsets and properly record an upset at the plan flare; PENALTY: $65,830; ENFORCEMENT COORDINATOR: Gary McDonald, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(28) COMPANY: Shallowater Independent School District; DOCKET NUMBER: 2001-0886- PST-E; IDENTIFIER: PST Facility Identification Number 49432; LOCATION: Shallowater, Lubbock County, Texas; TYPE OF FACILITY: maintenance shop with fleet refueling; RULE VIOLATED: 30 TAC §334.8(c)(5)(A)(i) and the Code, §26.3467(a), by failing to make available a valid, current delivery certificate; PENALTY: $800; ENFORCEMENT COORDINATOR: Gary Shipp, (806) 796-7092; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(29) COMPANY: City of Sinton; DOCKET NUMBER: 2000-1393-MWD-E; IDENTIFIER: TPDES Permit Number 10055-001; LOCATION: Sinton, San Patricio County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 10055-001, and the Code, §26.121, by failing to meet permitted limits for dissolved oxygen and pH, timely submit discharge monitoring reports (DMRs), and submit required non- compliance notifications; and 30 TAC §305.44, §305.128(3), and TPDES Permit Number 10055-001, by failing to submit DMRs signed by the proper principal executive officer, a ranking elected official, or duly authorized representative; PENALTY: $11,280; ENFORCEMENT COORDINATOR: Sherry Smith, (512) 239-0572; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(30) COMPANY: S.T.H.P. Corporation dba Tarantula Crossing; DOCKET NUMBER: 2001- 0770-PST-E; IDENTIFIER: PST Facility Identification Number 0069211; LOCATION: Grapevine, Tarrant County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to conduct the annual pressure decay test; PENALTY: $1,000; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239- 2576; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(31) COMPANY: Rick Stone (Individually) and Stone Recycling, Inc.; DOCKET NUMBER: 2001-0753-MSW-E; IDENTIFIER: Used Oil Handler Registration Number A85571; LOCATION: Crowley, Tarrant County, Texas; TYPE OF FACILITY: used oil transport, treatment, and storage; RULE VIOLATED: 30 TAC §324.22 and §37.2011, by failing to provide an original financial assurance mechanism; PENALTY: $200; ENFORCEMENT COORDINATOR: Erika Fair, (512) 239-6673; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(32) COMPANY: Tecon Water Companies, Inc. dba Southwest Water Services, Inc. dba Beachwood Estates Water System, Carolynn Estates Water System and Oak Trails Shores Water System; Tecon Water Companies, Inc. dba Resort Water Services, Inc., dba Arrowhead Shores Water System and Comanche Cove/Heritage Heights Water System; Tecon Water Companies, Inc. dba Texas Water Services, Inc. dba 377 Sunset Strip Water System, Acton/Royal Oaks Water System, Hideaway Bay Estates Water System, Montego Bay Estates Water System and Rancho Brazos Water System; DOCKET NUMBER: 2000-1217-PWS-E; IDENTIFIER: PWS Numbers 1070069, 1070106, 1110025, 1110004, 1110060, 1110003, 1110055, 1110002, 1110044, and 1110036; CCN Numbers 10764, 11512, 11517, 11943, 12512, and 12530; LOCATION: Trinidad, Caney City, Granbury, Acton; Henderson and Hood, Counties, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: THSC, §341.0315(c), by failing to provide a transfer and raw water pump capacity of 0.39 gpm per connection; 30 TAC §290.42(a), (d)(5), (11)(B)(iv) and (D)(ii), (F)(i), and (15)(E), (formerly 30 TAC §290.42(d)(10)(C) and (D)(i)), and THSC, §341.0315(c), by failing to provide a treated water production capacity greater than the anticipated maximum daily demand, provide flow measuring devices to measure the raw water supplied to the plant, ensure that the design capacity of filtration facilities are based on a maximum filtration rate of two gallons per square foot per minute, equip each declining rate filter with a rate-of-flow limiting device or an adjustable flow control valve, provide adequate backwash facilities, and equip the surface water treatment plant with a means to monitor the depth of the sludge blanket; THSC, §341.0315(c), by failing to provide the required service pump capacity of 1.3 gpm per connection; 30 TAC §290.43(c)(1) and (4), and (d)(3), by failing to provide the ground storage tank vents with screens fabricated of 16-mesh or finer corrosion-resistant material, provide the water storage tank with a liquid level indicator, and provide a device to readily determine air-water-volume on the pressure tank; 30 TAC §290.46(d)(2), (e)(1)(C) and (2), (f)(4), (g), (m)(4), (n)(2), (q)(1), (r), and (s)(2)(B)(ii), (formerly 30 TAC §290.46(u)), and THSC, §341.033(a), by failing to operate

the disinfection equipment so as to maintain a free chlorine residual of 0.2 milligram per liter (mg/L), employ at least two Class "C" certified operators, have at least a Class "C" surface water operator, submit monthly or quarterly reports, ensure that the maintenance and housekeeping practices provide reliability and improve the general appearance and ensure that all water storage facilities, submit a water sample from a repaired line for bacteriological analysis, distribution system lines and related appurtenances are maintained in a watertight condition, provide an up-to-date map of the distribution system, provide a minimum pressure of 35 psi throughout the distribution system, calibrate the turbidimeters, issue a boil water notification, and failure to properly calibrate laboratory equipment and the benchtop turbidimeters; 30 TAC §290.118(a), (formerly 30 TAC §290.113(1)), and THSC, §341.031(a), by failing to obtain written approval prior to providing public drinking water that exceeds the secondary constituent level for aluminium; 30 TAC §290.45(b)(1)(B)(i), (C)(i) and (iii), (2)(A), (F) and (G), and THSC, §341.0315(c), by failing to provide a minimum well capacity of 0.6 gpm per connection, provide a minimum well capacity of 0.6 gpm per connection, a service pump capacity of two gpm per connection, a raw water pump capacity which meets the maximum daily demand, provide a required service pump capacity of two gpm per connection, and provide a pressure tank capacity of 20 gallons per connection; 30 TAC §290.110(b)(4) and (c)(2)(A), §290.46(d)(2), (formerly 30 TAC §290.119(2)), by failing to maintain a residual disinfectant concentration of at least 0.2 mg/L, properly monitor the disinfectant residual; 30 TAC §290.44(a)(4), (c), and (h)(1), and THSC, §341.0315(c) and §341.033(f), by failing to install water lines at least 24 inches beneath the ground surface, install the proper size water lines, and provide an air gap or backflow prevention assembly; 30 TAC §290.119(1), by failing to monitor the combined filter effluent; 30 TAC §290.111(b)(1)(A)(i) and (ii), and THSC, §341.031(a), by failing to maintain a turbidity level of 0.5 Nephelometric turbidity unit or less; and 30 TAC §290.41(c)(1)(f), by failing to secure a sanitary control easement around the well site; PENALTY: $52,426; ENFORCEMENT; COORDINATOR: Brian Lehmkuhle, (512) 239-4482; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800; and 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(33) COMPANY: Texas Department of Transportation; DOCKET NUMBER: 2001-0603-PWS- E; IDENTIFIER: PWS Number 0700078; LOCATION: Waxahachie, Ellis County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.106(a), §290.109(c), and THSC, §341.033(d), by failing to collect and submit routine monthly water samples for bacteriological analysis; 30 TAC §§290.103(5), 290.106(e)(2), 290.109(g)(4), and 290.122(c), by failing to provide public notice of the failure to conduct routine monthly bacteriological sampling; and 30 TAC §290.51(a)(3), by failing to pay public health service fees; PENALTY: $1,400; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(34) COMPANY: Texas Lime Company; DOCKET NUMBER: 2001-0703-AIR-E; IDENTIFIER: Air Account Number JH-0045-I; LOCATION: Cleburne, Johnson County, Texas; TYPE OF FACILITY: lime manufacturing; RULE VIOLATED: 30 TAC §116.115(c), §101.20(1), Permit Number 20519, 40 CFR §60.8 and §60.675(b)(2), and THSC, §382.085(b), by failing to conduct a Method 9 opacity test and submit the results; PENALTY: $1,250; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(35) COMPANY: Union Carbide Corporation; DOCKET NUMBER: 2001-0844-AIR-E; IDENTIFIER: Air Account Number GB-0076-J; LOCATION: Texas City, Galveston County, Texas; TYPE OF FACILITY: chemical manufacturing; RULE VIOLATED: 30 TAC §101.20(1), 40 CFR §60.8 and 60.664(d) and (e), and THSC, §382.085(b), by allegedly using process calculations as an alternative method for determining the total resource efficiency; 30 TAC §335.323, by failing to pay outstanding fiscal year 2001 hazardous waste generation fees; and THSC, §370.008, by failing to pay outstanding reporting year 2001 toxic chemical release reporting fees; PENALTY: $760; ENFORCEMENT COORDINATOR: Rebecca Johnson, (713) 767- 3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

