TEXAS REGISTER

Volume 26 Number 49 December 7, 2001 *Pages 9991-10176*

This month's front cover artwork:

Artist: *Tereena Woods*
9th Grade
Jefferson 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
P.O. Box 13824
Austin, TX 78711-3824
(800) 22607199
(512) 463-5561
FAX (512) 463-5569
http://www.sos.state.tx.us

Director - Dan Procter

Customer Relations
Leti Benavides
LaKiza Fowler-Sibley

Texas Administrative Code
Dana Blanton
Roberta Knight

Texas Register
Carla Carter
Melissa Dix
Kris Hogan
Diana Muniz-Franklin

Circulation/Marketing
Jill S. Ledbetter

ATTORNEY GENERAL

PROPOSED RULES

TELECOMMUNICATIONS INFRASTRUCTURE FUND BOARD

OPERATING RULES OF THE TELECOMMUNICATIONS INFRASTRUCTURE FUND BOARD

PUBLIC UTILITY COMMISSION OF TEXAS

SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

TEXAS DEPARTMENT OF LICENSING AND REGULATION

TEXAS COMMISSION OF LICENSING AND REGULATION

BOARD OF NURSE EXAMINERS

LICENSURE, PEER ASSISTANCE AND PRACTICE

TEXAS DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

MEDICAID PROGRAMS

LOCAL AUTHORITY RESPONSIBILITIES

PROVIDER CLINICAL RESPONSIBILITIES

MEDICAID STATE OPERATING AGENCY RESPONSIBILITIES

COMPTROLLER OF PUBLIC ACCOUNTS

TAX ADMINISTRATION

ADOPTED RULES

TEXAS ANIMAL HEALTH COMMISSION

RIDING STABLE REGISTRATION PROGRAM

SWINE

GRANTS, GIFTS AND DONATIONS

EMERGENCY RESPONSE AND MANAGEMENT

TEXAS DEPARTMENT OF ECONOMIC DEVELOPMENT

TEXAS LEVERAGE FUND PROGRAM

TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

LICENSING

RULES OF PROFESSIONAL CONDUCT

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

ENFORCEMENT

REGULATORY FLEXIBILITY AND ENVIRONMENTAL MANAGEMENT SYSTEMS

APPLICATION PROCESSING

CONSOLIDATED PERMITS

UNDERGROUND INJECTION CONTROL

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

•••

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

OFFICE OF THE ATTORNEY GENERAL

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

Opinions

Opinion No. JC-0434

The Honorable David Counts, Chair, Natural Resources Committee, Texas House of Representatives, P.O. Box 2910, Austin, Texas 78768-2910, regarding determination of "actual costs" a hospital district must charge nonindigent district residents and related questions: clarification of Attorney General Opinion JC-0220 (2000) (RQ-0368-JC).

SUMMARY

Garza County Hospital District must charge nonindigent residents the "reasonable and customary cost of [medical care] services." Payment for those charges may be made directly to the District or to the contract medical provider. Annual contract payments made by the District to a contract medical provider are not, as a matter of law, an "illegal subsidy."

Attorney General Opinion JC-0220 (2000) is modified by statute.

Opinion No. JC-0435

Mr. Tom Harrison, Executive Director, Texas Ethics Commission, P.O. Box 12070, Capitol Station, Austin, Texas 78711-2070, regarding whether the Texas Ethics Commission is precluded from promptly providing public access to electronic copies of certain reports by §254.0401(b) of the Election Code (RQ-0412-JC).

SUMMARY

Section 254.0401(b) of the Election Code prohibits the Texas Ethics Commission from making available on the Internet a campaign contribution and expenditure report prior to the time all those who are required to file the report in a particular campaign have done so or until a date certain after the filing deadline. However, this section does not prohibit the Commission from providing an electronic copy of a report by other means prior to the time the reports are available on the Internet. Therefore, at any time after a report is filed, the Commission must disclose electronic copies of the report by, for example, computer diskette or CD as required by the Public Information Act.

Opinion No. JC-0436

The Honorable Pat Phelan, Hockley County Attorney, 802 Houston, Suite 211, Levelland, Texas 79336 and The Honorable G. Dwayne Pruitt, Terry County Attorney, 500 West Main, Room 208E, Brownfield, Texas 79316-4335, regarding the ad valorem taxation of mineral interests that extend across the boundary between two counties (RQ-0389-JC).

SUMMARY

When a mineral interest appertains to surface property that crosses a county line, each county must separately determine the market value of the mineral interest only as it pertains to surface property located in the county according to generally accepted appraisal methods. See Texas Tax Code Annotated §§23.01 - .013, .175 (Vernon 1992 & Supp. 2001); 34 Texas Administrative Code §9.4031 (2001). If the market value of the mineral interest is uniform across the surface estate, simply determining the market value of the entire mineral interest and allocating that value according to the ratio of surface acreage located in each county may be an appropriate method of appraising the market value of the mineral interest. If, on the other hand, the market value is not uniform across the surface estate, simply allocating the value of the entire mineral interest based on surface acreage is not appropriate.

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

TRD-200107347
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: November 28, 2001

♦ ♦ ♦

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 18. TELECOMMUNICATIONS INFRASTRUCTURE FUND BOARD

CHAPTER 471. OPERATING RULES OF THE TELECOMMUNICATIONS INFRASTRUCTURE FUND BOARD

1 TAC §471.7

The Telecommunications Infrastructure Fund Board (agency) proposes new §471.7, relating to the agency's training program. New §471.7 describes the policy of the agency to provide training and educational opportunities to its employees.

Frank Pennington, Director of Finance and Administration, Telecommunications Infrastructure Fund Board (TIFB), has determined that for the first five-year period the section is in effect there may be costs to the state. However, because of the inability to project the number of training activities under this rule, the cost to the state cannot be determined with any accuracy. The total costs to the state will be limited by the agency's administrative budget and the funds available for training. There will be no fiscal implication for local government as a result of enforcing the section.

Mr. Pennington also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the continued professional development of agency employees in order to better serve the public. There will be no effect on small or micro businesses. There may be an anticipated economic cost to any TIFB employee who does not to comply with the Academic Staff Development Obligations.

Comments on the proposal may be submitted to Frank Pennington, Telecommunications Infrastructure Fund Board, P.O. Box 12876, Austin, Texas 78711-2876, (512) 344-4304 or email at: fpenning@tifb.state.tx.us no later than 30 days from the date that the proposed rule is published in the *Texas Register*.

The new section is proposed pursuant to Government Code, §656, Subchapter C.

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

§471.7. Agency Training Plan.

(a) Purpose. In accordance with the State Employees Training Act, Government Code, Chapter 656, Subchapter C, it is the policy of the Telecommunications Infrastructure Fund Board (TIFB) to provide training and educational opportunities to its employees. This program is designed to help employees gain knowledge about general subjects required by the agency and to allow employees to participate in job related professional development opportunities that will increase an employee's job potential. This subchapter prescribes the policies governing employee eligibility for participation in TIFB's Staff Development programs and the obligations of the employees upon receiving education.

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

(1) Academic Staff Development--any subject offered through an accredited college or university.

(2) Board--Telecommunications Infrastructure Fund Board's governing board.

(3) Employee--An individual employed with TIFB in either a full-time or part-time position, not including contracted employees.

(4) Full-time employee--an individual employee with TIFB and working 40 hours or more per week.

(5) Hardship--A serious or catastrophic illness, family emergency, or extenuating circumstance beyond the control of the student that precludes the student from being reasonably expected to comply with the terms of an education assistance agreement.

(6) Institution of higher education--a public or private technical institute, junior college, senior college, university, medical or dental unit, or other institution offering an associate's baccalaureate, master's or doctoral degree program.

(7) Part-time employee--an individual employee with TIFB and working less than 40 hours per week.

(8) Professional Staff Development--educational, academic, or technical training used to improve an employee's professional or technical knowledge and skills or to maintain license requirements.

(9) Reimburse--to repay monies spent for the cost of an institute of higher educaion's tuition fees and books.

(10) Staff Development--planned, structured activities designed to improve employee job performance and job related skills by achieving specific, measurable, and predetermined learning objectives.

(11) TIFB--Telecommunications Infrastructure Fund Board, the agency.

(c) Professional Staff Development. Professional Staff Development may include workshops, seminars, conferences, training sessions or meetings.

(1) Purpose. TIFB provides employees with a Professional Staff Development program, which allows employees to gain knowledge about general subjects and encourages employees to participate in job related professional development opportunities that will help each employee to achieve his or her highest potential for the job they hold. This section establishes eligibility criteria for employee participation in TIFB training opportunities.

(2) Eligibility. TIFB may provide professional staff development for an employee if such training is:

(A) designed to increase the employee's competency through an objective, systematic program of teaching and/or self-study and is utilized to improve an employee's professional or technical knowledge and skills, or to maintain license requirements;

(B) directly related to the employee's current job duties, or for the purpose of upward mobility into a position currently available within the employee's career path; or

(C) designed to increase an employee's awareness of State or Federal laws regarding equal opportunity, non-discrimination, drug-free workplace, AIDS/HIV awareness, workplace safety, and other relevant topics.

(3) Attendance. Attendance is considered voluntary unless otherwise noted.

(A) TIFB may sponsor in-house staff development for all employees.

(B) A TIFB employee may be required to attend specific training as part of the employee's duties or perspective duties.

(4) Approval of training requests is not automatic and does not affect at-will status.

(A) Approval to participate in the TIFB's Professional Staff Development program is subject to supervisory approval and the availability of funds within TIFB's budget; and

(B) Approval to participate in TIFB's Professional Staff Development program, including in-house or TIFB-sponsored training shall not in any way affect an employee's at-will status and in no way constitutes a guarantee or indication of continued or future employment.

(d) Professional Staff Development Obligations.

(1) Obligation. Employee training under this section is conditional upon the employee:

(A) attending and satisfactorily completing the training, including passing tests or other types of performance measures where required; and

(B) initiating completion of the prescribed TIFB forms, which set forth the employee professional development agreement with terms and conditions of the training assistance.

(2) Waiver. For training covered by Texas Government Code, Chapter 656, Subchapter D, the Board has the discretion to waive an employee's obligation to abide by the terms of the agreement if the Board finds that a waiver is in the best interest of TIFB or is warranted because of an extreme personal hardship suffered by the employee.

(e) Academic Staff Development. TIFB's Academic Staff Development Program may include college-level courses or courses which award continuing professional education units.

(1) Purpose. TIFB encourages employees to participate in job-related professional development opportunities that will help each employee to achieve his or her highest potential for the job they hold or allow upward mobility into a position within their career path. This section establishes eligibility criteria for participation in the program.

(2) Eligibility. To qualify for TIFB's Academic Staff Development program, an employee:

(A) must currently meet or exceed performance standards in job performance;

(B) must not be on probation of any kind;

(C) must seek enrollment in a field of study where:

(i) course content is related to the employee's present job duties, or the course is taken for the purpose of upward mobility into a position available within TIFB; and

(ii) the course will equip the employee with the skills and knowledge needed to work efficiently and improve the employee's job effectiveness;

(3) Eligible Expenses. Financial assistance may be awarded for coursework registration and documented, require books.

(4) Approval to participate in TIFB's Academic Staff Development program is not automatic and does not affect at-will status.

(A) Participation is subject to supervisory approval and the availability of funds within TIFB's budget.

(B) Participation approval in the TIFB's Academic Staff Development program shall not in any way affect an employee's at-will status and in no way constitutes a guarantee or indication of continued or future employment.

(f) Academic Staff Development Program Obligations.

(1) Obligation. Academic staff development under this section is conditional upon the employee:

(A) obtaining supervisory approval for the particular class and cost, up to $600 per class prior to registration;

(B) attending the course after working hours or, if the course is taken during working hours, and approved by the employee's supervisor, accrued leave is taken to attend the class;

(C) initiating completion of the prescribed TIFB forms, which set forth the employee academic staff development agreement with the terms and conditions of training assistance; and

(D) completing the course with a grade of "C" or above.

(2) Waiver. For academic staff development covered by Texas Government Code, Chapter 656, Subchapter D, the Board has the discretion to waive an employee's obligation to abide by the terms of the agreement if the Board finds that a waiver is in the best interest of TIFB or is warranted because of an extreme personal hardship suffered by the employee.

This 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 November 26, 2001.

TRD-200107217
Robert J. "Sam" Tessen
Executive Director
Telecommunications Infrastructure Fund Board
Earliest possible date of adoption: January 6, 2002
For further information, please call: (512) 344-4306

♦ ♦ ♦

TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

SUBCHAPTER P. TEXAS UNIVERSAL SERVICE FUND

16 TAC §26.418

The Public Utility Commission of Texas (commission) proposes amendments to §26.418, relating to Designation of Common Carriers as Eligible Telecommunications Carriers to Receive Federal Universal Service Funds. The proposed amendments are comprised of several minor non-substantive changes and substantive revisions to add new subsections §26.418(j) and (k) that address the requirements of the Federal Communications Commission's (FCC's) *Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking* in CC Docket No. 96-45, and *Report and Order* in CC Docket No. 00-256 (FCC's *Report and Order*) (refer to FCC No. 01-157 for review at the FCC's website: www.fcc.gov) adopted on May 10, 2001. Project Number 24521 is assigned to this proceeding.

Non-Substantive Changes to Rule Language

Proposed §26.418 amends internal references and reflects minor non-substantive changes necessary to ensure consistency with changes made by the FCC.

Substantive Changes to Rule Language

Proposed §26.418(j) is added to provide an annual certification process to determine whether the federal universal service fund (FUSF) support provided to rural and non-rural telecommunications carriers is being utilized consistent with the Federal Telecommunications Act (FTA) §254(e). Specifically, proposed §26.418(j) establishes the filing deadlines for the annual certification process, and the commission's authority and responsibilities for review of the carriers' submissions.

Proposed §26.418(k) is added to provide the procedures for disaggregation of rural telecommunications carriers' FUSF support as outlined in the FCC's *Report and Order*. Specifically, proposed §26.418(k) provides rural carriers the flexibility to disaggregate their FUSF support according to three "paths" established by the FCC. The amendments allow a rural carrier to elect not to disaggregate and continue receiving funds on an access line averaged basis, in accordance with their federal study areas. The amendment also allows a rural carrier to either disaggregate their study area based on a plan that has been approved by the commission or elect a self-certification process to receive greater high cost support for targeted areas. Proposed §26.418 also addresses the commission's authority to review and monitor the requirements outlined in the FCC's *Report and Order*.

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

Ms. Ervin 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 the continuous provisioning of affordable basic local telecommunications service in high cost areas throughout the state. 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.

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

The commission staff will conduct a public hearing on this rulemaking, if requested, pursuant to Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Texas 78701, at 10:00 a.m. on Monday, January 15, 2002.

Comments on the proposed amendments (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. Comments should be organized in a manner consistent with the organization of the proposed rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 24521.

These amendments are 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, the FCC's *Fourteenth Report and Order* in CC Docket No. 96-45, which requires a state commission to implement an annual certification process to determine whether rural and non-rural carriers are utilizing FUSF support consistent with FTA §254(e) and procedures for the disaggregation of a rural carrier's FUSF support below the study area.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 56.021- 56.028.

§26.418. Designation of Common Carriers as Eligible Telecommunications Carriers to Receive Federal Universal Service Funds.

(a) Purpose. This section provides the requirements for the commission to designate common carriers as eligible telecommunications carriers (ETCs) to receive support from the federal universal service fund (FUSF). Only common carriers designated by the commission pursuant to 47 United States Code (U.S.C.) §214(e) (relating to Provision of Universal Service) as eligible for federal universal service support may qualify to receive universal service support under the FUSF. In addition, this section provides guidelines for rural and non-rural carriers to meet the federal requirements of annual certification for FUSF support criteria and, if requested or ordered, for the disaggregation of rural carriers' FUSF support.

(b) Service areas. The commission may designate ETC [~~eligible telecommunications carrier~~] service areas according to the following criteria.

(1) Non-rural service area. To be eligible to receive federal universal service support in non-rural areas, a carrier must provide federally supported services pursuant to 47 Code of Federal Regulations (C.F.R.) §54.101 (relating to Supported Services for Rural, Insular, and High Cost Areas) throughout the area for which the carrier seeks to be designated an ETC [~~eligible telecommunications carrier~~].

(2) Rural service area. In the case of areas served by a rural telephone company, as defined in §26.404 of this title (relating to the Small and Rural Incumbent Local Exchange Company (ILEC) Universal Service Plan), a carrier must provide federally supported services pursuant to 47 C.F.R. [~~Code of Federal Regulations~~] §54.101 throughout the study area of the rural telephone company in order to be eligible to receive federal universal service support.

(c) Criteria for determination of ETCs [~~eligible telecommunications carriers~~]. A common carrier shall be designated as eligible to receive federal universal service support if it:

(1) offers the services that are supported by the federal universal service support mechanisms under 47 C.F.R. [~~Code of Federal Regulations~~] §54.101 either using its own facilities or a combination of its own facilities and resale of another carrier's services; and

(2) (No change.)

(d) Criteria for determination of receipt of federal universal service support. In order to receive federal universal service support, a common carrier must:

(1) (No change.)

(2) offer Lifeline Service to qualifying low-income consumers in compliance with 47 C.F.R. [~~Code of Federal Regulations~~] Part 54, Subpart E (relating to Universal Service Support for Low-Income Consumers); and

(3) offer toll limitation services in accordance with 47 C.F.R. [~~Code of Federal Regulations~~] §54.400 (relating to Terms and Definitions) and §54.401 (relating to Lifeline Defined).

(e) Designation of more than one ETC [~~eligible telecommunications carrier~~].

(1) Non-rural service areas. In areas not served by rural telephone companies, as defined in §26.404 of this title, the commission shall designate, upon application, more than one ETC [~~eligible telecommunications carrier~~] in a service area so long as each additional carrier meets the requirements of subsection (b)(1) of this section and subsection (c) of this section.

(2) Rural service areas. In areas served by rural telephone companies, as defined in §26.404 of this title, the commission may designate as an ETC [~~eligible telecommunications carrier~~] a carrier that meets the requirements of subsection (b)(2) of this section and subsection (c) of this section if the commission finds that the designation is in the public interest.

(f) Proceedings to designate ETCs [~~eligible telecommunications carriers~~].

(1) (No change.)

(2) In order to receive support under this section for exchanges purchased from an unaffiliated carrier, the acquiring ETC [~~eligible telecommunications carrier~~] shall file an application, within 30 days after the date of the purchase, to amend its ETC [~~eligible telecommunications carrier~~] service area to include those geographic areas that are eligible for support.

(3) If an ETC [~~eligible telecommunications carrier~~] receiving support under this section sells an exchange to an unaffiliated carrier, it shall file an application, within 30 days after the date of the sale, to amend its ETC [~~eligible telecommunications carrier~~] designation to exclude from its designated service area those exchanges for which it was receiving support.

(g) Application requirements and commission processing of applications.

(1) Requirements for notice and contents of application.

(A) Notice of application. Notice shall be published in the *Texas Register*. The presiding officer may require additional notice. Unless otherwise required by the presiding officer or by law, the notice shall include at a minimum a description of the service area for which the applicant seeks eligibility, the proposed effective date of the designation, and the following statement: "Persons who wish to comment on this application should notify the Public Utility Commission of Texas by (specified date, ten days before the proposed effective date). Requests for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or you may call the Public Utility Commission's [~~Office of~~] Customer Protection Division at (512) 936-7120 or (888) 782-8477. Hearing- and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136, or use Relay Texas (800) 735-2989 to reach the commission's toll free number (888) 782-8477."

(B) Contents of application for each common carrier seeking ETC [~~eligible telecommunications carrier~~] designation. A common carrier that seeks to be designated as an ETC [~~eligible telecommunications carrier~~] shall file with the commission an application complying with the requirements of this section. In addition to copies required by other commission rules, one copy of the application shall be delivered to the commission's Regulatory Division and one copy shall be delivered to the Office of Public Utility Counsel. The application shall:

(i) show that the applicant offers each of the services that are supported by the FUSF support mechanisms under 47 U.S.C. [~~United States Code~~] §254(c) (relating to Universal Service) either using its own facilities or a combination of its own facilities and resale of another carrier's services throughout the service area for which it seeks designation as an ETC [~~eligible telecommunications carrier~~];

(ii) show that the applicant assumes the obligation to offer each of the services that are supported by the FUSF support mechanisms under 47 U.S.C. [~~United States Code~~] §254(c) to any consumer in the service area for which it seeks designation as an ETC [~~eligible telecommunications carrier~~];

(iii) (No change.)

(iv) show the service area in which the applicant seeks designation as an ETC [~~eligible telecommunications carrier~~];

(v) - (viii) (No change.)

(C) Contents of application for each common carrier seeking ETC [~~eligible telecommunications carrier~~] designation and receipt of federal universal service support. A common carrier that seeks to be designated as an ETC [~~eligible telecommunications carrier~~] and receive federal universal service support shall file with the commission an application complying with the requirements of this section. In addition to copies required by other commission rules, one copy of the application shall be delivered to the commission staff and one copy shall be delivered to the Office of Public Utility Counsel. The application shall:

(i) (No change.)

(ii) show that the applicant offers Lifeline Service to qualifying low-income consumers in compliance with 47 C.F.R. [~~Code of Federal Regulations~~] Part 54, Subpart E; and

(iii) show that the applicant offers toll limitation services in accordance with 47 C.F.R. [~~Code of Federal Regulations~~] §54.400 and §54.401.

(2) Commission processing of application.

(A) (No change.)

(B) Approval or denial of application.

(i) An application filed pursuant to paragraph (1)(B) of this subsection shall be approved by the presiding officer if the application meets the following requirements:

(I) the provision of service constitutes the services that are supported by the FUSF support mechanisms under 47 U.S.C. [~~United States Code~~] §254(c);

(II) - (V) (No change.)

(VI) if, in areas served by a rural telephone company, the ETC [~~eligible telecommunications carrier~~] designation is consistent with the public interest.

(ii) An application filed pursuant to paragraph (1)(C) of this subsection shall be approved by the presiding officer if the application meets the following requirements:

(I) (No change.)

(II) the applicant offers Lifeline Service to qualifying low- income consumers in compliance with 47 C.F.R. [~~Code of Federal Regulations~~] Part 54, Subpart E; and

(III) the applicant offers toll limitation services in accordance with 47 C.F.R. [~~Code of Federal Regulations~~] §54.400 and §54.401.

(C) - (D) (No change.)

(E) Waiver. In the event that an otherwise ETC [~~eligible telecommunications carrier~~] requests additional time to complete the network upgrades needed to provide single-party service, access to enhanced 911 service, or toll limitation, the commission may grant a waiver of these service requirements upon a finding that exceptional circumstances prevent the carrier from providing single-party service, access to enhanced 911 service, or toll limitation. The period for the waiver shall not extend beyond the time that the commission deems necessary for that carrier to complete network upgrades to provide single-party service, access to enhanced 911 service, or toll limitation services.

(h) Designation of ETC [~~eligible telecommunications carrier~~] for unserved areas. If no common carrier will provide the services that are supported by federal universal service support mechanisms under 47 U.S.C. [~~United States Code~~] §254(c) to an unserved community or any portion thereof that requests such service, the commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such service for that unserved community or portion thereof.

(i) Relinquishment of ETC [~~eligible telecommunications carrier~~] designation. A common carrier may seek to relinquish its ETC [~~eligible telecommunications carrier~~] designation.

(1) Area served by more than one ETC [~~eligible telecommunications carrier~~]. The commission shall permit a common carrier to relinquish its designation as an ETC [~~eligible telecommunications carrier~~] in any area served by more than one ETC [~~eligible telecommunications carrier~~] upon:

(A) written notification not less than 90 days prior to the proposed effective date that the common carrier seeks to relinquish its designation as an ETC [~~eligible telecommunications carrier~~];

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

(2) Area where the common carrier is the sole ETC [~~eligible telecommunications carrier~~]. In areas where the common carrier is the only ETC [~~eligible telecommunications carrier~~], the commission may permit it to relinquish its ETC [~~eligible telecommunications carrier~~] designation upon:

(A) written notification not less than 90 days prior to the proposed effective date that the common carrier seeks to relinquish its designation as an ETC [~~eligible telecommunications carrier~~]; and

(B) commission designation of a new ETC [~~eligible telecommunications carrier~~] for the service area or areas.

(j) Rural and non-rural carriers' requirements for annual certification to receive FUSF support. A common carrier serving a rural or non-rural study area shall comply with the following requirements for annual certification for the receipt of FUSF support.

(1) Annual certification. Common carriers must provide the state commission with an affidavit annually, on or before September 1st of each year, which certifies that the carrier is complying with the federal requirements for the receipt of FUSF support. Upon receipt and acceptance of the affidavits filed on or before September 1st each year, the commission will certify these carriers' eligibility for FUSF to the FCC and the Federal Universal Service Fund Administrator by October 1st each year.

(2) Failure to file. Common carriers failing to file an affidavit by September 1st may be certified by the commission for annual FUSF effective January 1st of the following year. If a common carrier makes a late filing, the carrier is ineligible for support until the quarter following the federal universal service administrator's receipt of the commission's supplemental submission of the carrier's compliance with the federal requirements.

(3) Supplemental certification. For carriers not subject to the annual certification process, the schedule set forth in 47 C.F.R. §54.313 and 47 C.F.R. §54.314(d) for the filing of supplemental certifications shall apply.

(4) Revocation of FUSF support certification. The commission may revoke the FUSF support certification of any carrier that it determines has not complied with the federal requirements pursuant to 47 U.S.C. §254(e) and to review any challenge to a carrier's FUSF support certification.

(k) Disaggregation of rural carriers' FUSF support. Common carriers serving rural study areas must comply with the following requirements regarding disaggregation of FUSF support.

(1) Election by May 15, 2002. On or before May 15, 2002, all rural incumbent local exchange carriers (ILECs) may notify the commission of one of the following elections regarding FUSF support. This election will remain in place for four years from the effective date of certification, pursuant to 47 C.F.R. §54.315, unless the commission, on its own motion, or upon the motion of the rural ILEC or an interested party, requires a change to the elected disaggregation plan:

(A) a rural ILEC may choose to certify to the commission that it will not disaggregate at this time;

(B) a rural ILEC may seek disaggregation of its FUSF support by filing a targeting plan with the commission that meets the criteria in paragraph (3) of this subsection, subject to the commission's approval of the plan;

(C) a rural ILEC may self-certify a disaggregation targeting plan that meets the criteria in paragraphs (3) and (4) of this subsection, disaggregate support to the wire center level or up to no more than two cost zones, or mirror a plan for disaggregation that has received prior commission approval; or

(D) if the rural ILEC serves a study area that is served by another carrier designated as an ETC prior to the effective date of 47 C.F.R. §54.315, (June 19, 2001), the ILEC may only self-certify the disaggregation of its FUSF support by adopting a plan for disaggregation that has received prior commission approval.

(2) Abstain from filing. If a rural ILEC abstains from filing an election on or before May 15, 2002, the carrier will not be permitted to disaggregate its FUSF support unless it is ordered to do so by the commission pursuant to the terms of paragraph (5) of this subsection.

(3) Requirements for rural ILECs' disaggregation plans. Pursuant to the federal requirements in 47 C.F.R. §54.315(e) a rural ILEC's disaggregation plan, whether submitted pursuant to paragraph (1)(B), (C) or (D) of this subsection, must meet the following requirements:

(A) the sum of the disaggregated annual support must be equal to the study area's total annual FUSF support amount without disaggregation;

(B) the ratio of the per line FUSF support between disaggregation zones for each disaggregated category of FUSF support shall remain fixed over time, except as changes are required pursuant to paragraph (5) of this subsection;

(C) the ratio of per line FUSF support shall be publicly available;

(D) the per line FUSF support amount for each disaggregated zone or wire center shall be recalculated whenever the rural ILEC's total annual FUSF support amount changes and revised total per line FUSF support and updated access line counts shall then apply;

(E) each support category complies with subparagraphs (A) and (B) of this paragraph;

(F) monthly payments of FUSF support shall be based upon the annual amount of FUSF support divided by 12 months if the rural ILEC's study area does not contain a competitive carrier designated as an ETC ; and

(G) a rural ILEC's disaggregation plan methodology and the underlying access line count upon which it is based will apply to any competitive carrier designated as an ETC in the study area.

(4) Additional requirements for self-certification of a disaggregation plan. Pursuant to 47 C.F.R. §54.315(d)(2), a rural ILEC's self-certified disaggregation plan must also include the following:

(A) support for, and a description of, the rationale used, including methods and data relied upon, as well as a discussion of how the plan meets the requirements in paragraph (3) of this subsection and this paragraph;

(B) a reasonable relationship between the cost of providing service for each disaggregation zone within each disaggregation category of support proposed;

(C) a clearly specified per-line level of FUSF support for each category pursuant to 47 C.F.R. §54.315(d)(2)(iii);

(D) if the plan uses a benchmark, a detailed explanation of the benchmark and how it was determined that is generally consistent with how the level of support for each category of costs was derived so that competitive ETCs may compare the disaggregated costs for each cost zone proposed; and

(E) maps identifying the boundaries of the disaggregated zones within the study area.

(5) Disaggregation upon commission order. The commission on its own motion or upon the motion of an interested party may order a rural ILEC to disaggregate FUSF support under the following criteria:

(A) the commission determines that the public interest of the rural study area is best served by disaggregation of the rural ILEC's FUSF support;

(B) the commission establishes the appropriate disaggregated level of FUSF support for the rural ILEC; or

(C) changes in ownership or changes in state or federal regulation warrant the commission's action.