TRD-200106647
Paul Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: October 30, 2001

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Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (TNRCC or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) pursuant to Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **December 10, 2001**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the TNRCC's orders and permits issued pursuant to the TNRCC's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each of the proposed AOs is available for public inspection at both the TNRCC's Central Office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable Regional Office listed as follows. Comments about the AOs should be sent to the attorney designated for the AO at the TNRCC's Central Office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on December 10, 2001**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The TNRCC attorneys are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs should be submitted to the TNRCC in **writing**.

(1) COMPANY: C. C. Southern, Incorporated; DOCKET NUMBER: 2000-0103-PST-E; TNRCC ID NUMBER: 0019996; LOCATION: 7179 Industrial Drive, El Paso, El Paso County, Texas; TYPE OF FACILITY: trucking terminal; RULES VIOLATED: 30 TAC §334.50(a)(1)(A), by failing to provide release detection for its underground storage tank (UST) system, which contains regulated substances; 30 TAC §334.104(c), by failing to submit evidence of financial assurance upon request; 30 TAC §334.22(a), by failing to pay its UST fees; PENALTY: $20,250; STAFF ATTORNEY: Elisa Roberts, Litigation Division, MC R-4, (817) 588-5877; REGIONAL OFFICE: El Paso Regional Office, 401 E. Franklin Ave., Ste. 560, El Paso, Texas 79901-1206, (915) 834-4949.

(2) COMPANY: Fred Palacios dba Fred's Gas Depot; DOCKET NUMBER: 1999-0895-PST-E; TNRCC ID NUMBER: 33816; LOCATION: 2527 South Highway 281, Edinburg, Hidalgo County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A), and TWC, §26.3475, by failing to have an acceptable method of release detection for the UST system; 30 TAC §334.50(b)(2), and TWC, §26.3475, by failing to perform tightness test for suction piping; 30 TAC §334.93(a) and (b), by failing to demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental release arising from the operation of the petroleum USTs; 30 TAC §334.49(a), and TWC, §26.3475, by failing to have corrosion protection for the UST system; PENALTY: $9,000; STAFF ATTORNEY: Rebecca Petty, Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Ave., Harlingen, Texas 78550-5247, (956) 425-6010.

(3) COMPANY: Harris County Municipal Utility District Number 150; DOCKET NUMBER: 2001-0295- MWD-E; TNRCC ID NUMBER: 11863-001; LOCATION: 11621 C. Walter Road, approximately three miles west of intersection of Interstate Highway 45 and Greens Bayou Crossing, Harris County, Texas; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(1); TWC, §26.121, Texas Pollutant Discharge Elimination System Permit Number 11863-001, Effluent Limitations and Monitoring Requirement 1, by failing to comply with permitted limits for Total Suspended Solids, ammonia nitrogen, and five-day Carbonaceous biochemical Oxygen Demand; PENALTY: $2,500; STAFF ATTORNEY: Rebecca Petty, Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Ave., Ste. H, Houston, Texas 77023-1486, (713) 767-3500.

(4) COMPANY: Hector Flores dba Flores and Son Backhoe and Trenching; DOCKET NUMBER: 2000- 1438-OSI-E; TNRCC ID NUMBER: none; LOCATION: south side of U.S. Highway 70, one-mile east of Muleshoe, Bailey County, Texas; TYPE OF FACILITY: on-site sewage facility (OSSF); RULES VIOLATED: 30 TAC §285.50(b) and (c), and Texas Health and Safety Code (THSC), §366.004 and §366.071, by failing to obtain the required certification prior to the installation of an OSSF; THSC, §366.004 and §366.051(c), by beginning the installation of an OSSF without the property owner providing proof of a permit and approved plan from the TNRCC; PENALTY: $875; STAFF ATTORNEY: John Sumner, Litigation Division, MC R-7, (915) 620-6118; REGIONAL OFFICE: Lubbock Regional Office, 4630 50th St., Ste. 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(5) COMPANY: Republic Waste Services of Texas, LLC dba Brazoria County Recycling Center; DOCKET NUMBER: 2000-0481-MSW-E; TNRCC ID NUMBER: 1539; LOCATION: 10310 Farm-to-Market Road 523, Angleton, Brazoria County, Texas; TYPE OF FACILITY: Type I landfill; RULES VIOLATED: 30 TAC §330.113(b)(2), by failing to promptly maintain inspection records, training procedures, and regulated material notification procedures; 30 TAC §330.113(d)(2), by failing to maintain two protective well collars in operating order, locked and labeled; PENALTY: $5,625; STAFF ATTORNEY: James Biggins, Litigation Division, MC R-13, (210) 403-4017; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Ave., Ste. H, Houston, Texas 77023-1486, (713) 767-3500.