(6) Effective dates of disaggregation plans. The effective date of a rural ILEC's disaggregation plan shall be as specified in 47 C.F.R. §54.315.

This 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 November 26, 2001.

TRD-200107214
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: January 6, 2002
For further information, please call: (512) 936-7308

♦ ♦ ♦

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 60. TEXAS COMMISSION OF LICENSING AND REGULATION
SUBCHAPTER B. ORGANIZATION

16 TAC §60.64

The Texas Department of Licensing and Regulation ("Department") proposes amendments to §60.64, concerning the duration of advisory committees/boards/councils governed by the Texas Commission of Licensing and Regulation and the Executive Director of the Texas Department of Licensing and Regulation.

The amendments to §60.64 propose to amend the rule to continue the existence of the Architectural Barriers Advisory Committee, Air Conditioning and Refrigeration Contractors Advisory Board, Auctioneer Education Advisory Board, Board of Boiler Rules, Elevator Advisory Board, Licensed Court Interpreter Advisory Board, Property Tax Consultants Advisory Council, Service Contract Providers Advisory Board, Vehicle Protection Product Warrantor Advisory Board, Water Well Drillers Advisory Council and the Weather Modification Advisory Committee. The proposed changes will extend the duration of each of these advisory bodies from the abolishment dates set forth in the current rule, or as otherwise established by applicable law, to September 1, 2006.

The Texas Government Code §2110.008(a) states that a state agency that is advised by an advisory committee shall establish by rule a date on which the committee will automatically be abolished. The advisory committee may continue in existence after that date only if the governing body of the agency affirmatively votes to continue the committee in existence. Pursuant to this authority, the Department seeks to continue the existence of the advisory committees/boards/councils to the Commission and Executive Director and to set September 1, 2006 as the automatic abolishment dates for them. The Commission relies on these advisory bodies to provide technical knowledge of their respective programs and industries, and receives expert advice from them on matters critical to the Commission's protection of public health, safety, and welfare. Additionally, if these advisory bodies are not continued in existence, state statutory requirements and duties imposed on each of these advisory bodies would not be fulfilled. The proposed changes set forth the period for which each advisory body has been and will be continued, with each period ending with the automatic abolishment date for that advisory body.

Michael D. Chisum, General Counsel, Texas Department of Licensing and Regulation, has determined that for the first five-year period this section is in effect there will be no fiscal implications for any state or local governments as a result of enforcing or administering the proposed rule.

Mr. Chisum also has determined that for each year of the first five years this section is in effect the public benefit anticipated as a result of enforcing this section will be an opportunity to receive technical knowledge and expert advice from the advisory bodies on matters related to their respective industries that are critical to the Commission and Executive Director's protection of public health, safety, and welfare, and to fulfill statutory requirements and duties applicable to these advisory bodies.

The Department does not anticipate any additional economic costs to licensees, small businesses, or other persons as a result of the proposed rule changes.

Comments on the proposal may be submitted to Michael D. Chisum, General Counsel, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or facsimile (512) 475-2872, or electronically: Michael.Chisum@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments to §60.64 are proposed under Texas Occupations Code, Chapter 51, §51.203 which authorizes the Department to adopt rules as necessary to implement this Chapter and any other law establishing a program regulated by the Department and Government Code, §2110.008 which authorizes an agency to continue the existence of an advisory committee beyond the four-year period following the date of creation of the committee.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51; Texas Civil Statutes, Article 9102; Texas Civil Statutes, Article 8861; Texas Occupations Code, Chapter 1802; Health and Safety Code, Chapter 755; Texas Health and Safety Code, Chapter 754; Texas Government Code, Chapter 57; Texas Civil Statutes, Article 8886; Texas Civil Statutes, Article 9034; Texas Civil Statutes, Article 9035; Texas Water Code, Chapters 32 and 33; and Senate Bill 1175, Article 1, 77th Texas Legislative Session.

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

§60.64. Duration of Advisory Committee/Boards/Councils.

In accordance with Texas Government Code Annotated, §2110.008 the Commission establishes the following periods during which the advisory committee/boards/councils listed will continue in existence. The automatic abolishment date of each advisory committee/board/council will be the ending date of the respective period listed for that committee/board/council [~~automatic abolishment dates for the committees/boards/councils as indicated~~] unless the Commission subsequently establishes a different date:

(1) Architectural Barriers Advisory Committee--11/05/1998 to 09/01/2006 [~~09/01/2001~~];

(2) Air Conditioning and Refrigeration Contractors Advisory Board--11/05/1998 to 09/01/2006 [~~& Refrigeration Advisory Council--09/01/2001~~];

(3) Auctioneer Education Advisory Board--11/05/1998 to 09/01/2006 [~~09/01/2004~~];

(4) Board of Boiler Rules--11/05/1998 to 09/01/2006 [~~09/01/2002~~];

(5) Elevator Advisory Board--11/05/1998 to 09/01/2006 [~~09/01/2001~~];

(6) Licensed Court Interpreter Advisory Board--09/01/2001 to 09/01/2006;

(7) [~~(6)~~] Property Tax Consultants Advisory Council--11/05/1998 to 09/01/2006; [~~09/01/2004; and~~]

(8) Service Contract Providers Advisory Board--09/01/1999 to 09/01/2006;

(9) Vehicle Protection Product Warrantor Advisory Board--09/01/2001 to 09/01/2006;

(10) [~~(7)~~] Water Well Drillers [~~Driller~~] Advisory Council--11/05/1998 to 09/01/2006; and [~~09/01/2001.~~]

(11) Weather Modification Advisory Committee--09/01/2001 to 09/01/2006.

This 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 November 21, 2001.

TRD-200107196
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: January 6, 2002
For further information, please call: (512) 463-7348

♦ ♦ ♦

TITLE 22. EXAMINING BOARDS

PART 11. BOARD OF NURSE EXAMINERS

CHAPTER 217. LICENSURE, PEER ASSISTANCE AND PRACTICE

22 TAC §217.18

The Board of Nurse Examiners for the State of Texas proposes a new section to Chapter 217 by adding §217.18 that includes language relating to Registered Nurse First Assistants (RNFA).

HB 803, passed in the 77th Legislative Session, amends the Nursing Practice Act by adding Section 301.1525. The section defines a "nurse first assistant" as a registered nurse who is certified in perioperative nursing by an organization recognized by the Board and has completed a nurse first assistant program approved by an organization recognized by the Board. The new section grants the Board authority to develop rules relating to RNFAs. The purpose of Section 301.1525 was to effectuate a mechanism to allow reimbursement for RNs who first assist from third party payers.

In the past, the Board determined that RN first assisting is within the scope of practice of the registered nurse (January 1995 Board meeting). It was determined that RNs who elect to function in such a role should meet the requirements that are outlined in the Association of Perioperative Registered Nurses' (AORN's) position statement relating to RNFAs. The position statement and other RNFA information can be located at *www.aorn.org/clinical/rnfainfo.htm.* It was reported that currently practicing RNFA's were highly in favor of HB 803 and the new Section 301.1525.

The proposed §217.18 seeks to establish a regulatory definition of registered nurse first assistant consistent with Section 301.1525. As such it defines "nurse first assistant" as a registered nurse who is certified in perioperative nursing by an organization recognized by the Board and has completed a nurse first assistant program approved by an organization recognized by the Board. Proposed §217.18 recognizes that current certification by the Certification Board Perioperative Nursing as a registered nurse first assistant (CRNFA) satisfies the definitional criteria of Section 301.1525. Additionally, the proposed §217.18 creates a registry for those RNFAs who meet the definitional criteria, reiterates the minimum standards required for all registered nurses practicing in the first assistant role, and recognizes AORN standards for first assisting.

Much discussion has been generated between Board staff and representatives of RNFA interests concerning the legislative requirement that the RNFA complete a "nurse first assistant program approved by an organization recognized by the Board" as written in Section 301.1525. The Board proposes the exact language of the statute in its rule. In this regard, however, the Certification Board Perioperative Nursing (CBPN) is currently the only organization directly involved in setting and enforcing standards for RNFA education programs. CBPN reviews and accepts programs appropriate for preparing RNs for the first assisting role and for sitting for the CRNFA certification exam. CBPN has written program acceptance criteria and requires programs to demonstrate compliance through a written application process for initial acceptance. Prior to adoption of this proposed §217.18, CBPN is expected to adopt a process for verifying ongoing compliance with acceptance criteria. Therefore, it is anticipated that those RNFAs who have completed a program accepted by CBPN have met the required completion of a "nurse first assistant program approved by an organization recognized by the Board." The rule is also broad enough to allow Board review and approval of other organizations who approve and review RNFA educational programs in the future.

The proposed rule alternatively states that the national certification examination given to CRNFAs will also satisfy the legislative requirement that a nurse first assistant complete a program approved by an organization recognized by the Board (see Section 301.1525). The CRNFA examination process requires a review of the educational qualification of RNFA and provides for a measure of competency in the first assistant role. The recognition of the national certification examination for CRNFAs is consistent with the Board's overall mission to protect the public health and safety.

Kathy Thomas, Executive Director, has determined that for the first five-year period the proposed new section is effective there will be some fiscal implications for state or local government as a result of enforcing or administering the section. The magnitude of those fiscal implications are not known. It is anticipated there will be administrative costs associated with the new obligation for Board staff review and registry of RNFAs pursuant to Section 301.1525. Further, state and federal costs are anticipated to the extent state and federal monies are used to reimburse services provided by RNFAs. The magnitude of those costs, if any, are not known.

Ms. Thomas has determined that the public benefit of the new section is to facilitate RNFA reimbursement for payment of health services provided to the public and payed by third party payers. There is no anticipated effect on small businesses. It is anticipated that, in the future, a fee will be imposed on those RNFAs required to comply with these sections as proposed to cover administrative costs.

Comments on the proposed new section may be submitted in writing to Kathy Thomas, Executive Director, Board of Nurse Examiners for the State of Texas, 333 Guadalupe, Suite 3-460, Austin, Texas 78701. Comments will be accepted and considered for 30 days following the publication of this proposal in the *Texas Register*.

The new section is proposed under the authority of the Texas Occupations Code, Sections 301.151 and 301.1525 that authorizes the Board of Nurse Examiners to adopt and enforce rules consistent with its legislative authority under the Nursing Practice Act including rules relating to registered nurses seeking approval of RNFAs.

The proposed new section affects the Nursing Practice Act, Texas Occupations Code, Section 301.1525; Texas Insurance Code, Articles 3.70-3C, 21.52 and 20A-14; Texas Human Resources Code, Section 32.027; and Texas Labor Code, Section 408.029.

§217.18. Registered Nurse First Assistants.

(a) A registered nurse who wishes to function as a first assistant (RNFA) in surgery shall submit an application for registration and all applicable fees to the Board and shall submit evidence including, but not limited to, the following:

(1) Current licensure as a registered nurse in the State of Texas or reside in any party state and hold a current, valid registered nurse license in that state;

(2) has a current national certification (CNOR) in perioperative nursing; and

(3) has completed a nurse first assistant educational program approved by an organization recognized by the Board; or

(4) has a current certification as a registered nurse first assistant (CRNFA) by a national certifying body recognized by the Board.

(b) After review by the Board, notification of registration shall be mailed to the RNFA informing him/her that the registration process has been completed.

(c) The registered nurse whose functions include acting as a first assistant in surgery shall know and conform to the Texas Nursing Practice Act; current Board rules, regulations, and standards of professional nursing; and all federal, state and local laws, rules, and regulations affecting the RNFA specialty area. When collaborating with other health care providers, the RNFA shall be accountable for knowledge of the statutes and rules relating to RNFAs and function within the scope of the registered nurse.

(d) A registered nurse functioning as a first assistant in surgery shall comply with the standards set forth by the AORN.

This 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 November 26, 2001.

TRD-200107236
Katherine A. Thomas
Executive Director
Board of Nurse Examiners
Earliest possible date of adoption: January 6, 2002
For further information, please call: (512) 305-6824

♦ ♦ ♦

TITLE 25. HEALTH SERVICES

PART 2. TEXAS DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

CHAPTER 409. MEDICAID PROGRAMS
SUBCHAPTER L. MENTAL RETARDATION LOCAL AUTHORITY (MRLA) PROGRAM

25 TAC §§409.523, 409.525, 409.527, 409.531, 409.541

The Texas Department of Mental Health and Mental Retardation (department) proposes amendments to §§409.523, 409.525, 409.527, 409.531, and 409.541 of Chapter 409, Subchapter L, governing mental retardation local authority (MRLA) program.

The proposed amendments to §§409.525, 409.527, 409.531, and 409.541 implement several of the provisions of Senate Bill 368, 77th Legislature (SB 368). First, SB 368 expands the permanency planning requirements in the Texas Government Code, Chapter 531, Subchapter D, to apply to individuals under 22 years of age who receive developmental disability services in an institution, including waiver program services in a residence other than the individual's own or foster home. For MRLA, this applies to individuals receiving supervised living or residential support services. Previous law required permanency planning only for individuals under 18 years of age living in certain institutions; waiver programs were not included in the definition of "institution." Amendments to §419.525(e)(4) reflect this change in the law. SB 368 also requires the initiation of supervised living or residential support for an individual under 22 years of age to be approved by the department's commissioner or designee and provides that these services may not exceed six months unless a six month extension is approved by the commissioner or designee after a review of documented permanency planning efforts. The legislation provides that additional six-month extensions are permitted only if recommended by the commissioner or designee and approved by the commissioner of the Texas Health and Human Services Commission (THHSC) or designee. These provisions are reflected in Authority Principle 5.11; the Authority Principles are referenced in §409.541. SB 368 further requires that no later than the third day after supervised living or residential support is initiated for an individual under 22 years of age, the program provider must notify the local mental retardation authority (MRA), the community resource coordination group (CRCG) for the county in which the individual's legally authorized representative (LAR) resides, and the local school district, if the individual is at least three years of age, or the local early childhood intervention (ECI) program, if the individual is under three years of age. These requirements are reflected in new Provider Principle 43 and the specific information that must be included in a program provider's notice is listed in Provider Principle 44; Provider Principles are referenced in §409.531. SB 368 also requires a volunteer advocate to be designated to assist in permanency planning if the individual or LAR requests an advocate or the individual's LAR cannot be located. These provisions have been implemented in §409.525(f) and (g) and §409.527(a)(2).

New §409.525(c)(2) implements a provision of SB 367, 77th Legislature, that requires at least one family member of an individual to be informed of all care and support options available before the individual is placed in a care setting. In addition, new §409.525(b) clarifies that an individual who is a member of a target group identified in the approved MRLA waiver request may be notified of a program vacancy even if the individual's name is not the first one on the waiting list. New §409.523(1)(A) and (B) clarify that an applicant's placement on the MRLA Program waiting list is assigned chronologically by the date of receipt of a written request for MRLA Program services, or by date of the receipt of a notice given by an institution for an individual under 22 years of age who is admitted to the institution. New §409.523(6) specifies the circumstances under which the name of an individual who was under 22 years of age when the individual was admitted to an institution may be removed from the MRLA Program waiting list.