(6) COMPANY: Ronnie Bailey dba Bailey's Brokerage; DOCKET NUMBER: 2000-1303-MLM-E; TNRCC ID NUMBERS: F0637 and MA0054K; LOCATION: Farm-to-Market Road 2028, Brady, McCulloch County, Texas; TYPE OF FACILITY: scrap metal brokerage; RULES VIOLATED: 30 TAC §335.2(a), and 40 Code of Federal Regulations (CFR), §270.1, by allowing the disposal of hazardous waste containing lead and cadmium on-site without a permit; 30 TAC §335.4, by allowing the release, dilution, and disposal of hazardous wastes and hazardous waste ash generated from a metal grading process and burning copper wire; 30 TAC §335.6(c), and 40 CFR, §270.1, by failing to notify the TNRCC of hazardous waste generating activities; 30 TAC §335.9(a)(1), and 40 CFR, §270.1, by failing to keep records of hazardous waste generating activities; 30 TAC §335.62, and 40 CFR, §262.11, by failing to perform hazardous waste determinations on ash; 30 TAC §335.63, and 40 CFR, §262.12, by failing to obtain an Environmental Protection Agency ID Number prior to storage and disposal of hazardous waste; 30 TAC §335.69(f)(5)(c), and 40 CFR, §262.34(d)(5)(iii), by failing to provide proper hazardous waste handling procedures; 30 TAC §335.431, and 40 CFR, §§268.3(a), 268.7(a), and 268.40(a), by failing to determine whether the hazardous waste had to be treated prior to land application; 30 TAC §111.201, and THSC, §382.085(b), by allowing unauthorized burning of wire for metal recovery; PENALTY: $12,000; STAFF ATTORNEY: James Biggins, Litigation Division, MC R-13, (210) 403-4017; REGIONAL OFFICE: San Angelo Regional Office, 622 S. Oakes, Ste. K, San Angelo, Texas 76903-7013, (915) 655-9479.

TRD-200106710
Paul C. Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: October 31, 2001

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Notice of Water Rights Application

Notices mailed during the period October 10, 2001 through October 26, 2001.

APPLICATION NO. 18-3834B; Canyon Regional Water Authority (CRWA) has applied for an amendment to their Certificate of Adjudication No 18-3834, as amended, to divert an additional 5,600 acre-feet of water per annum from the perimeter of Lake Dunlap on the Guadalupe River, Guadalupe River Basin in Guadalupe County for municipal use and change the place of use to CRWA's service area within the Guadalupe River Basin. Canyon Regional Water Authority, 850 Lakeside Pass, New Braunfels, Texas 78130, applicant, seeks to amend Certificate of Adjudication No. 18-3834, as amended, pursuant to Texas Water Code §11.122 and Texas Natural Resource Conservation Commission Rules 30 TAC §§295.1, et seq. Applicant owns Certificate of Adjudication No. 18-3834, as amended, which authorizes owner to divert and use not to exceed 18.52 acre-feet of water per annum for municipal use from the perimeter of Lake Dunlap, on the Guadalupe River in the Guadalupe River Basin with a maximum diversion rate of .23 cfs (103 gpm). Applicant is also authorized to divert and use 71.48 acre-feet of water per annum from the perimeter of Lake Dunlap to irrigate 45.11 acres in the J. S. Johnson Survey, Abstract 190, Guadalupe County at a maximum diversion rate of .88 cfs (397 gpm). The time priority is April 19, 1912. Applicant seeks to amend Certificate of Adjudication No. 18-3834, as amended, to divert an additional 5,600 acre-feet of water per annum from the perimeter of Lake Dunlap for municipal purposes, increase the maximum diversion rate to 93 cfs (41,738.4 gpm) and change the place of use to CRWA's service area within the Guadalupe River Basin. Applicant has indicated that the additional 5,600 acre-feet of water per annum will only be diverted when the stream flow of the Guadalupe River above the Comal River at New Braunfels, USGS gaging station No. 07168500 and the Comal River at New Braunfels USGS gaging station No. 0816900 have a combined total of 300 cfs.

Applicant also indicated that for stream flows between 300 to 593 cfs the maximum instantaneous diversion rate will be 31 cfs (13,912.8 gpm), for stream flows between 596 to 1,300 cfs the maximum instantaneous diversion rate will be 62 cfs (27,825.6 gpm), and for stream flows in excess of 1,300 cfs, the maximum instantaneous diversion rate will be 93 cfs (41,738.4 gpm). The application was received on June 22, 2000. Additional information was received on July 5, 2000, October 25, 2000, February 27, 2001, and June 27, 2001. The application was determined to be administratively complete on July 5, 2001. 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. The TNRCC may grant a contested case hearing on this application if a written hearing request is filed within 30 days from the date of newspaper publication of this notice. The Executive Director may approve the application unless a written request for a contested case hearing is filed.

APPLICATION NO. 5744; Somervell County Water District has applied for a Water Use Permit to store water in two reservoirs to be constructed on Wheeler Branch, tributary of the Paluxy River and on the Paluxy River, tributary of the Brazos River, Brazos River Basin in Somervell County, and to divert 5,000 acre-feet of water per year from the reservoir on the Paluxy River for storage in the reservoir on Wheeler Branch, of which 2,000 acre-feet per year will be diverted for municipal use. Somervell County Water District, P.O. Box 1386, Glen Rose, Texas, 76043, applicant, seeks a permit pursuant to Texas Water Code §11.121 and §11.042 and Texas Natural Resource Conservation Commission Rules 30 TAC §§ 295.1, et seq. Somervell County Water District, applicant, seeks authorization to construct two on-channel dams and reservoirs. Reservoir No. 1, an on-channel dam and reservoir on the Paluxy River, tributary of the Brazos River, Brazos River Basin will impound not to exceed 35.2 acre-feet of water with a surface area of approximately 9 acres. Station 10+00 on the center-point of the channel dam will be located in the City of Glen Rose at Latitude N 32.2389 degrees N, Longitude 97.7467 degrees W, also bearing N 38.92 degrees E, 4,810 feet from the southwest corner of the Milam County School Land Survey, Abstract No. A-136, in Somervell County, Texas. Reservoir No. 2 will be on Wheeler Branch, tributary of the Paluxy River and impound not to exceed 4,118 acre-feet of water with a surface area of approximately 169 acres. Station 0+00 on the center line of the Wheeler Branch dam will be located approximately 2 miles north-northwest of the City of Glen Rose at Latitude N 32.2553 degrees N, Longitude 97.7697 degrees W, also bearing S 86.4333 degrees E, 6,066 feet from the northwest corner of the Milam County School Land Survey, Abstract No. A-135, in Somervell County, Texas. Applicant also seeks authorization to divert not to exceed 5,000 acre-feet of water per annum at the maximum rate of 50 cfs (22,500 gpm) from the perimeter of the Reservoir No. 1 on the Paluxy River and pipe this water to Reservoir No. 2 on Wheeler Branch for storage. From the 5000 acre-feet of water per annum diverted to Reservoir No. 2 and the impoundment of flows from the Wheeler Branch watershed, applicant seeks authorization to divert and use not to exceed 2,000 acre-feet of water per annum from the perimeter of the reservoir at a maximum rate of 11 cfs (4, 937 gpm) for municipal, industrial and irrigation purposes within the Brazos River Basin. Applicant seeks to use the impounded water in both reservoirs for recreation purposes. Applicant also seeks authorization to use all return flows generated from the use of the water authorized by the requested permit for municipal, industrial and irrigation purposes within the service area of Somervell County Water District. Somervell County Water District submitted Water Use Permit Application No. 5744 on April 6, 2001. Additional information was received on June 4, 2001, and the application was declared administratively complete on June 27, 2001. 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. The TNRCC may grant a contested case hearing on this application if a written hearing request is filed within 30 days from the date of newspaper publication of this notice. The Executive Director may approve the application unless a written request for a contested case hearing is filed.

Information Section

A public meeting is intended for the taking of public comment, and is not a contested case hearing. A public meeting will be held if the Executive Director determines that there is a significant degree of public interest in an application.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any: (2) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TNRCC Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TNRCC Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TNRCC can be found at our web site at www.tnrcc.state.tx.us.

TRD-200106674
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: October 30, 2001

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Request for Comments on the 2002 Clean Water Act §305(b)

The Texas Natural Resource Conservation Commission (TNRCC) announces the availability of the draft 2002 Clean Water Act (CWA) §305(b) Water Quality Inventory. The §305(b) Inventory is an overview of the status of surface waters in the state, including concerns for public health, fitness for use by aquatic species and other wildlife, and specific pollutants and their possible sources. In addition, a draft summary is provided of water bodies that do not support beneficial uses or water quality criteria and those water bodies that demonstrate some cause for concern. The 305(b) Inventory is used by the TNRCC for management decisions including monitoring, planning, implementing, and funding best management practices to control pollution sources, and to develop a draft list of impaired waters for selecting water bodies for which total maximum daily load analyses will be initiated.

Local residents, interest groups, or other organizations may have knowledge of specific problems, programs, or conditions unknown to TNRCC staff that should be considered in the inventory. Useful

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Petroleum products were ignited as they flowed downstream and the fire traveled back upstream toward the sources of the unauthorized discharges. In the following days these fires continuously burned at the ends of the broken gasoline pipeline, the diesel oil pipeline, and one end of the crude oil pipeline. In addition, ignited petroleum products flowed downstream and burned riparian vegetation on mid-channel islands and adjacent shoreline riparian forests and wetlands, as well as numerous homes and other structures. The fires did not consume all of the discharged petroleum products. Significant quantities flowed downstream in the San Jacinto River to the upper portions of Galveston Bay.

As a result of the unauthorized discharge of diesel fuel, gasoline and crude oil and the resultant fires, numerous natural resources were affected. The discharged petroleum products and fires impacted terrestrial, freshwater and estuarine plants, sediments, wildlife, and invertebrates as well as freshwater and estuarine fishes. Water quality within the lower reaches of the San Jacinto River and upper Galveston Bay was impacted by the dispersion of the discharged materials into the water column.

The Natural Resource Trustees have the authority under OPA (33 U.S.C. Section 2701 et seq.) to assess the natural resource injuries resulting from this incident. The TPWD, TNRCC, TGLO, NOAA and USFWS are trustees of the natural resources injured by the discharges from the Colonial Pipeline Company and Texaco Pipeline Inc. pipelines crossing the San Jacinto River, Harris County, Texas pursuant to OPA, 33 U.S.C. Section 2706 (b).

The Natural Resource Trustees have determined that natural resources subject to their trust authority under this act were exposed to gasoline, diesel and crude oil as a result of the unauthorized discharge. The quantity and concentration of the materials discharged and resultant fires was sufficient to result in injury to trust resources and information available to the Natural Resource Trustees indicates that trust resources were affected. Consequently the Natural Resource Trustees are seeking compensation for natural resource damages as identified in the proposed Consent Decree.

TRD-200106630
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Filed: October 29, 2001

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Public Utility Commission of Texas

Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On October 24, 2001, Excel Telecommunications, 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 60228. Applicant intends to reflect a change in ownership/control to VarTec Telecom, Inc.

The Application: Application of Excel Telecommunications, Inc. for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 24898.

Persons with questions about this docket, or who wish to intervene or otherwise participate in these proceedings should make appropriate filings or comments to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326 no later than November 14, 2001. You may contact the commission's Customer Protection Division at (512) 936-7120. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 24898.

TRD-200106544
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 26, 2001

♦ ♦ ♦

Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on October 25, 2001, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of Tellaire Corporation for a Service Provider Certificate of Operating Authority, Docket Number 24905 before the Public Utility Commission of Texas.

Applicant intends to provide facilities-based, data, and resale telecommunications services.

Applicant's requested SPCOA geographic area includes the entire state of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 no later than November 14, 2001. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200106545
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 26, 2001

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Notice of Application for Waiver of Denial by NANPA of Request for a Second NXX Code

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on October 15, 2001, for waiver of denial by the North American Numbering Plan Administrator (NANPA) of applicant's request for NXX codes.

Docket Title and Number: Application of AT&T Communications of Texas, L.P. and Teleport Communications Group-Houston for Waiver of Denial by NANPA of NXX Code Request. Docket Number 24837.

The Application: On October 15, 2001, AT&T Communications of Texas, L.P. and Teleport Communications Group-Houston (collectively AT&T or the Applicant), filed with the commission a request that the commission find good cause to waive the NANPA's denial of AT&T's request for NXX codes. A customer in the Houston Rate Center requested AT&T to supply "a bank of 10,000 continuous Direct Inword Dial (DID)" numbers for its use. To satisfy this request, AT&T asserted that a complete unused full NXX, or 10,000 telephone numbers, from NANPA would be needed. The NANPA denied AT&T's request based on practices designed to prohibit acquisition of unneeded numbering resources. AT&T seeks an exception to the application of NXX assignment guidelines. AT&T asks that the commission overturn or waive the NANPA's denial of AT&T's NXX assignment request.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. The deadline for comment is November 21, 2001. All comments should reference Docket Number 24837.

TRD-200106631
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 29, 2001

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Notice of Application of Southwestern Public Service Company Regarding the Allocation and Payment of Merger Savings Credits

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on October 25, 2001, for an order regarding the allocation and payment of merger savings credits pursuant to the Public Utility Regulatory Act (PURA), Texas Utilities Code Annotated §§11.002 and 31.001 (Vernon 1998 & Supplement 2001) and P.U.C. Substantive Rule §25.1. A summary of the application follows.

Docket Title and Number: Application of Southwestern Public Service Company Regarding the Allocation and Payment of Merger Savings Credits, Docket Number 24904 before the Public Utility Commission of Texas.

Applicant seeks an order authorizing it to continue crediting merger savings credit amounts to customers through Applicant's purchased cost recovery factor after December 31, 2001.

Applicant also seeks confirmation of the present allocation of merger savings credits among customer classes.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 no later than November 16, 2001. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200106655
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 30, 2001

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Notice of Application to Amend Certificate of Convenience and Necessity

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application filed on October 22, 2001, for a certificate of convenience and necessity for a proposed transmission line in Hidalgo County, Texas.

Docket Style and Number: Application of Sharyland Utilities, L.P. (SU) for a Certificate of Convenience and Necessity for a Proposed Transmission Line in Hidalgo County, Texas. Docket Number 24874.