Cindy Brown, Chief Financial Officer, has determined that for each year of the first five year period that the amendments are in effect, enforcing or administering the amendments do not have foreseeable implications relating to costs or revenues of state or local government. It is not anticipated that adopting the amendments will have an adverse economic effect on small businesses or micro-businesses because these changes do not impose any measurable cost on program providers. It is not anticipated that there will be any additional economic cost to persons required to comply with the amendments. It is not anticipated that the amendment will affect a local economy.

Barry Waller, Director, Long Term Services and Supports, has determined that for each year of the first five-year period the amendments are in effect, the expected public benefit is that for individuals under 22 years of age in the waiver program who are receiving supervised living or residential support, service planning will be focused on providing a permanent living arrangement for the individual with the primary feature of an enduring and nurturing relationship with a specific adult who will be an advocate for the individual. The requirement that the local MRA, CRCG, and school district or ECI program be notified within three days of the services being initiated is intended to help ensure that the individual receives services for which the individual is eligible and that are appropriate to the individual's needs.

A hearing to accept oral and written testimony from members of the public concerning the proposed amendments has been scheduled for 1:30 p.m., Monday, January 7, 2002, in the department's Central Office Auditorium in Building 2 at 909 West 45th Street, in Austin, Texas. Persons requiring an interpreter for the deaf or hearing impaired should contact the department's Central Office operator at least 72 hours prior to the hearing at TDD (512) 206-5330. Persons requiring other accommodations for a disability should notify the Long Term Services and Supports Division, at least 72 hours prior to the hearing at (512) 206-4706 or at the TDY phone number of Texas Relay, 1-800-735-2988.

Comments concerning this proposal must be submitted in writing to Linda Logan, Director, Policy Development, Texas Department of Mental Health and Mental Retardation, by mail to P.O. Box 12668, Austin, Texas 78711, by fax to (512) 206-4750, and by e-mail to policy.co@mhmr.state.tx.us within 30 days of publication of this notice.

The amendments are proposed under the Texas Health and Safety Code, §532.015(a), which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide THHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to operate the MRLA Program.

The proposed amendments affect Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a) and (c) and Texas Government Code, Chapter 531, Subchapter D and §531.042.

§409.523. Maintenance of MRLA Program Waiting List.

The [~~local~~] MRA will maintain an up-to-date waiting list of individuals living in and waiting to receive MRLA Program services in the MRA's local service area.

(1) The MRA will register the individual on the waiting list chronologically by: [~~date of request for MRLA Program services.~~]

(A) date of receipt of a written request for MRLA Program services; or

(B) date of receipt of notification given to the MRA in accordance with Texas Government Code, §531.154, that an individual under 22 years of age has been admitted to an ICF/MR, nursing home, institution for the mentally retarded licensed by the Texas Department of Protective and Regulatory Services (TDPRS), or a foster group home licensed by the TDPRS.

(2) The MRA will provide written notification to MRLA program providers in its local service area of the process that program providers should use to refer to the MRA individuals who are seeking [~~wish to be placed on the~~] MRLA Program services [~~referral list~~].

(3) Except as specified in paragraph (6) of this section, the [~~The~~] MRA must remove an individual's name from the waiting list only when it is documented that:

(A) - (F) (No change.)

(G) the applicant or the applicant's LAR chooses participation in the ICF/MR Program instead of in the MRLA Program when offered this choice in accordance with §419.164(a) of this title (relating to Process for Enrollment of Applicants [~~applicants~~]);

(H) - (I) (No change.)

(4) If an applicant's name is removed from a waiting list in accordance with paragraph (3) or (6) of this subsection, the applicant, the applicant's LAR, or the MRA may request the department to review the circumstances under which the applicant's name was removed from the MRA's waiting list. At its discretion, the department may direct the MRA to reinstate the applicant's name to the waiting list using the previously assigned date.

(5) (No change.)

(6) Until an individual who was registered on the waiting list based on notification received in accordance with Texas Government Code, §531.154, reaches 22 years of age, the MRA must remove such an individual's name from the waiting list only when it is documented that:

(A) the individual is deceased;

(B) TDMHMR has denied the individual's enrollment and the individual or the LAR has had an opportunity to exercise the individual's right to appeal the decision according to §409.505 of this title (relating to Eligibility Criteria); or

(C) the individual's name has been transferred in accordance with paragraph (5) of this section.

§409.525. Process for [~~Referral and~~] Enrollment of Individuals.

[~~(a) An individual or an individual's LAR on behalf of the individual who seeks MRLA Program services must submit a written request to the MRA serving the area where the individual lives.~~]

[~~(1) The MRA will register the individual on the waiting list as specified in §409.523 of this title (relating to Maintenance of MRLA Program Waiting List).~~]

(a) [~~(2)~~] Upon written notification by TDMHMR of a program vacancy in the MRA's local service area, except as provided in subsection (b) of this section, the MRA notifies the [~~first~~] individual whose

name is first on the waiting list of the vacancy [~~and begins the enrollment process by informing the individual or the LAR of the individual's right to choose between participation in the ICF-MR Program in a state school setting or community-based setting, the MRLA Program, or other services~~].

(b) An applicant who is a member of a target group identified in the approved MRLA waiver request may be notified of a program vacancy even though the individual's name is not the first one on the waiting list.

(c) If an applicant who is notified of a program vacancy in accordance with subsection (a) or (b) of this section indicates an interest in enrolling in the MRLA Program, the MRA must:

(1) give the applicant or applicant's LAR the choice of ICF/MR or MRLA Program services; and

(2) provide the applicant, the applicant's LAR, and, if the LAR is not a family member, at least one family member both an oral and written explanation of the services and supports for which the applicant may be eligible including the ICF/MR Program - both state mental retardation facilities and community-based facilities, other waiver programs under §1915(c) of the Social Security Act, and other community-based services and supports.

(d) The MRA must document the individual's or the LAR's choice of services.

(e) [~~(3)~~] If the individual or the LAR chooses participation in the MRLA Program, the MRA will assign a service coordinator who develops [~~will develop~~], in conjunction with the service planning team (including the individual and the LAR), a person-directed plan (PDP). At a minimum, the PDP must include the following:

(1) [~~(A)~~] a description of the services and supports the individual requires to continue living in the community;

(2) [~~(B)~~] a description of the individual's current services and supports, identifying those that will be available if the individual is enrolled in the MRLA Program;

(3) [~~(C)~~] a description of individual outcomes to be achieved through MRLA Program service components and justification for each service component to be included in the IPC;

(4) if the individual is under 22 years of age and seeking supervised living or residential support, a description of the desired permanency planning outcomes including:

(A) the natural supports and strengths of the family of an individual under 18 years of age that, when supplemented by activities and supports provided or facilitated by the program provider or MRA, will enable an individual to return to the family home;

(B) a family-based alternative, a family setting in which the family provider or providers are specially trained to provide support and in-home care for children with disabilities or children who are medically fragile, that will secure for an individual under 18 years of age a consistent, nurturing environment and an enduring, positive relationship with a specific adult who will be an advocate for the individual; or

(C) the natural supports and strengths of an individual from 18 to 22 years of age that, when supplemented by activities and supports provided or facilitated by the program provider or MRA, will result in the individual having a consistent and nurturing environment as defined by the individual and LAR.

(5) [~~(D)~~] documentation that the type and amount of each service component included in the individual's IPC:

(A) [~~(i)~~] are necessary for the individual to live in the community, to ensure the individual's health and welfare in the community, and to prevent the need for institutional services;

(B) [~~(ii)~~] do not replace existing natural supports or other non-program sources for the service components; [~~and~~]

(C) [~~(iii)~~] when the proposed IPC includes residential support, the reasons the team concluded that supervision and assistance from awake service providers are required during normal sleeping hours to assure the individual's health and welfare including but not limited to the individual's demonstrated needs for staff intervention to respond to the individual's medical condition, a behavior displayed by the individual that poses a danger to the individual or to others, or the individual's need for assistance with activities of daily living during normal sleeping hours;

(6) [~~(E)~~] description of all determinations needed to establish the individual's eligibility for SSI or Medicaid benefits and for an ICF/MR [~~ICF-MR~~] level-of-care (LOC); and

(7) [~~(F)~~] description of actions and methods to be used to reach identified service outcomes, projected completion dates, and person(s) responsible for completion.

(f) If the individual is under 22 years of age and seeking supervised living or residential support, the MRA must inform the individual and LAR that they may request a volunteer advocate to assist in permanency planning.

(g) If an individual or LAR requests a volunteer advocate or the MRA cannot locate the individual's LAR, the MRA must designate a volunteer advocate to assist in permanency planning who is:

(1) a person selected by the individual or LAR who is not employed by or under contract with the provider;

(2) an adult relative of the individual; or

(3) a representative from a child advocacy group.

(h) [~~(4)~~] The MRA compiles and maintains information necessary to process the individual's or LAR's request for enrollment in the MRLA Program.

(1) [~~(A)~~] If the individual's financial eligibility for the MRLA Program must be established, the MRA will initiate, monitor, and support the processes necessary to obtain a financial eligibility determination.

(2) [~~(B)~~] The MRA will complete an [~~a~~] MR/RC Assessment if necessary.

(A) [~~(i)~~] The MRA will determine or validate a determination that the applicant has mental retardation in accordance with Chapter 415, Subchapter D of this title (relating to Diagnostic Eligibility for Services and Supports--Mental Retardation Priority Population and Related Conditions) [~~Chapter 405, Subchapter D of this title (relating to Determination of Mental Retardation and Appropriateness for Admission to Mental Retardation Services)~~]; or

(B) [~~(ii)~~] The MRA will verify that the individual has been diagnosed by a licensed physician as having a related condition as defined in §419.203 of this title (relating to Definitions); and

(C) [~~(iii)~~] The MRA will administer the Inventory for Client and Agency Planning (ICAP) and recommend an LON assignment to TDMHMR in accordance with §409.507 of this title (relating to Level of Need Assignment).

(3) If the individual is under 22 years of age and requesting supervised living or residential support, the MRA must complete a Permanency Planning Review and receive approval from the department to provide such services;

(4) [~~(C)~~] The MRA will develop a proposed IPC with the individual or the LAR based on the PDP and §409.503(b) of this title (relating to Service Components of the MRLA Program).

(i) [~~(5)~~] The service coordinator will inform the individual or the LAR of all available MRLA program providers in the local service area. The service coordinator will:

(1) [~~(A)~~] provide information to the individual or the LAR regarding all MRLA program providers in the MRA's local service area;

(2) [~~(B)~~] review the proposed IPC with potential MRLA program providers selected by the individual or the LAR;

(3) [~~(C)~~] arrange for meetings/visits with potential MRLA program providers as desired by the individual or the LAR;

(4) [~~(D)~~] assure that the individual's or LAR's choice of a MRLA program provider is documented, signed by the individual or the LAR, and retained by the MRA in the individual's record; and

(5) [~~(E)~~] negotiate/finalize the proposed IPC with the selected MRLA program provider.

(j) [~~(b)~~] When the selected MRLA program provider has agreed to deliver the services delineated on the IPC, the MRA will transmit the enrollment information to TDMHMR. TDMHMR will notify the individual or the LAR, the selected MRLA program provider, and the MRA of its approval or denial of the individual's MRLA Program enrollment.

(k) [~~(c)~~] The selected MRLA program provider will not initiate services until notified of TDMHMR's enrollment approval.

§409.527. Revisions and Renewals of Individual Plans of Care (IPCs), Levels of Care (LOCs) and Levels of Need (LONs) for Enrolled Individuals.

(a) At least annually, and prior to the expiration of an individual's IPC, the service coordinator, the individual, the LAR, and the MRLA program provider must review the PDP and IPC to determine whether individual outcomes and services previously identified remain relevant.

(1) (No change.)

(2) If the individual is under 22 years of age and receiving supervised living or residential support, the service coordinator must inform the individual and LAR that they may request a volunteer advocate to assist in permanency planning. If the individual or LAR requests a volunteer advocate or the service coordinator cannot locate the individual's LAR, the MRA will designate a volunteer advocate who is:

(A) a person selected by the individual or LAR who is not employed by or under contract with the provider;

(B) an adult relative of the individual; or

(C) a representative from a child advocacy group.

(3) [~~(2)~~] The service coordinator will submit [~~submits~~] annual reviews and necessary revisions of the IPC to TDMHMR for approval and will retain [~~retains~~] documentation as described in §409.525(e) and (h) [~~§409.525(a)(3)-(4)~~] of this title (relating to Process for [~~Referral and~~] Enrollment of Individuals).

(b) (No change.)

§409.531. Certification Status.

(a) MRLA program providers contracting with TDMHMR for participation in the MRLA Program must be in continuous compliance with the MRLA Program Principles for Program Providers as described in Mental Retardation Local Authority Program Principles for Program Providers. Each MRLA program provider participating in the MRLA Program will receive a certification review conducted by TDMHMR or its designee at least annually in order to maintain certification status.
Figure: 25 TAC §409.531(a)

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

(b) (No change.)

§409.541. Compliance with MRLA Program Principles for Mental Retardation Authorities (MRAs).

(a) MRAs participating in the MRLA Program must be in continuous compliance with the MRLA Program Principles for Authorities as described in Mental Retardation Local Authority Program Principles for Mental Retardation Authority.
Figure: 25 TAC §409.541(a)

(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 November 26, 2001.

TRD-200107224
Andrew Hardin
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: January 6, 2002
For further information, please call: (512) 206-5232

♦ ♦ ♦

CHAPTER 412. LOCAL AUTHORITY RESPONSIBILITIES
SUBCHAPTER F. CONTINUITY OF SERVICES--STATE MENTAL RETARDATION FACILITIES

The Texas Department of Mental Health and Mental Retardation (department) proposes amendments to §§412.253, 412.254, 412.259, 412.264, 412.265, 412.266 - 412.269, and 412.274 of Chapter 412, Subchapter F, governing continuity of services--state mental retardation facilities.