The Application: SU states its preferred route starts in the northeast corner of the Sharyland Plantation Development at the Taylor Road Substation located at 3715 South Taylor Road in McAllen, Texas. The proposed line would travel east for 1/4 mile and turn south along the east boundary of the development along the drainage sump and Bentsen Road. It crosses Military Highway and the St. Louis Brownsville and Mexico Railway 1/2 mile south of Military Highway. The line then travels west, paralleling the south side of the railway, for 1/4 mile to the new Bentsen Substation. It then leaves the substation and continues for 1.4 miles crossing Shary Road, Glasscock Road, and Stewart Road, to the proposed Railroad Substation located 1/4 mile west of Stewart Road in South Mission. The route continues to head west for 1/4 mile, then heads north, crossing over the railway and Military Highway and proceeds northward for approximately 1 mile. It turns west for a distance of 1/4 mile to a point where it again turns northward for 0.6 miles to enter the proposed Mayberry Substation, located 1/4 mile west of Bryan Road. The route next travels north for a distance of 0.12 miles to its intersection with the existing AEP/CPL 138 kV transmission line.

Pursuant to P.U.C. Substantive Rule §25.101(c)(4), the commission must render a decision approving or denying an application for a certificate within one year of the date of filing of a complete application for such certificate.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, P. O. Box 13326, Austin, Texas 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 or (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.

TRD-200106635
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 30, 2001

♦ ♦ ♦

Notice of Application to Amend Certificate of Convenience and Necessity for Minor Boundary Change

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application filed on October 24, 2001, by Southwestern Bell Telephone Company (SWBT) for an amendment to its certificate of convenience and necessity for minor boundary change. Pursuant to P.U.C. Substantive Rule §26.101(b)(4), the presiding officer must enter a final order in this docket within one year of the filing of the application.

Docket Style and Number: Application of Southwestern Bell Telephone Company to Amend Certificate of Convenience and Necessity within Ellis County, Texas, Docket Number 24901.

The Application: On October 24, 2001, Southwestern Bell Telephone Company (SWBT) filed an application to amend its certificate of convenience and necessity for a minor boundary change within its Midlothian and Waxahachie Exchanges in Ellis County, Texas. SWBT asserts the approval of the minor boundary change would enable it to serve a new subdivision more efficiently.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, P. O. Box 13326, Austin, Texas 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 or (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. The deadline for intervention in the proceeding will be established. The commission should receive a letter requesting intervention on or before the intervention deadline.

TRD-200106654
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 30, 2001

♦ ♦ ♦

Notice of ERCOT's Filing of its Petition for Approval of Governance Changes

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of the Petition of the Electric Reliability Council of Texas (ERCOT) for Approval of Governance Changes on October 30, 2001.

Docket Style and Number: Petition of the Electric Reliability Council of Texas (ERCOT) for Approval of Governance Changes - Docket Number 24932.

The Application: ERCOT seeks approval of its revised Bylaws to reflect a change in governance structure pursuant to the Public Utility Regulatory Act (PURA), Texas Utilities Code Annotated §39.151 (Vernon 1998 & Supplement 2001).

Persons who wish to intervene in the proceeding or comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120. Hearing- and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 24932.

TRD-200106667
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 30, 2001

♦ ♦ ♦

Notice of Joint Application to Amend Certificated Service Area Boundaries

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of the Joint Application of Bluebonnet Electric Cooperative, Inc. (BEC) and Austin Energy (AE) to Amend Certificated Service Area Boundaries within Travis County, Texas filed on October 22, 2001. The commission has jurisdiction over this matter pursuant to the Public Utility Regulatory Act (PURA), Texas Utilities Code Annotated, §§14.001, 37.051, 37.053, 37.054 and 37.056 (Vernon 1998 & Supplement 2001) and P.U.C. Substantive Rule §25.101.

Pursuant to P.U.C. Substantive Rule §25.101(c)(5)(B), service area exception applications shall be approved administratively within 45 days of the filing of the application and may be approved sooner if good cause is shown, provided that all utilities whose certificated service area is affected agree to the change and all customers within the affected area have given prior consent.

Docket Style and Number: Joint Application of Bluebonnet Electric Cooperative, Inc. and Austin Energy to Amend Certificated Service Area Boundaries with Travis County, Texas - Docket Number 24876.

The Application: BEC and AE filed an application to amend certificated service area boundaries within northeast Travis County along Highway 290 East. Applicants assert this boundary change will eliminate the need for additional, duplicate power lines and would result in the lowering of service costs to future customers along U.S. Highway 290, where BEC already operates adequate service facilities. Otherwise, AE would have to duplicate BEC facilities along Highway 290 East to serve those same customers.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, P. O. Box 13326, Austin, Texas 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 or (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.

TRD-200106637
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 30, 2001

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Public Notice of Amendment to Interconnection Agreement

On October 18, 2001, Southwestern Bell Telephone Company and Southern Telcom Network, 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 2001) (PURA). The joint application has been designated Docket Number 24861. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing ten copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 24861. 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 November 19, 2001, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those

issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the commission's Customer Protection Division at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 24861.

TRD-200106491
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 25, 2001

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Public Notice of Amendment to Interconnection Agreement

On October 18, 2001, Southwestern Bell Telephone Company and MCImetro Access Transmission Services, 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 2001) (PURA). The joint application has been designated Docket Number 24864. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing ten copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 24864. 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 November 19, 2001, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the commission's Customer Protection Division at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 24864.

TRD-200106492
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 25, 2001

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Public Notice of Amendment to Interconnection Agreement

On October 18, 2001, Southwestern Bell Telephone Company and MCI WorldCom Communications, Inc., collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under Section 252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2001) (PURA). The joint application has been designated Docket Number 24865. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing ten copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 24865. 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 November 19, 2001, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the commission's Customer Protection Division at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 24865.

TRD-200106493
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 25, 2001

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Public Notice of Amendment to Interconnection Agreement

On October 22, 2001, Southwestern Bell Telephone Company and TechTel Communications, 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 2001) (PURA). The joint application has been designated Docket Number 24875. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing ten copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 24875. 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 November 19, 2001, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the commission's Customer Protection Division at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 24875.

TRD-200106494
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 25, 2001

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Public Notice of Amendment to Interconnection Agreement

On October 23, 2001, Southwestern Bell Telephone Company and Brooks Fiber Communications of Texas, 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 2001) (PURA). The joint application has been designated Docket Number 24897. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing ten copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 24897. 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 November 19, 2001, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the commission's Customer Protection Division at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 24897.

TRD-200106495
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 25, 2001

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Public Notice of Intent to File Pursuant to P.U.C. Substantive Rule §26.214

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.214

Docket Title and Number. Sugar Land Telephone Company Application for Approval of LRIC Study for ISDN/PRA Provisioning Pursuant to P.U.C. Substantive Rule §26.214 on November 1, 2001.

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 24882. 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 commission's 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-200106500
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 26, 2001

♦ ♦ ♦

Public Notice of Intent to File Pursuant to P.U.C. Substantive Rule §26.214

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.214

Docket Title and Number. Sugar Land Telephone Company Application for Approval of LRIC Study for Voice Mail Promotion Pursuant to P.U.C. Substantive Rule §26.214 on November 1, 2001.

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 24883. 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 commission's 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-200106501
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 26, 2001

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Public Notice of Intent to File Pursuant to P.U.C. Substantive Rule §26.214

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.214

Docket Title and Number. Texas Alltel, Inc. Application for Approval of LRIC Study for Voice Mail Promotion Pursuant to P.U.C. Substantive Rule §26.214 on November 1, 2001.

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 24884. 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 commission's 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-200106502
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 26, 2001

♦ ♦ ♦

Public Notice of Intent to File Pursuant to P.U.C. Substantive Rule §26.214

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.214

Docket Title and Number. Valor Telecommunications of Texas, LP Application for Approval of LRIC Study for City Plex Service Pursuant to P.U.C. Substantive Rule §26.214 on October 29, 2001.

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 24885. 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 commission's 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-200106503
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 26, 2001

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Public Notice of Intent to File Pursuant to P.U.C. Substantive Rule §26.214

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.214

Docket Title and Number. Texas Alltel, Inc. Application for Approval of LRIC Study for New Business Calling Packages Pursuant to P.U.C. Substantive Rule §26.214 on November 2, 2001.

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 24894. 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 commission's 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-200106504
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 26, 2001

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Public Notice of Intent to File Pursuant to P.U.C. Substantive Rule §26.214

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.214

Docket Title and Number. Sugar Land Telephone Company Application for Approval of LRIC Study for New Business Calling Packages Pursuant to P.U.C. Substantive Rule §26.214 on November 2, 2001.

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 24895. 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 commission's 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-200106505
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 26, 2001

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Public Notice of Interconnection Agreement

On October 25, 2001, Lightyear Communications, Inc. and Verizon Southwest, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under Section 252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2001) (PURA). The joint application has been designated Docket Number 24909. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing ten copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 24909. 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 November 20, 2001, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326. You may call the commission's Customer Protection Division at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and

speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 24909.

TRD-200106599
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 26, 2001

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Public Notice of Interconnection Agreement

On October 25, 2001, Now Communications, Inc. and Verizon Southwest, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under Section 252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2001) (PURA). The joint application has been designated Docket Number 24910. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing ten copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 24910. 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 November 20, 2001, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the commission's Customer Protection Division at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 24910.

TRD-200106600
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 26, 2001

♦ ♦ ♦

Public Notice of Interconnection Agreement

On October 25, 2001, Ernest Communications, Inc. and Verizon Southwest, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under Section 252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2001) (PURA). The joint application has been designated Docket Number 24911. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing ten copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 24911. 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 November 20, 2001, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this project or who wish to comment on the joint application should contact the Public Utility Commission of

Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326. You may call the commission's Customer Protection Division at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 24911.

TRD-200106601
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 26, 2001

♦ ♦ ♦

Public Notice of Interconnection Agreement

On October 25, 2001, United Technological Systems Incorporated doing business as Uni-Tel and Verizon Southwest, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under Section 252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2001) (PURA). The joint application has been designated Docket Number 24912. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing ten copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 24912. 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 November 20, 2001, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the commission's Customer Protection Division at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 24912.

TRD-200106602
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 26, 2001

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Texas Racing Commission

Correction of Error

The Texas Racing Commission proposed an amendment to 16 TAC §323.4 in the October 26, 2001, issue of the *Texas Register* (26 TexReg 8469).

Due to an error by the Commission subsections (b) - (c) were omitted. The subsections should have been included and marked as "no change."

TRD-200106632

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San Antonio-Bexar County Metropolitan Planning Organization

Request for Proposal

The San Antonio-Bexar County Metropolitan Planning Organization (MPO) is seeking proposals from qualified firms to develop an Infrastructure Needs Assessment for the Brooks City-Base Area.

A copy of the Request for Proposals (RFP) may be requested by calling Jeanne Geiger, Senior Transportation Planner, at (210) 227-8651 or by downloading the RFP and attachments from the MPO's website at www.sametroplan.org. Anyone wishing to submit a proposal must do so by 12:00 p.m. (CST), Friday, November 30, 2001 at the MPO office:

Janet A. Kennison, Administrator

Metropolitan Planning Organization

1021 San Pedro, Suite 2200

San Antonio, Texas 78212

The contract award will be made by the MPO's Transportation Steering Committee based on the recommendation of the project's consultant selection committee. The Infrastructure Needs Assessment for the Brooks City-Base Area Consultant Selection Committee will review the proposals based on the evaluation criteria listed in the RFP.

Funding for this study, in the amount of $200,000, is contingent upon the availability of Federal transportation planning funds.

TRD-200106469
Janet A. Kennison
Administrator
San Antonio-Bexar County Metropolitan Planning Organization
Filed: October 25, 2001

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University of North Texas Health Science Center

Notice of Request for Information (RFI) for Outside Legal Services Related to Intellectual Property Matters

The University of North Texas System (UNT System) Texas System (U. T. System) requests information from law firms interested in representing its component institution the University of North Texas Health Science Center at Fort Worth (UNTHSC) U. T. System and its component institutions in intellectual property matters. This RFI is issued to establish (for the time frame beginning September 1, 20011999 to August 31, 20022000) a referral list from which UNT System U. T. System, by and through its Office of Vice Chancellor and General Counsel, will select appropriate counsel for representation on specific intellectual property matters as the need arises.

Description: The UNT System comprises one health institution and two academic institutions located in three cities in Texas. The U. T. System comprises six health institutions and nine academic institutions located in eleven cities in TexasResearch activities and other educational pursuits at UNTHSCeach institution produce intellectual property that is carefully evaluated for protection and licensing to commercial entities. Subject to approval by the Office of the Attorney General (OAG) for the State of Texas, UNTHSC U. T. System will engage outside counsel to prepare, file, prosecute, and maintain patent applications in the United States and other countries; secure copyright protection for computer software; and to prepare, file and prosecute applications to register trademarks and service marks in the United States and other countries. UNTHSC U.T. System also will engage outside counsel from time to time to pursue litigation against infringers of these intellectual property rights and to handle other related matters. The UNT System U. T. System invites responses to this RFI from qualified firms for the provision of such legal services under the direction and supervision of UNT System's Office of Vice Chancellor and General CounselU. T. System's Office of General Counsel.