The proposed amendments to §§412.253, 412.264 - 412.269, and 412.274 implement several provisions of Senate Bill 368, 77th Legislature (SB 368). SB 368 expands the permanency planning requirements in the Texas Government Code, Chapter 531, Subchapter D, to apply to individuals under 22 years of age who receive developmental disability services in an institution, including a state mental retardation facility (state MR facility). Previously, Chapter 531, Subchapter D required permanency planning only for individuals under 18 years of age living in certain institutions. Amendments to §§412.253(28), 412.264(a)(1)(F) and (b), 412.265(g)(16) and (h)(13), 412.269(g), and 412.274(a) and new §412.274(e) reflect this change in the law. SB 368 also requires the admission of an individual under 22 years of age to

an institution to be approved by the department's commissioner or designee and provides that the individual's initial placement may not exceed six months unless a six month extension is approved by the commissioner or designee after a review of documented permanency planning efforts. The legislation provides that additional six-month extensions are permitted only if recommended by the commissioner or designee and approved by the commissioner of the Texas Health and Human Services Commission (THHSC) or designee. These provisions are reflected in new §412.264(c) and §412.274(b) with references to the relevant provision in amendments to Chapter 419, Subchapter E, governing ICF/MR programs, that are published for review and comment elsewhere in this issue of the *Texas Register*.

Another provision of SB 368 requires that no later than the third day after an individual under 22 years of age is admitted, an institution must notify the following entities of the initiation of services: the local mental retardation authority (MRA), the community resource coordination group (CRCG) for the county in which the individual's legally authorized representative (LAR) resides, and the local school district, if the individual is at least three years of age, or the local early childhood intervention (ECI) program, if the individual is under three years of age. This requirement is reflected in new §§412.266(j), 412.267(h), 412.268(i), and 412.269(n) with references to the relevant provision in amendments to Chapter 419, Subchapter E, governing ICF/MR Programs that are published for review and comment elsewhere in this issue of the *Texas Register*. SB 368 also requires a volunteer advocate to be designated to assist in permanency planning if the individual or LAR requests an advocate or the individual's LAR cannot be located. These provisions are reflected in new §412.264(d) and §412.274(c)(3) with references to the relevant provision in amendments to Chapter 419, Subchapter E, governing ICF/MR programs, that are published for review and comment elsewhere in this issue of the *Texas Register*.

The proposed amendments also implement a provision of SB 367, 77th Legislature, which modified the Texas Government Code, §531.042. The amendments require that, in addition to the individual, at least one family member of the individual, if possible, must be informed of all care and support settings for which the individual is eligible before the individual is placed in a care setting. The new requirement is addressed in an amendment to §412.265(a) that references the relevant provision in amendments to Chapter 415, Subchapter D governing diagnostic eligibility for services and supports--mental retardation priority population and related conditions that are published for review and comment elsewhere in this issue of the *Texas Register*.

New terms and definitions are added in §412.253 that are related to the amendments in other sections. The definition of "Community Resource Coordination Group (CRCG)" is revised to specify that both adults and minors may be assisted. Amendments to §412.254(a) correct stylistic anomalies. A missing statutory reference is added in §412.259(a) and the term "child" replaced with "minor" in subsection (b) to be consistent with usage in other sections. Revisions to the title of §412.264 and to newly designated subsection (a) specify that the IDT discussed in the section is an MRA IDT. Amendments to §412.265(a) and new (b) - (e) describe how interstate transfers are handled during the MRA referral process and the review by the MRA's executive director or designee and the department's ombudsman. New §412.265(f)(3) and amendments to §412.266(f) and §412.267(f) specify that the MRA will request an applicant's enrollment in the ICF/MR with a reference to a provision of Chapter 419, Subchapter E, governing ICF/MR programs. References to other rules are corrected in §412.265(g)(5) and (18). The listings of documents an MRA is required submit with a complete application packet is revised in §412.265 with the addition of new subsections (g)(19), (h)(15) and (i)(12) specifying the inclusion of any documents related to immigration status and in new subsection (g)(6) and (10) requiring the submission of available psychological, medical, and social histories for the individual and any will naming the individual as a devisee. Amendments to §412.266(g) and the deletion of subsection (i) correct ambiguities in the existing rule language concerning when an MRA may petition a court for an order of protective custody. Amendments to §412.268(b) clarify language concerning the legal documents an MRA must submit when a minor is placed in a state MR facility under the Texas Family Code. In §412.269, a grammatical error is corrected in subsection (i) and amendments to subsection (j) clarify the role of the state MR facility IDT. In §412.274(a), the requirement that living options must be discussed quarterly with the individual or LAR when the individual is a minor is revised to require the discussion occur every six months when the individual is under 22 years of age consistent with the provisions of SB 368. Revisions to re-lettered §412.274(d) and new subsection (e) describe the criteria for an IDT's living options recommendations for individuals under 22 years of age.

Cindy Brown, Chief Financial Officer, has determined that for each year of the first five year period the amendments are in effect, enforcing or administering the amendments do not have foreseeable implications relating to costs or revenues of state or local government. It is not anticipated that adopting the amendments will have an adverse economic effect on small businesses or micro-businesses because they impact small providers. It is not anticipated that there will be any additional economic cost to persons required to comply with the amendments. It is not anticipated that the amendment will affect a local economy.

Barry Waller, Director, Long Term Services and Supports, has determined that for each year of the first five-year period the amendments are in effect, the expected public benefit is that for an individual under 22 years of age who is admitted to or residing in a state MR facility, service planning will be focused on providing a permanent living arrangement for the individual with the primary feature of an enduring and nurturing relationship with a specific adult who will be an advocate for the individual. The requirement that the local MRA, CRCG, and school district or ECI program be notified within three days of the services being initiated will help ensure that the individual receives services for which the individual is eligible and that are appropriate to the individual's needs. The requirement that at least one family member of an individual must be informed of all care and support settings for which the individual is eligible before the individual is admitted to a state MR facility will help ensure that the family of an individual for whom admission to a state MR facility is sought will be fully informed of all care and support settings for which the individual is eligible.

A hearing to accept oral and written testimony from members of the public concerning the proposed amendments has been scheduled for 1:30 p.m., Monday January 7, 2002, in the department's Central Office Auditorium in Building 2 at 909 West 45th Street, in Austin, Texas. Persons requiring an interpreter for the deaf or hearing impaired should contact the department's Central Office operator at least 72 hours prior to the hearing at TDD (512) 206-5330. Persons requiring other accommodations for a

disability should notify the Long Term Services and Supports Division, at least 72 hours prior to the hearing at (512) 206-4706 or at the TDY phone number of Texas Relay, 1-800-735-2988.

Comments concerning this proposal must be submitted in writing to Linda Logan, director, Policy Development, Texas Department of Mental Health and Mental Retardation, by mail to P.O. Box 12668, Austin, Texas 78711, by fax to (512) 206-4750, and by e-mail to policy.co@mhmr.state.tx.us within 30 days of publication of this notice.

DIVISION 1. GENERAL PROVISIONS

25 TAC §412.253, §412.254

The amendments are proposed under the Texas Health and Safety Code (THSC), §532.015(a), which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority; THSC, §591.004, which provides the board with authority to adopt rules implementing the Persons with Mental Retardation Act (PMRA) and the Texas Government Code, §531.153, which directs health and human services agencies to develop procedures regarding permanency planning.

The amendments would affect THSC, Chapter 593, Subchapters B and C, and Texas Government Code, Chapter 531, Subchapter D and §531.042.

§412.253. Definitions.

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

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

(5) Community Resource Coordination Group (CRCG)--A local interagency group composed of public and private agencies that develops service plans for individuals [~~children and adolescents~~] whose needs can be met only through interagency coordination and cooperation. The role and responsibilities of the involved agencies, including MRAs, school districts, and providers, are described in §411.56 of this title (relating to Memorandum of Understanding (MOU) on Coordinated Services to Children and Youths).

(6) - (12) (No change.)

(13) Family-Based Alternative--A family setting in which the family provider or providers are specially trained to provide support and in-home care for children with disabilities or children who are medically fragile.

(14) [~~(13)~~] Head of the facility--The superintendent of a state school or the director of a state center.

(15) [~~(14)~~] ICAP (Inventory for Client and Agency Planning) service level--A designation which identifies the level of services needed by an individual as determined by the ICAP assessment instrument. (For information on how to obtain a copy of the ICAP assessment instrument contact TDMHMR, Office of Medicaid Administration, P.O. Box 12668, Austin, Texas 78711-2668.)

(16) [~~(15)~~] Individual--A person who has or is believed to have mental retardation.

(17) [~~(16)~~] Interdisciplinary team (IDT)--Mental retardation professionals and paraprofessionals and other concerned persons, as appropriate, who assess an individual's treatment, training, and habilitation needs and make recommendations for services, including recommendations of whether the individual is best served in a facility or in a community setting.

(A) Team membership always includes:

(i) the individual;

(ii) the individual's LAR, if any; and

(iii) persons specified by an MRA or a state MR facility, as appropriate, who are professionally qualified and/or certified or licensed with special training and experience in the diagnosis, management, needs, and treatment of individuals with mental retardation.

(B) Other participants in IDT meetings may include:

(i) other concerned persons whose inclusion is requested by the individual or the LAR;

(ii) at the discretion of the MRA or state MR facility, persons who are directly involved in the delivery of mental retardation services to the individual; and

(iii) if the individual is school eligible, representatives of the appropriate school district.

(18) Interstate transfer--The admission of an individual to a state MR facility directly from a similar facility in another state.

(19) [~~(17)~~] IQ (intelligence quotient)--A score reflecting the level of an individual's intelligence as determined by the administration of a standardized intelligence test.

(20) [~~(18)~~] LAR (legally authorized representative)--A person authorized by law to act on behalf of a person with regard to a matter described in this subchapter, and may include a parent, guardian, or managing conservator of a minor, or the guardian of an adult.

(21) [~~(19)~~] Legally adequate consent--Consent given by a person when each of the following conditions has been met:

(A) legal status: The individual giving the consent:

(i) is 18 years of age or older, or younger than 18 years of age and is or has been married or had his or her disabilities removed for general purposes by court order as described in the Texas Family Code, Chapter 31; and

(ii) has not been determined by a court to lack capacity to make decisions with regard to the matter for which consent is being sought;

(B) comprehension of information: The individual giving the consent has been informed of and comprehends the nature, purpose, consequences, risks, and benefits of and alternatives to the procedure, and the fact that withholding or withdrawal of consent shall not prejudice the future provision of care and services to the individual with mental retardation; and

(C) voluntariness: The consent has been given voluntarily and free from coercion and undue influence.

(22) [~~(20)~~] Less restrictive setting--A setting which allows the greatest opportunity for the individual to be integrated into the community.

(23) [~~(21)~~] Local service area--A geographic area composed of one or more Texas counties delimiting the population which may receive services from a local MRA.

(24) [~~(22)~~] Mental retardation--Consistent with THSC, §591.003, significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

(25) [~~(23)~~] Minor--An individual under the age of 18.

(26) [~~(24)~~] MRA (mental retardation authority)--As defined in THSC, §531.002, an entity to which the Texas Mental

Health and Mental Retardation Board delegates its authority and responsibility within a specified region for planning, policy development, coordination, and resource development and allocation, and for supervising and ensuring the provision of mental retardation services to persons in one or more local service areas.

(27) [~~(25)~~] Ombudsman--Consistent with THSC, §533.039, an employee in the department's Central Office who is responsible for assisting an individual or LAR of an individual who has been denied service by the department, a department program or facility, or an MRA. The ombudsman must explain and provide information on department and MRA services, facilities, and programs, and the rules, procedures, and guidelines applicable to the individual denied services, and assist the individual in gaining access to an appropriate program or in placing the individual on an appropriate waiting list. The director of the Office of Consumer Services and Rights Protection/Ombudsman is the department's ombudsman and can be contacted by calling 1-800-252-8154.

(28) [~~(26)~~] Permanency planning--A philosophy and planning process that focuses on the outcome of family support for an individual under 22 years of age [~~a minor~~] by facilitating a permanent living arrangement in which the primary feature is an enduring and nurturing parental relationship.

(29) [~~(27)~~] Planning team--A group organized by the MRA and composed of:

(A) the individual;

(B) the individual's legally authorized representative (LAR), if any;

(C) actively-involved family members or friends of the individual who has neither the ability to provide legally adequate consent nor an LAR;

(D) other concerned persons whose inclusion is requested by the individual with the ability to provide legally adequate consent or the LAR;

(E) a representative from the designated MRA; and

(F) a representative from the individual's provider.

(30) [~~(28)~~] PMRA--Persons with Mental Retardation Act, Texas Health and Safety Code, Title 7, Subtitle D.

(31) [~~(29)~~] Provider--A public or private entity that delivers community-based residential services and supports for individuals, including, but not limited to, an intermediate care facility for individuals with mental retardation (ICF/MR) or a nursing facility. The term also includes a public or private entity that provides waiver services [~~entities which provide home and community-based services under a Medicaid waiver program operated by the department as authorized by the Health Care Financing Administration (HCFA) in accordance with §1915(c) of the Social Security Act, including the Home and Community-based Services (HCS), Home and Community-based Waiver Services-OBRA (HCS-O), and Mental Retardation Local Authority (MRLA) programs; Community Living and Support Services (CLASS); the Deaf-Blind Multiple Disability Waiver programs; the Medically Dependent Children Program; and the Community-Based Alternatives Waiver~~].

(32) [~~(30)~~] Related services--Services for school eligible individuals as described in 19 TAC §89.1060 (relating to Definitions of Certain Related Services).

(33) [~~(31)~~] Respite admission/discharge agreement--A written agreement between the state MR facility, the individual or LAR, and MRA, sample copies of which are available from State Mental Retardation Facilities, Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711, that describes:

(A) the purpose of the respite admission including the circumstances that precipitated the need for the admission and the expected outcomes from the admission;

(B) the length of time the individual will receive respite services from the state MR facility; and

(C) the responsibilities of each party regarding the care, treatment, and discharge of the individual.

(34) [~~(32)~~] School eligible--A term describing those individuals between the ages of three and 22 who are eligible for public education services.

(35) [~~(33)~~] Service delivery system--All facility and community-based services and supports operated or contracted for by the department.

(36) [~~(34)~~] Services and supports--Programs and assistance for persons with mental retardation that may include a determination of mental retardation, interdisciplinary team recommendations, education, special training, supervision, care, treatment, rehabilitation, residential care, and counseling, but does not include those services or programs that have been explicitly delegated by law to other state agencies.

(37) [~~(35)~~] Significantly subaverage general intellectual functioning--Consistent with THSC, §591.003, measured intelligence on standardized general intelligence tests of two or more standard deviations (not including standard error of measurement adjustments) below the age-group mean for the tests used.

(38) [~~(36)~~] State MH facility (state mental health facility)--A state hospital.

(39) [~~(37)~~] State MR facility (state mental retardation facility)--A state school or a state center with a mental retardation residential component.

(40) [~~(38)~~] THSC--Texas Health and Safety Code.

(41) Waiver services--Home and community-based services provided through a Medicaid waiver program approved by Centers for Medicare and Medicaid Services (CMS), formerly Health Care Financing Administration (HCFA), as described in §1915(c) of the Social Security Act. Medicaid waiver programs operated by the department include Home and Community-based Services (HCS) Program, Home and Community-based Waiver Services-OBRA (HCS-O) Program, and Mental Retardation Local Authority (MRLA) Program. Other waiver programs for which an individual applying to an MRA for services and supports might be eligible that are operated by other state agencies include Community Living and Support Services (CLASS); the Deaf-Blind Multiple Disability Waiver programs; the Medically Dependent Children Program; and the Community-Based Alternatives Waiver.