Responses; Qualifications: Responses to this RFI should include at least the following information: (1) a description of the firm's or attorney's qualifications for performing the legal services requested, including the firm's prior experience in intellectual property-related matters, and appropriate information regarding efforts made by the firm to encourage and develop the participation of minorities and women in the provision both of the firm's legal services generally and intellectual property matters in particular; (2) the names, experience, and scientific or technical expertise of the attorneys who may be assigned to work on such matters; (3) the submission of fee information (either in the form of hourly rates for each attorney who may be assigned to perform services in relation to UNTHSC's U. T. System's intellectual property matters, flat fees, or other fee arrangements directly related to the achievement of specific goals and cost controls) and billable expenses; (4) disclosures of conflicts of interest (identifying each and every matter in which the firm has, within the past calendar year, represented any entity or individual with an interest adverse to the UNT System, UNTHSC, U. T. System or to the State of Texas, or any of its boards, agencies, commissions, universities, or elected or appointed officials); and (5) confirmation of willingness to comply with policies, directives and guidelines of the UNT System, UNTHSC U. T. System and the OAG for the State of Texas.

The law firm(s) or attorney(s) will be selected based on demonstrated knowledge and experience, quality of staff assigned to perform services under the contract, compatibility with the goals and objectives of UNTHSC, and reasonableness of proposed fees. The successful firm(s) or attorney(s) will be required to sign the Texas OAG's Outside Counsel Agreement, and execution of a contract with UNTHSC is subject to approval by the Texas OAG. UNTHSC reserves the right to accept or reject any or all responsessubmitted. UNTHSC is not responsible for and will not reimburse any costs incur red in developing and submitting a response.

UNTHSC previously contracted with the law firm of Merchant & Gould LLP for intellectual property services and intends to award one of the contracts to Merchant & Gould LLP to continue last year's work.

Format and Person to Contact: Two copies of the response are requested. The response should be typed, preferably double spaced, on 8 1/2 x 11 inch paper with all pages sequentially numbered, and either stapled or bound together. They should be sent by mail, facsimile, or electronic mail, or delivered in person, marked "Response to Request for Information," and addressed to William S. LeMaistre, JD, MPH, Associate General Counsel, Office of the Vice Chancellor and General Counsel, UNT System, c/o UNTHSC Legal Affairs, 3500 Camp Bowie Blvd., Fort Worth, TX, 76107 -2699; or email ; or fax to (817) 735-0433.

Georgia K. Harper, Section Manager for Intellectual Property, Office of General Counsel, The University of Texas System, 201 West 7th Street, Austin, Texas 78701 (gharper@utsystem.edu; fax: (512) 499-4523; telephone (512) 499-4462 for questions). Deadline for Submission of Response: All responses must be received by UNTHSC Legal Affairsthe Office of General Counsel of U. T. System at the address set forth above no later than 5:00 p.m., Friday, November 30, 2001. Questions regarding this request may be directed to Mr. LeMaistre at (817) 735-2527.

TRD-200106731

Ronald R. Blanck, D. O.

President

University of North Texas Health Science Center at Fort Worth

Filed: October 31, 2001

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Texas Water Development Board

Applications Received

Pursuant to the Texas Water Code, Section 6.195, the Texas Water Development Board provides notice of the following applications received by the Board:

El Paso County Water Authority, 1539 Pawling Drive, El Paso, Texas, 79927-6915, received August 29, 2001, application for financial assistance in the amount of $7,780,000 from the Texas Water Development Funds.

City of Nacogdoches, P.O. Drawer 630648, Nacogdoches, Texas, 75963-0648, received September 29, 2001, application for financial assistance in the amount of $17,630,000 from the Drinking Water State Revolving Fund.

North Alamo Water Supply Corporation, 420 South Doolittle Road, Edinburg, Texas, 78539, received August 21, 2001, application for financial assistance in the amount of $757,011 from the Economically Distressed Areas Account of the Texas Water Development Funds.

Colorado River Municipal Water District, P. O. Box 869, Big Spring, Texas, 79721-0869, received September 21, 2001, application for financial assistance in an amount not to exceed $20,800 from the Research and Planning Fund.

Lavaca-Navidad River Authority, P.O. Box 429, Edna, Texas, 77957-0429, received September 21, 2001, application for financial assistance in an amount not to exceed $15,000 from the Research and Planning Fund.

Nueces River Authority, Coastal Bend Division, 6300 Ocean Drive, NRC 3100, Corpus Christi, Texas, 78412, received November 1, 2001, application for financial assistance in an amount not to exceed $40,000 from the Research and Planning Fund.

Floyd County Soil and Water Conservation District, U.S. Department of Agriculture Building, P.O. Box 157, Floydada, Texas, 79235, received June 11, 2001, application for financial assistance in the amount of $6,410 from the Agricultural Conservation Grants to Districts Program.

Hartley County Soil and Water Conservation District, Box 15, Hartley, Texas, 79044, received August 7, 2001, application for financial assistance in the amount of $5,142.75 from the Agricultural Conservation Grants to Districts Program.

Hudspeth County Underground Water Conservation District No. 1, P.O. Box 212, Dell City, Texas, 79837, received September 28, 2001, application for financial assistance in the amount of $25,000 from the Agricultural Conservation Grants to Districts Program.

Wilbarger Soil and Water Conservation District, 5015 College Drive, Room 3, Vernon, Texas, 76384, received October 16, 2000, application for financial assistance in the amount of $5,120.25 from the Agricultural Conservation Grants to Districts Program.

Hockley and Lubbock Soil and Water Conservation Districts, 920 Austin, Levelland, Texas, 79339, received February 9, 2001, application for financial assistance in the amount of $4,807.50 from the Agricultural Conservation Grants to Districts Program.

Rolling Plains Groundwater Conservation District, P.O. Box 717, Munday, Texas, 76371, received September 30, 2001, application for financial assistance in the amount of $2,381.25 from the Agricultural Conservation Grants to Districts Program.

Rio Blanco Soil and Water Conservation District, 402 South Ayrshire, Crosbyton, Texas, 79322, received March 1, 2001, application for financial assistance in the amount of $4,807.50 from the Agricultural Conservation Grants to Districts Program.

Wichita Brazos Soil and Water Conservation District, 1101 East Main, Knox City, Texas, 79529, received February 2, 2000, application for financial assistance in the amount of $750 from the Agricultural Conservation Grants to Districts Program.

Delta Lake Irrigation District, Rt. 1, Box 225, Edcouch, Texas, 78538, received September 28, 2001, application for financial assistance in the amount of $7,480 from the Agricultural Conservation Grants to Districts Program.

TRD-200106715
Gail L. Allan
Director of Project-Related Legal Services
Texas Water Development Board
Filed: October 31, 2001

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Texas Workers' Compensation Commission

Request for Proposal

Invitation and Purpose. Pursuant to Chapter 2254, Subchapter B, Texas Government Code, the Texas Workers' Compensation Commission (Commission) acting on behalf of the Health Care Network Advisory Committee (HNAC) announces and publishes this Request for Proposals (RFP) for the provision of consulting services to the Commission and the HNAC. The purpose and scope of the project is to determine whether fee-for-service regional workers' compensation health care delivery networks designed to improve the quality and reduce the cost of health care, with active health care management and specific health care services or a full range of health care services are feasible (Feasibility Study). The Feasibility Study contains several components, or phases, as specified elsewhere in the RFP. Consultant(s) (Consultant) may bid individually on separate phases of the project or on the project as a whole. The Commission anticipates entering into a contract on behalf of HNAC for consulting services with the selected Consultant whose qualifications meet or exceed those required in this RFP. The purpose and scope of the project is defined more specifically within in the RFP.