§412.254. Department's Philosophy Concerning Continuum of Care.

(a) The department will maintain a balanced and effective service delivery system that affords a full range of services and supports to individuals and their families.

(1) The continuum of care within the department's service delivery system encompasses [~~will encompass~~] residential services in state mental retardation (MR) facilities and community-based ICF/MR programs, [~~home and community-based~~] waiver services, and those services and supports provided or contracted by a mental retardation authority (MRA) [~~an MRA~~].

(2) Residential services in a state MR facility are intended to serve individuals with severe or profound mental retardation and those individuals with mental retardation who are medically fragile or who have behavioral problems.

(b) (No change.)

~~[(c) For each minor for whom residential services in a state MR facility are sought, the MRA will ensure that permanency planning is included as an integral part of service planning with emphasis on identifying:]~~

~~[(1) the family's natural supports and strengths, as well as activities and supports that can be provided or facilitated by the MRA, that will enable the minor to remain in the family home; or]~~

~~[(2) alternative arrangements that will secure a consistent, nurturing environment that provides the minor with an enduring, positive relationship with a specific adult who will be an advocate for that minor.]~~

(c) [~~(d)~~] For an individual residing in a state MR facility, the MRA designated in CARE for that individual is responsible for:

(1) maintaining a link between the individual and the individual's home community;

(2) ensuring that the individual, LAR, and state MR facility are provided with information concerning alternative living arrangements that may be appropriate for the individual;

(3) assisting the individual or LAR who decides to seek an alternative living arrangement in accessing the alternative living arrangement, including working with other MRAs if the alternative living arrangement being sought is outside the designated MRA's local service area; and

(4) providing the state MR facility with current, provider-furnished information about services and supports in the MRA's local service area.

(d) [~~(e)~~] The MRA and state MR facility will provide the supports and encouragement necessary to ensure that each individual or LAR is able to exercise choice and decision-making authority in all issues related to services and supports.

(1) Whether an individual lives in the community or is a resident of a state MR facility, if the individual does not have an LAR and cannot communicate a preference concerning services and supports, the MRA or state MR facility will involve those persons who are actively involved with the individual in discussions regarding services and supports.

(2) For the individual residing in a state MR facility, the state MR facility must have procedures in place to ensure that an individual residing in the state MR facility or the individual's LAR is supported in making decisions concerning living options.

(3) The following principles support choice and decision-making by the individual or LAR. Each MRA and state MR facility must follow these principles when addressing issues of services and supports.

(A) The choices, preferences, expectations, likes, and dislikes of the individual and LAR are the dominant force in discussions about service planning.

(B) When considering Medicaid services, the individual with the ability to provide legally adequate consent or LAR is entitled to choose a provider from:

(i) a list of ICF/MR Program providers qualified and willing to provide services and supports to that individual; or

(ii) a list of waiver program providers serving the area in which the individual or LAR is interested.

(C) The individual will be provided with opportunities for appropriate training, counseling, and other learning experiences that may facilitate the exercise of choice and decision-making. If the individual has an LAR, these opportunities will be provided only with the consent of the LAR.

(D) Whenever possible, the individual and the LAR will be encouraged to visit a residential setting prior to the individual's admission. If the individual does not have an LAR, persons who are actively involved with the individual will be encouraged to visit a residential setting prior to the individual's admission, unless the individual objects.

This 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 November 26, 2001.

TRD-200107225
Andrew Hardin
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: January 6, 2002
For further information, please call: (512) 206-5232

♦ ♦ ♦

DIVISION 2. ADMISSION AND COMMITMENT

25 TAC §§412.259, 412.264, 412.265, 412.266 - 412.269

The amendments are proposed under the Texas Health and Safety Code (THSC), §532.015(a), which provides the Texas Mental Health and Mental Retardation Board with broad rule-making authority; THSC, §591.004, which provides the board with authority to adopt rules implementing the Persons with Mental Retardation Act (PMRA) and the Texas Government Code, §531.153, which directs health and human services agencies to develop procedures regarding permanency planning.

§412.259. Criteria for Commitment of a Minor to a State MR Facility Under the Texas Family Code.

(a) In accordance with Texas Family Code, §55.41 and §55.60, a minor in the juvenile justice system may be committed to a state MR facility only if:

(1) the minor [~~child~~] is found to be unfit to proceed or to lack responsibility for the minor's actions pursuant to juvenile charges;

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

(b) (No change.)

§412.264. MRA IDT Recommendation Concerning the Commitment of an Adult or a Minor or the Regular Voluntary Admission of an Adult to a State MR Facility Under the PMRA.

(a) The IDT at an MRA must do the following in making a report of its findings and recommendations as described in §412.255(a)(5) and (b)(1)(B) of this title (relating to Criteria for

Commitment and Regular Voluntary Admission of an Adult to a State MR Facility Under the PMRA), §412.256(b)(3)(E), (c)(3)(E), (e)(3)(E), and (f)(3)(E) of this title (relating to Criteria for Commitment of an Adult under the Texas Code of Criminal Procedure), and §412.257(a)(5) of this title (relating to Criteria for Commitment of a Minor to a State MR Facility Under the PMRA):

(1) in accordance with THSC, §593.013:

(A) interview the individual or the individual's LAR;

(B) review the individual's:

(i) social and medical history;

(ii) medical assessment, which must include an audiological, neurological, and vision screening;

(iii) psychological and social assessment, including the ICAP; and

(iv) determination of adaptive behavior level;

(C) determine the individual's need for additional assessments, including educational and vocational assessments;

(D) obtain any additional assessment(s) necessary to plan services;

(E) identify the individual's or LAR's habilitation and service preferences and the individual's needs;

(F) recommend services to address the individual's needs that consider the individual's or LAR's interests, choices, and goals and, for the individual under 22 years of age [~~who is a minor~~], include permanency planning as a goal;

(G) encourage the individual and the individual's LAR to participate in IDT meetings;

(H) if desired, use a previous assessment, social history, or other relevant record from a school district, public or private agency, or appropriate professional if the IDT determines that the assessment, social history or record is valid;

(I) prepare a written report of its findings and recommendations that is signed by each IDT member and send a copy of the report within 10 working days to the individual or LAR, as appropriate; and

(J) if the individual is being considered for commitment to the state MR facility, submit the IDT report promptly to the court, as ordered, and to the individual or LAR, as appropriate; and

(2) determine whether:

(A) the individual, because of mental retardation:

(i) represents a substantial risk of physical impairment or injury to self or others; or

(ii) is unable to provide for and is not providing for the individual's most basic personal physical needs;

(B) the individual cannot be adequately and appropriately habilitated in an available, less restrictive setting; and

(C) the state MR facility provides habilitative services, care, training and treatment appropriate to the individual's needs.

(b) For the individual under 22 years of age, the MRA will ensure that permanency planning is included as an integral part of service planning, as required in subsection (a)(1)(F) of this section, with an emphasis on identifying:

(1) the family's natural supports and strengths that, supplemented by activities and supports provided or facilitated by the MRA, will enable the individual under 18 years of age to remain in the family home;

(2) a family-based alternative living arrangement that will secure for an individual under 18 years of age a consistent, nurturing environment and an enduring, positive relationship with a specific adult who will be an advocate for that individual; or

(3) the natural supports and strengths of an applicant from 18 to 22 years of age that, when supplemented by activities and supports provided or facilitated by the program provider or MRA, will result in the applicant having a consistent and nurturing environment as defined by the applicant and LAR.

(c) If the individual is under 22 years of age, the MRA must explain to the individual and LAR that:

(1) before the individual is admitted to the state MR facility, the commissioner or designee must approve the admission; and

(2) the individual's residency at a state MR facility will last no longer than six months unless the commissioner or designee approves a six-month extension.

(d) As described in §419.244 of this title (relating to Applicant Enrollment), if the individual is under 22 years of age, the MRA's IDT must inform the individual and LAR of the right to request a volunteer advocate to assist in permanency planning required in subsection (a)(1)(F) of this section.

§412.265. MRA Referral of an Applicant to a State MR Facility.

(a) If an individual or LAR requests residential services in a state MR facility, the MRA serving the local service area in which the individual lives or, in the case of an interstate transfer, the MRA serving the local service in which the individual's LAR or family lives or intends to live must provide an oral and written explanation as described in §415.159(c) of this title (relating to Assessment of Individual's Need for Services and Supports).[~~:~~]

[~~(1) provide an oral and written explanation to the individual or LAR about community-based alternatives that may meet the individual's needs;~~]

[~~(2) provide a copy of the written explanation to the individual or LAR with the original to be retained in the individual's record; and~~]

[~~(3) provide an oral and written explanation to the individual or LAR about residential services in a state MR facility and advise the individual or LAR of whether or not the individual meets the criteria for admission or commitment to a state MR facility.~~]

[~~(b) The written explanation described in subsection (a)(1) of this subsection must:~~]

[~~(1) describe the program and service preferences of the individual or LAR in a way that is understandable to the individual or LAR; and~~]

[~~(2) be signed and dated by the individual or LAR to indicate that the explanation was provided.~~]

(b) [~~(c)~~] If the MRA's IDT determines that an applicant meets the criteria described in §412.255 of this title (relating to Criteria for Commitment and Regular Voluntary Admission of an Adult to a State MR Facility Under the PMRA) or §412.257 of this title (relating to Criteria for Commitment of a Minor to a State MR Facility Under the PMRA), the MRA will:

(1) notify the applicant or LAR in writing;

(2) [~~(1)~~] contact the state MR facility serving the area in which the applicant lives or, if the applicant is requesting an interstate transfer, the area in which the individual's LAR or family lives or intends to live;

(3) [~~(2)~~] contact the department's interstate compact coordinator, if the applicant is requesting an interstate transfer; [~~open an assignment in CARE indicating the applicant is waiting for services in a state MR facility; and~~]

(4) [~~(3)~~] compile and submit all information required to complete an application packet, as described in subsection (g) of this section;

(5) open an assignment in CARE indicating the applicant is waiting for services in a state MR facility.

(c) If the MRA's IDT determines that the applicant does not meet the criteria for commitment or regular voluntary admission to a state MR facility as described in this subchapter, the MRA will:

(1) notify the applicant or LAR in writing of the determination and explain the procedure for the applicant or LAR to request a review of the IDT's determination by the MRA's executive director or designee in accordance with §401.464 of this title (relating to Notification and Appeals Process); or

(2) if the applicant was seeking an interstate transfer, notify the department's interstate compact coordinator in writing.

[~~(d) If the MRA's IDT does not recommend that the applicant be admitted to a state MR facility because the applicant does not meet the criteria in §412.255 of this title (relating to Criteria for Commitment and Regular Voluntary Admission of an Adult to a State MR Facility Under the PMRA) or §412.257 of this title (relating to Criteria for Commitment of a Minor to a State MR Facility Under the PMRA), the MRA will:~~]

[~~(1) notify the applicant or the applicant's LAR of the procedure to request a review by the MRA of the IDT decision in accordance with §401.464 of this title (relating to Notification and Appeals Process); and~~]

(d) [~~(2)~~] If a review by the MRA's executive director or designee of [~~if the MRA upholds~~] the IDT's determination results in the determination being upheld [~~decision~~], the MRA will inform the applicant or [~~the applicant's~~] LAR in writing that a request for a review by the department's ombudsman may be made in writing to Consumer Services and Rights Protection, Ombudsman, Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas, 78711-2668, or by calling 1-800-252-8154.

(e) If the applicant or LAR requests a review, the department's ombudsman will review relevant documentation provided by the applicant and LAR, the IDT, and the MRA's executive director or designee, and determine whether the processes described in this subchapter were followed. [~~If the applicant or the applicant's LAR requests a review by the department's ombudsman as described in subsection (d)(2) of this section, the department's ombudsman will decide whether the processes in this subchapter have been followed by reviewing relevant documentation from the IDT, the MRA's executive director or designee, and the applicant's LAR.~~]

(1) The ombudsman will issue a written decision to the applicant, the applicant's LAR, and the MRA within 14 calendar days of the request.

(2) If the ombudsman [~~ombudsman's~~] decides that the processes in this subchapter were [~~have been~~] followed, [~~then~~] the ombudsman will assist the applicant in gaining access to an appropriate program for which the applicant is eligible or in placing the applicant on the waiting list of an appropriate program for which the applicant is eligible.

(3) If the ombudsman decides that the processes in this subchapter were [~~have~~] not [~~been~~] followed, then the MRA must take action to follow the processes in this subchapter.

(f) If the MRA determines that an applicant meets the criteria described in §412.261 of this title (relating to Criteria for Emergency Admission of an Adult or a Minor to a State MR Facility Under the PMRA) or §412.262 of this title (relating to Criteria for Admission of an Adult or a Minor to a State MR Facility for Respite Care Under the PMRA), the MRA will:

(1) contact the state MR facility serving the area in which the applicant lives; [~~and~~]

(2) compile all of the information required to complete an application packet as described in subsection (h) or (i) of this section, as appropriate; and[~~.~~]

(3) request the applicant's enrollment in the ICF/MR Program as described in §419.244(e) of this title (relating to Applicant Enrollment), if appropriate.

(g) A complete application packet, as referenced in subsection (b)(4) [~~(c)(3)~~] of this section, must include:

(1) the original order of commitment, if applicable;

(2) a completed Application for Admission including signature of the applicant or the applicant's LAR (copies of the Application for Admission are available by contacting the Office of State Mental Retardation Facilities, Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711-2668);

(3) a DMR report with statement that the applicant has mental retardation, as described in §415.155(g) of this title (relating to Determination of Mental Retardation (DMR));

(4) a completed ICAP (Inventory for Client and Agency Planning) booklet and MR/RC Assessment form;

(5) an IDT report completed as described in §412.264(a) [~~§412.264~~] of this title (relating to MRA IDT Recommendation Concerning the Commitment of an Adult or a Minor or the Regular Voluntary Admission of an Adult to a State MR Facility Under the PMRA) recommending the commitment or regular voluntary admission of the applicant to a state MR facility;

(6) copies of available psychological, medical, and social histories for the applicant;

(7) [~~(6)~~] a copy of any divorce decree pertaining to the applicant [~~individual~~];

(8) [~~(7)~~] any legal document dealing with the custody of a minor;

(9) [~~(8)~~] current letters of guardianship, order appointing a guardian, and related orders, if the applicant [~~individual~~] has a guardian;

(10) a copy of any will naming the applicant as a devisee;

(11) [~~(9)~~] a certified copy of the applicant's birth certificate;

(12) [~~(10)~~] a copy of the applicant's immunization record;

(13) [~~(11)~~] a copy of the applicant's social security card;

(14) [~~(12)~~] a copy of the applicant's Medicare and Medicaid card (if applicable);

(15) [~~(13)~~] any record regarding care and treatment of the individual in a state mental health facility or a psychiatric hospital;

(16) [~~(14)~~] for the applicant who is school eligible, the Admission, Review and Dismissal (ARD) Committee report, Individual Education Plan (IEP), and Comprehensive Assessment; [~~and~~]

(17) [~~(15)~~] for the applicant who is a minor, results of the CRCG staffing held as described in §412.257(c) of this title (relating to Criteria for Commitment of a Minor to a State MR Facility Under the PMRA); [~~:~~]

[~~(A) results of the CRCG staffing held as described in §412.257(c) of this title (relating to Criteria for Commitment of a Minor to a State MR Facility Under the PMRA); and~~]

(18) [~~(B)~~] for the applicant under 22 years of age, results of the MRA's permanency planning process as described in §412.264(b) [~~§412.264(1)(F)~~] of this title (relating to MRA IDT Recommendation Concerning the Commitment of an Adult or a Minor or the Regular Voluntary Admission of an Adult to a State MR Facility Under the PMRA) ; and

(19) any documents concerning the applicant's immigration status.

(h) A complete application packet for emergency admission of an individual, as referenced in subsection (f)(2) of this section, must include:

(1) a completed Application for Admission including signature of the applicant or the applicant's LAR (copies of the Application for Admission are available by contacting the Office of State Mental Retardation Facilities, Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711-2668);

(2) a written request from the MRA for the emergency admission of the applicant;

(3) documentation:

(A) describing the persuasive evidence that the individual has mental retardation;

(B) of the reasons supporting the individual's urgent need for the emergency admission, including the circumstances precipitating the need for the emergency admission;

(C) of the expected outcomes from the emergency admission; and

(D) that the requested relief can be provided by the state MR facility within a year after the individual is admitted;

(4) a copy of any divorce decree pertaining to the individual;

(5) any legal document dealing with the custody of a minor;

(6) current letters of guardianship, order appointing a guardian and related orders, if the individual has a guardian;

(7) a certified copy of the applicant's birth certificate;

(8) a copy of the applicant's immunization record;

(9) a copy of the applicant's social security card;

(10) a copy of the applicant's Medicare and Medicaid card (if applicable);

(11) for the applicant who is school eligible, the Admission, Review and Dismissal (ARD) Committee report, Individual Education Plan (IEP), and Comprehensive Assessment;

(12) for the applicant who is a minor, the results of the CRCG staffing held as described in §412.257(c) of this title (relating to Criteria for Commitment of a Minor to a State MR Facility Under the PMRA);

(13) for the applicant under 22 years of age, results of the MRA's permanency planning process as described in §412.264(b) of this title (relating to MRA IDT Recommendation Concerning the Commitment of an Adult or a Minor or the Regular Voluntary Admission of an Adult to a State MR Facility Under the PMRA);

(14) [~~(13)~~] any record regarding care and treatment of the individual in a state mental health facility or a psychiatric hospital; [~~and~~]

(15) any documents concerning the applicant's immigration status; and

(16) [~~(14)~~] if requested by the department:

(A) a DMR report with a statement that the applicant has mental retardation, as described in §415.155(g) of this title (relating to Determination of Mental Retardation (DMR)), if requested by the department; and

(B) a completed ICAP (Inventory for Client and Agency Planning) booklet and MR/RC Assessment form.

(i) A complete application packet for admission of an individual for respite care, as referenced in subsection (f)(2) of this section, must include:

(1) a completed Application for Admission including signature of the applicant or the applicant's LAR (copies of the Application for Admission are available by contacting the Office of State Mental Retardation Facilities, Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711-2668);

(2) a written request from the MRA for the admission of the applicant for respite care;

(3) documentation:

(A) describing the persuasive evidence that the individual has mental retardation;

(B) of the reasons why the individual or the individual's family urgently requires respite care; and

(C) that the requested assistance or relief can be provided by the state MR facility within a period not to exceed 30 calendar days after the date of admission;

(4) a copy of any divorce decree pertaining to the individual;

(5) any legal document dealing with the custody of a minor;

(6) current letters of guardianship, order appointing a guardian and related orders, if the individual has a guardian;

(7) a certified copy of the applicant's birth certificate;

(8) a copy of the applicant's immunization record;

(9) a copy of the applicant's social security card;

(10) a copy of the applicant's Medicare and Medicaid card (if applicable);

(11) for the applicant who is school eligible, the Admission, Review and Dismissal (ARD) Committee report, Individual Education Plan (IEP), and Comprehensive Assessment; [~~and~~]

(12) any documents concerning the applicant's immigration status; and

(13) [~~(12)~~] if requested by the department:

(A) a DMR report with a statement that the applicant has mental retardation, as described in §415.155(g) of this title (relating to Determination of Mental Retardation (DMR)), if requested by the department; and

(B) a completed ICAP (Inventory for Client and Agency Planning) booklet and MR/RC Assessment form.

§412.266. Process for Admission of an Adult or a Minor Who Has Been Committed to a State MR Facility Under the PMRA.

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

(f) If the applicant or the applicant's LAR accepts the proposed admission, the MRA must request enrollment of [~~will take the steps necessary to enroll~~] the applicant in the ICF/MR Program [~~program~~] as described in §419.244 of this title (relating to Applicant Enrollment), if appropriate [~~department rules~~].

(g) If the applicant or LAR [~~the state MR facility has offered admission, the applicant or the applicant's LAR~~] has accepted the proposed admission, and the MRA has filed for commitment, but the commitment order has not been completed, the MRA may petition the court for [~~court may issue~~] an order of protective custody.

(h) The MRA shall coordinate the following with the state MR facility's admission coordinator:

(1) transportation arrangements for the individual on the day of the admission;

(2) arrangements for the individual's LAR to be present at the state MR facility when the individual is admitted, or if the individual does not have an LAR, for the individual's family members or other actively involved persons to be present; and

(3) the exchange of essential information training necessary to familiarize staff at the state MR facility with the needs of the individual.

~~[(i) If the applicant or the applicant's LAR accepts the proposed admission but a commitment order has not been obtained, a petition for an order of protective custody may be made.]~~

(i) [~~(j)~~] If the LAR or family of the individual no longer wishes to pursue admission of the individual to a state MR facility under the commitment order, the MRA will notify the court in writing.

(j) Within three days of the admission of an individual under 22 years of age, the state MR facility must make the notifications required in §419.222(c) and (d) of this title (relating to Permanency Planning for Individuals Under 22 Years of Age).

§412.267. Process for the Regular Voluntary Admission of an Adult to a State MR Facility Under the PMRA.

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

(f) If the applicant or the applicant's LAR accepts the proposed admission, the MRA must request enrollment of [~~will take the steps necessary to enroll~~] the applicant in the ICF/MR Program as described in §419.244 of this title (relating to Applicant Enrollment), if appropriate [~~the department rules~~].

(g) The MRA will coordinate the individual's pre-admission visit, if such visit is appropriate and desired by the individual.

(h) Within three days of the admission of an individual under 22 years of age, the state MR facility must make the notifications required in §419.222(c) and (d) of this title (relating to Permanency Planning for Individuals Under 22 Years of Age).

§412.268. Process for Placement of Minor under the Texas Family Code in a State MR Facility.

(a) (No change.)

(b) Prior to the minor's admission under a placement order, the MRA must submit the following documents to the state MR facility:

(1) the original court order;

(2) an offense record;

(3) a DMR, if available;

(4) a current medical assessment;

(5) a physician's medication orders;

(6) a social history;

(7) a psychological history;

(8) an immunization record;

(9) a copy of social security card;

(10) a certified copy of birth certificate;

(11) the Admission, Review and Dismissal (ARD) Committee report, Individual Education Plan (IEP), and Comprehensive Assessment;

(12) a copy of the Medicaid card, if applicable;

(13) any legal document dealing with the custody of a minor [~~a copy of relevant legal documents (e.g., orders or other documents concerning guardianship or managing conservatorship of the minor individual, the divorce or the minor's parents, or immigration status)~~];

(14) current letters of guardianship, order appointing a guardian, and related orders, if the individual has a guardian;

(15) a certified copy of the applicant's birth certificate;

(16) any documents concerning the applicant's immigration status;

(17) [~~(14)~~] a completed ICAP (Inventory for Client and Agency Planning) booklet and MR/RC assessment form, if available; and

(18) [~~(15)~~] other available evaluations.

(c) (No change.)

(d) Within 30 calendar days after the minor is admitted to the state MR facility, the state MR facility will schedule an IDT meeting to develop an IPP for the minor. In accordance with §419.222 [~~§419.282~~] of this title (relating to Permanency Planning for Individuals Under 22 Years of Age [~~Children~~]), the IPP will be developed using permanency planning.

(e) - (h) (No change.)

(i) Within three days of the admission of the minor, the state MR facility must make the notifications required in §419.222(c) and (d) of this title (relating to Permanency Planning for Individuals Under 22 Years of Age).

§412.269. Process for the Emergency Admission of an Adult or a Minor to a State MR Facility Under the PMRA.

(a) (No change.)

(b) If the MRA determines that an individual meets the criteria for emergency admission under §412.261 of this title (relating to Criteria for Emergency Admission of an Adult or a Minor to a State MR Facility Under the PMRA), the MRA must retain a copy of the application packet, as described in §412.265(h) of this title (relating to MRA Referral of an Applicant to a State MR Facility) and send the original application packet to the admission coordinator of the state MR facility.

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

(g) If the individual is under 22 years of age [~~a minor~~], the Emergency Admission/Discharge Agreement must be developed using permanency planning, as described in §419.222 [~~§419.282~~] of this title (relating to Permanency Planning for Individuals Under 22 Years of Age [~~Children~~]) and must specify that the individual is to be admitted for no longer than six months to receive emergency services in the state MR facility.

(h) (No change.)

(i) If the Emergency Admission/Discharge Agreement is approved by the commissioner or designee and the individual is admitted, the state MR facility will, at the time of admission:

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

(j) Within 30 calendar days after the individual is admitted, the state MR facility will arrange for:

(1) (No change.)

(2) an IDT at the state MR facility to make findings and recommendations in accordance with the process required for an MRA IDT as described in §412.264(a) [~~§412.264~~] of this title (relating to MRA IDT Recommendation Concerning the Commitment of an Adult or a Minor or the Regular Voluntary Admission of an Adult to a State MR Facility Under the PMRA).

(k) - (m) (No change.)

(n) Within three days of the admission of an individual under 22 years of age, the state MR facility must make the notifications required in §419.222(c) and (d) of this title (relating to Permanency Planning for Individuals Under 22 Years of 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 November 26, 2001.

TRD-200107226
Andrew Hardin
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: January 6, 2002
For further information, please call: (512) 206-5232

♦ ♦ ♦

DIVISION 4. MOVING FROM A STATE MR FACILITY TO AN ALTERNATIVE LIVING ARRANGEMENT

25 TAC §412.274

The amendments are proposed under the Texas Health and Safety Code (THSC), §532.015(a), which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority; THSC, §591.004, which provides the board with authority to adopt rules implementing the Persons with Mental Retardation Act (PMRA) and the Texas Government Code, §531.153, which directs health and human services agencies to develop procedures regarding permanency planning.

The amendments would affect THSC, Chapter 593, Subchapters B and C, and Texas Government Code, Chapter 531, Subchapter D and §531.042.

§412.274. Consideration of Living Options for Individuals Residing in State MR Facilities.

(a) A state MR facility must discuss living options with the individual or the individual's LAR using the State MR Facility Living Options instrument within six months after the individual is admitted or committed to the state MR facility and at least annually thereafter for the individual who is over 22 years of age [~~is an adult~~] and at least every six months [~~quarterly~~] thereafter for the individual who is under 22 years of age [~~a minor~~] and upon request by an individual or LAR. Copies of the State MR Facility Living Options instrument are available on the department's website at www.mhmr.state.tx.us or by contacting the Office of State Mental Retardation Facilities, Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711. At the conclusion of a meeting during which living options have been discussed, the individual's IDT will document the:

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

(4) recommendation by the IDT of whether the individual should remain in the current living arrangement at the state MR facility or move to an alternative living arrangement; and[~~.~~]

(5) IDT's conclusions as to whether or not the permanency planning goals for an individual under 22 years of age have been met.

(b) If the review of living options for an individual under 22 years of age results in an IDT conclusion that the individual's permanency planning goals have not been met and that the individual should remain at the state MR facility, the IDT must request approval for the individual's continued residence as described in §419.222(g) of this title (relating to Permanency Planning for Individuals Under 22 Years of Age).

(c) [~~(b)~~] The state MR facility will ensure that the individual and LAR receive adequate notice of a meeting at which the state MR facility anticipates that living options are likely to be discussed.

(1) The individual with the ability to provide legally adequate consent or the LAR of an individual who does not have the ability to provide legally adequate consent may choose to:

(A) invite other family members, friends, or other interested persons to the meeting; or

(B) exclude any and all family members, friends, or other interested persons from attending the meeting.

(2) The state MR facility must:

(A) encourage the attendance and participation in the meeting by those persons invited by the individual or LAR;

(B) make a reasonable attempt to schedule the meeting at a time that is convenient for the individual's LAR and those family members, friends, or other persons invited by the individual or LAR; and

(C) notify the designated MRA of the meeting at the same time the individual and LAR are notified and request from the

MRA the information about alternative living arrangements and community services and supports in the MRA's local service area that the IDT will need before making a recommendation as described in subsection (a)(4) of this section.

(3) If the individual is under 22 years of age, the state MR facility will inform the individual and the LAR that they may request a volunteer advocate to assist in permanency planning as described in §419.222(e) and (f) of this title (relating to Permanency Planning for Individuals Under 22 years of Age).

(d) [~~(c)~~] If the individual is a minor and:

(1) parental rights have not been terminated, the IDT recommendation regarding living arrangements will be based on the [~~individual's~~] permanency planning needs for services and supports which will enable the minor:

(A) to live with the minor's family if the LAR chooses to move the minor back into the family home; or

(B) to move to a family-based [~~an~~] alternative living arrangement [~~home~~] chosen by the minor's family that will secure a consistent, nurturing environment and an enduring, positive relationship with a specific adult who will be an advocate for that minor; or

(2) [~~and if the~~] parental rights have been terminated, the IDT recommendation will be based on the permanency planning needs for support and services that [~~which~~] will enable the minor to move to a family-based alternative living arrangement that will secure a consistent, nurturing environment and an enduring, positive relationship with a specific adult who will be an advocate for that minor [~~live in a family environment in the community~~].

(e) If the individual is between 18 and 22 years of age, the IDT recommendation regarding living arrangements will be based on the individual's natural supports and strengths that, when supplemented by activities and supports provided or facilitated by a provider or MRA, will result in the individual having a consistent and nurturing alternative living arrangement as defined by the applicant and LAR.