Procedure for Award. The Commission shall select Consultant based on demonstrated competence, knowledge, and qualifications and on the reasonableness of the proposed fee for the services and responsiveness to the RFP and stated Evaluation and Selection Criteria as provided in Section 4 of the RFP, after approval from the Commission Source Select Review Board. The contract will consist of the RFP, the Consultant's proposal, and any addendums, as finally negotiated and approved by the Commission.

Contact. The Commission is the Issuing Office and the sole point of contact for the RFP. All communications concerning this procurement must be in writing and addressed to:

Hope Teneyuque

Texas Workers' Compensation Commission

4000 South IH 35, MS 72

Austin, Texas 78704-7491

FAX (512) 804-4216

E-MAIL: hope.teneyuque@twcc.state.tx.us

Deadline for Submission of Proposals; Copies. An original and six (6) copies of each proposal must be submitted to and received in the Issuing Office no later than 3:00 p.m. (CZT), December 21, 2001. FAXED OR E-MAIL RESPONSES ARE NOT ACCEPTABLE. Proposals received in the Issuing Office after deadline will not be accepted.

TRD-200106732
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Filed: October 31, 2001

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Texas Workforce Commission

Request for Qualifications for Selection of Professional Architectural/Engineering Services

The Texas Workforce Commission (TWC), Facilities, Construction and Maintenance Department, 101 E. 15th St., Room 226T, Austin, Texas 78778-0001 together with and on behalf of the Cameron County Workforce Development Board d/b/a Cameron Works, Inc. (the Board), hereby issues this request for statement of interest and qualifications (RFQ) for the purpose of selecting a professional architectural/engineering (A/E) firm for interior and exterior building renovations for TWC agency owned building located at 245 E. Levee Street, Brownsville, Texas.

The following work is being considered for the interior and exterior renovation (this list is not exhaustive, but is intended to give a reasonable understanding of the scope of the project):

Interior and exterior building renovations, exterior structural repairs and additions; space planning; roof repairs and designs; providing technical advice; cost estimates; plumbing; mechanical systems; electrical;

HVAC; life safety; canopy design; remove, repair and/or replace leaking and deteriorated parts; parking lot renovations, fencing repair and replacement, ADA/TAS compliance; asbestos abatement, testing and monitoring.

The contract will require the A/E firm to develop the scope of the individual projects, provide technical advice and cost estimates, prepare construction drawings, specifications and bid documents. The contract will also require the A/E firm to perform project management, coordinate the work, be responsible for compliance with applicable regulations, and perform budgeting/payment activities.

The estimated budget for these projects is $347,992.00, which includes construction costs, architectural fees, contingencies, and other project related services. If you are awarded this professional services contract, you will be required to develop the scope of the individual projects, develop bid documents, drawings and specifications, provide oversight and project administration.

If your firm is interested in being considered to serve as prime professional services contractor for this project, please provide the following information about your company and associates who will perform professional services under this contract.

Firm Name; Business Address; Telephone Number; Business Office Hours; Years in Business; Texas Professional License Number; Is company certified as a Historically Underutilized Business (HUB)?; Number of employees available to work on this project; Name of project manager for this project; List projects over $300,000.00 completed in the last five years for which you served as prime administrator.

This information must be submitted to the following address (a company brochure or project proposal can be submitted in lieu of the questionnaire):

Texas Workforce Commission

Attn: Dan Cibulka

101 E. 15th Street, Room 226T

Austin, Texas 78778-0001

Selection will be based on respondent's demonstrated experience on projects of similar size and complexity; quality of design; budgetary experience and responsibility; the size, availability, expertise and experience of respondent's staff; respondent's workload, to the extent it might impact on the design schedule for this project; respondent's willingness to accept owner-required design, contract and construction standards; and respondent's organization and management, including type of ownership, number of years respondent has been established, and the experience of respondent's members in working together as a team.

The TWC and the Board, recognize the benefits of aiding and stimulating the growth of small disadvantaged and small women-owned business enterprises, and therefore require that your firm consider in its proposal the participation of qualified, certified HUBs as subcontractors. It is TWC's intention that qualified HUBs receive a minimum of twenty percent (20%) of this professional services contract. If your firm is not certified as a HUB, your response to this RFQ should include a plan for utilization of HUBs in providing services to TWC in connection with any contractual agreement awarded to you as a result of this RFQ.

The TWC and the Board are not obligated to enter into any contract or agreement, and TWC reserves the right to reject any or all proposals. The TWC reserves the right to enter into negotiations with any and all respondents hereto. Any respondent hereto may be requested to appear for an in-person interview. Depending on available resources, TWC reserves the right to award this project based on individual buildings.

To be considered, your response must be received at the above address on or before 2:00 p.m. on December 14, 2001. Any questions concerning this request may be directed to Dan Cibulka at 512-936-2358.

TRD-200106624
John Moore
Assistant General Counsel
Texas Workforce Commission
Filed: October 29, 2001

How to Use the Texas Register

Information Available: The 13 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following a 30-day public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Open Meetings - notices of open meetings.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 26 (2001) is cited as follows: 26 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "26 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 26 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For subscription information, see the back cover or call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC)*** is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles (using Arabic numerals) and Parts (using Roman numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15:

1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 19, April 13, July 13, and October 12, 2001). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).

Texas Register
Services

The *Texas Register* offers the following services. Please check the appropriate box (or boxes).

Texas Natural Resource Conservation Commission, Title 30

❑ **Chapter 285** $25 ❑ update service $25/year *(On-Site Wastewater Treatment)*
❑ **Chapter 290** $25 ❑ update service $25/year *(Water Hygiene)*
❑ **Chapter 330** $50 ❑ update service $25/year *(Municipal Solid Waste)*
❑ **Chapter 334** $40 ❑ update service $25/year *(Underground/Aboveground Storage Tanks)*
❑ **Chapter 335** $30 ❑ update service $25/year *(Industrial Solid Waste/Municipal Hazardous Waste)*

Update service should be in ❑ printed format ❑ 3 1/2" diskette

Texas Workers Compensation Commission, Title 28

❑ Update service $25/year

Texas Register Phone Numbers	**(800) 226-7199**
Documents	(512) 463-5561
Circulation	(512) 463-5575
Marketing	(512) 305-9623
Texas Administrative Code	(512) 463-5565

Information For Other Divisions of the Secretary of State's Office

Executive Offices	(512) 463-5701
Corporations/	
Copies and Certifications	(512) 463-5578
Direct Access	(512) 475-2755
Information	(512) 463-5555
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Name Availability	(512) 463-5555
Trademarks	(512) 463-5576
Elections	
Information	(512) 463-5650
Statutory Documents	
Legislation	(512) 463-0872
Notary Public	(512) 463-5705
Uniform Commercial Code	
Information	(512) 475-2700
Financing Statements	(512) 475-2703
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