(f) [~~(d)~~] The designated MRA shall ensure that the state MR facility has the information about alternative living arrangements and community services and supports needed to assist the IDT in making a recommendation described in subsection (a)(4) of this section.

(g) [~~(e)~~] Communication devices and techniques (including the use of sign language) will be utilized, as appropriate, to facilitate the involvement of the individual and the LAR during the meeting.

(h) [~~(f)~~] If the individual or the individual's LAR expresses an interest in an alternative living arrangement during a meeting or at any other time, the state MR facility will ensure that the individual or LAR is informed of the range of alternative living arrangements, including community-based ICF/MR programs, [~~home and community-based~~] waiver services, those services and supports provided or contracted by an MRA, and any other services that may be appropriate.

(i) [~~(g)~~] An individual with the ability to provide legally adequate consent or the LAR may choose for the individual to remain a resident of a state MR facility if the individual has been determined to have mental retardation in accordance with §415.155 of this title (relating to Determination of Mental Retardation (DMR)).

This 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 November 26, 2001.

TRD-200107227
Andrew Hardin
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: January 6, 2002
For further information, please call: (512) 206-5232

♦ ♦ ♦

CHAPTER 415. PROVIDER CLINICAL RESPONSIBILITIES

SUBCHAPTER D. DIAGNOSTIC ELIGIBILITY FOR SERVICES AND SUPPORTS -- MENTAL RETARDATION PRIORITY POPULATION AND RELATED CONDITIONS

25 TAC §415.159

The Texas Department of Mental Health and Mental Retardation (department) proposes amendments to §415.159 of Chapter 415, Subchapter D, concerning diagnostic eligibility for services and supports -- mental retardation priority population and related conditions.

The proposed amendments implement a provision of Senate Bill 367, 77th Legislature, which modified the Texas Government Code, §531.042. SB 367 adds to §531.042 the requirement that, if possible, at least one family member of an individual must be informed of all care and support settings available to the individual before the individual is placed in a care setting. SB 367 also provides that if the individual has a legally authorized representative, the information must also be provided to that representative.

Cindy Brown, chief financial officer, has determined that for each year of the first five year period that the amendments are in effect, enforcing or administering the amendments do not have foreseeable implications relating to costs or revenues of state or local government. It is not anticipated that adopting the amendments will have an adverse economic effect on small businesses or micro-businesses because they do not impose any requirements on small business or micro-businesses. It is not anticipated that there will be any additional economic cost to persons required to comply with the amendments. It is not anticipated that the amendment will affect a local economy.

Barry Waller, director, Long Term Services and Supports, has determined that for each year of the first five-year period the amendments are in effect, the expected public benefit is that the family of an individual for whom mental retardation services and supports are sought will be fully informed of all care and support settings for which the individual is eligible.

A hearing to accept oral and written testimony from members of the public concerning the proposed amendments has been scheduled for 1:30 p.m., Monday January 7, 2002, in the department's Central Office Auditorium in Building 2 at 909 West 45th Street, in Austin, Texas. Persons requiring an interpreter for the deaf or hearing impaired should contact the department's Central Office operator at least 72 hours prior to the hearing at TDD (512) 206-5330. Persons requiring other accommodations for a disability should notify the Long Term Services and Supports Division, at least 72 hours prior to the hearing at (512) 206-4706 or at the TDY phone number of Texas Relay, 1/800-735-2988.

Comments concerning this proposal must be submitted in writing to Linda Logan, director, Policy Development, Texas Department of Mental Health and Mental Retardation, by mail to P.O. Box 12668, Austin, Texas 78711, by fax to 512/206-4750, and by e-mail to policy.co@mhmr.state.tx.us within 30 days of publication of this notice.

The amendments are proposed under the Texas Health and Safety Code, §532.015(a), which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority.

The amendments would affect Texas Health and Safety Code, §§532.015 and 533.038, and Texas Government Code, §531.042.

§415.159. Assessment of Individual's Need for Services and Supports.

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

(c) If the individual or LAR is seeking residential mental retardation services, the MRA representative must provide [~~both an oral and written explanation~~] to the individual, LAR, and, if the LAR is not a family member, at least one family member both an oral and written explanation [~~or LAR~~] of the services and supports for which the individual may be eligible.

(1) As required by THSC, §533.038, the explanation must address:

(A) Intermediate Care Facilities for Persons with Mental Retardation (ICF/MR) Program services -- both state mental retardation facilities and community-based facilities;

(B) waiver services under §1915(c) of the Social Security Act; and

(C) other community-based services and supports [~~that may meet the individual's needs~~].

(2) The MRA must give a [~~A~~] copy of the written explanation [~~must be given~~] to the individual, LAR, and any family member to whom the explanation was given [~~or LAR~~] and retain the original [~~retained~~] in the individual's record [~~of the individual~~]. The written explanation must:

(A) describe the program and service preferences of the individual or LAR; and

(B) be signed and dated by the individual, [~~or~~] LAR, or family member to indicate that the explanation was provided.

(3) If the services and supports requested by the individual or LAR are not available, the MRA must:

(A) assist the individual or LAR in gaining access to alternative services and supports and appropriate waiting lists;

(B) document efforts undertaken by the MRA to obtain the requested services and supports, including the names and addresses of programs and facilities to which the individual or LAR was referred; and

(C) document the services and supports for which the individual is waiting.

This 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 November 26, 2001.

TRD-200107228
Andrew Hardin
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: January 6, 2002
For further information, please call: (512) 206-5232

♦ ♦ ♦

CHAPTER 419. MEDICAID STATE OPERATING AGENCY RESPONSIBILITIES

SUBCHAPTER D. HOME AND COMMUNITY-BASED SERVICES (HCS) PROGRAM

25 TAC §§419.153, 419.164, 419.165, 419.174, 419.175

The Texas Department of Mental Health and Mental Retardation (department) proposes amendments to §§419.153, 419.165, 419.174, and 419.175 and new §419.164 of Chapter 419, Subchapter D, concerning home and community-based services (HCS) program. Existing §419.164 is proposed for repeal in this issue of the *Texas Register*.

The proposed amendments to §§419.153, 419.174, and 419.175 and new §419.164 implement several of the provisions of Senate Bill 368, 77th Legislature (SB 368). First, SB 368 expands the permanency planning requirements in the Texas Government Code, Chapter 531, Subchapter D, to apply to individuals under 22 years of age who receive developmental disability services in an institution including waiver program services in a residence other than the individual's own or foster home. For HCS, this applies to individuals receiving supervised living or residential support services. Previous law required permanency planning only for individuals under 18 years of age living in certain institutions and waiver programs were not included in the definition of "institution." New §419.164(e)(3) and amendments to §§419.153(21) and 419.174(14) reflect this change in the law. SB 368 also requires the initiation of supervised living or residential support for an individual under 22 years of age to be approved by the department's commissioner or designee and provides that these services may not exceed six months unless a six month extension is approved by the commissioner or designee after a review of documented permanency planning efforts. The legislation provides that additional six-month extensions are permitted only if recommended by the commissioner or designee and approved by the commissioner of the Texas Health and Human Services Commission (THHSC) or designee. These provisions are reflected in new §§419.174(49)(D) and (51)(E). SB 368 further requires that no later than the third day after supervised living or residential support is initiated for an individual under 22 years of age, the program provider must notify following entities of the initiation of services: the local mental retardation authority (MRA), the community resource coordination group (CRCG) for the county in which the individual's legally authorized representative (LAR) resides, and the local school district, if the individual is at least three years of age, or the local early childhood intervention (ECI) program, if the individual is under three years of age. These requirements are reflected in new §419.174(58). New §419.174(59) lists the specific information that must be included in a program provider's notice. SB 368 also requires a volunteer advocate to be designated to assist in permanency planning if the individual or LAR requests an advocate or the individual's LAR cannot be located. These provisions have been implemented in §419.164(f) and (g).

New §419.164(c)(2) implements a provision of SB 367, 77th Legislature, that requires at least one family member of an individual to be informed of all care and support options available before the individual is placed in a care setting. In addition, new §419.164(a) and (b) clarify that an individual who is a member of a target group identified in the approved HCS waiver request may be notified of a program vacancy even if the individual's name is not the first one on the waiting list. New §419.165(1)(A) and (B) clarifies that an applicant's placement on the HCS waiting list is assigned chronologically by the date of receipt of a written request for HCS Program services, or by date of the receipt of a notice given by an institution for an individual under 22 years of age who is admitted to the institution. New §419.165(6) specifies the circumstances under which the name of an individual who was under 22 years of age when the individual was admitted to an institution may be removed from the HCS Program waiting list.

The following new terms and definitions are added in §419.153 as a result of the amendments in other sections -- "CARE," "CRCG (community resource coordination group)," "family-based alternative," "permanency planning," and "permanency-planning review."

Cindy Brown, chief financial officer, has determined that for each year of the first five year period that the amendments and new section are in effect, enforcing or administering the amendments and new section do not have foreseeable implications relating to costs or revenues of state or local government. It is not anticipated that adopting the amendments and new section will have an adverse economic effect on small businesses or micro-businesses because these changes do not impose any measurable cost on program providers. It is not anticipated that there will be any additional economic cost to persons required to comply with the amendments and new section. It is not anticipated that the amendment will affect a local economy.

Barry Waller, director, Long Term Services and Supports, has determined that for each year of the first five-year period the amendments and new section are in effect, the expected public benefit is that for individuals under 22 years of age in the waiver program who are receiving supervised living or residential support, service planning will be focused on providing a permanent living arrangement for the individual with the primary feature of an enduring and nurturing relationship with a specific adult who will be an advocate for the individual. The requirement that the local MRA, CRCG, and school district or ECI program be notified within three days of the services being initiated is intended to help ensure that the individual receives services for which the individual is eligible and that are appropriate to the individual's needs.

A hearing to accept oral and written testimony from members of the public concerning the proposed amendments and new section has been scheduled for 1:30 p.m., Monday, January 7, 2002, in the department's Central Office Auditorium in Building 2 at 909 West 45th Street, in Austin, Texas. Persons requiring an interpreter for the deaf or hearing impaired should contact the department's Central Office operator at least 72 hours prior to the hearing at TDD (512) 206-5330. Persons requiring other accommodations for a disability should notify the Long Term Services and Supports Division, at least 72 hours prior to the hearing at (512) 206-4706 or at the TDY phone number of Texas Relay, 1/800-735-2988.

Comments concerning this proposal must be submitted in writing to Linda Logan, director, Policy Development, Texas Department of Mental Health and Mental Retardation, by mail to P.O. Box 12668, Austin, Texas 78711, by fax to 512/206-4750, and by e-mail to policy.co@mhmr.state.tx.us within 30 days of publication of this notice.

The amendments and new section are proposed under the Texas Health and Safety Code, §532.015(a), which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide THHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to operate the HCS Program.

The proposed amendments and new section affect Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a) and (c) and Texas Government Code, Chapter 531, Subchapter D and §531.042.

§419.153. 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 Texas resident seeking services in the HCS Program.

(2) CARE -- The department's Client Assignment and Registration System, an on-line data entry system that provides demographic and other data about individuals served by the department.

(3) CRCG (Community Resource Coordination Group) -- A local interagency group composed of public and private agencies that develops service plans for individuals whose needs can be met only through interagency coordination and cooperation. The role and responsibilities of the involved agencies, including MRAs, school districts, and providers, are described in §411.56 of this title (relating to Memorandum of Understanding (MOU) on Coordinated Services to Children and Youths).

(4) [~~(2)~~] Department -- The Texas Department of Mental Health and Mental Retardation

(5) Family-based alternative -- A family setting in which the family provider or providers are specially trained to provide support and in-home care for children with disabilities or children who are medically fragile.

(6) [~~(3)~~] HCS -- The Home and Community-Based Services Program operated by the department as authorized by the Health Care Financing Administration (HCFA) in accordance with §1915(c) of the Social Security Act.

(7) [~~(4)~~] HCS case manager -- An employee of the program provider who is responsible for the overall coordination and monitoring of services provided to an individual enrolled in the HCS Program.

(8) [~~(5)~~] ICF/MR -- The Intermediate Care Facilities Program for Persons with Mental Retardation or Related Conditions.

(9) [~~(6)~~] IDT (interdisciplinary team) -- A planning team constituted by the program provider for each individual consisting of, at a minimum, the individual and LAR, HCS case manager, and a nurse. Other applicable persons assigned to provide or who are currently providing direct services to the individual and, as appropriate, a physician and other professional personnel may be included as team members as necessary.

(10) [~~(7)~~] IPC (individual plan of care) -- A document that describes the type and amount of each HCS program service component to be provided to an individual and describes medical and other services and supports to be provided through non-program resources.

(11) [~~(8)~~] IPC cost -- Estimated annual cost of program services included on an IPC.

(12) [~~(9)~~] IPC year -- A 12-month period of time starting on the date an authorized initial or renewal IPC begins.

(13) [~~(10)~~] Individual -- A person enrolled in the HCS program.

(14) [~~(11)~~] ISP (individual service plan) -- A document developed by the IDT, from which the IPC is derived, which describes the assessments, recommendations, deliberations, conclusions, justifications and outcomes regarding the specific services provided to the individual by the program provider.

(15) [~~(12)~~] LAR (legally authorized representative) -- A person authorized by law to act on behalf of a person with regard to a matter described in this subchapter, and may include a parent, guardian, or managing conservator of a minor, or the guardian of an adult.

(16) [~~(13)~~] LOC (level of care) -- A determination given to an individual as part of the eligibility determination process based on data submitted on the MR/RC Assessment.

(17) [~~(14)~~] LON (level of need) -- An assignment given by the department to an individual upon which reimbursement for foster/companion care, supervised living, residential support and day habilitation is based. The LON assignment is derived from the service level score obtained from the administration of the Inventory for Client and Agency Planning (ICAP) to the individual and from selected items on the MR/RC Assessment.

(18) [~~(15)~~] MRA (mental retardation authority) -- An entity to which the Texas Mental Health and Mental Retardation Board delegates its authority and responsibility within a specified region for planning, policy development, coordination, and resource development and allocation, and for supervising and ensuring the provision of mental retardation services to people with mental retardation in one or more local service areas.

(19) [~~(16)~~] MR/RC Assessment -- A form used by the department for LOC determination and LON assignment.

(20) [~~(17)~~] PDP (person-directed plan) -- A plan developed for an applicant in accordance with §419.164 of this title (relating to Process for Enrollment of Applicants) that describes the supports and services necessary to achieve the desired outcomes identified by the applicant or the applicant's LAR on behalf of the applicant.

(21) Permanency Planning -- A philosophy and planning process that focuses on the outcome of family support for an individual under 22 years of age by facilitating a permanent living arrangement in which the primary feature is an enduring and nurturing parental relationship.

(22) Permanency Planning Review -- A screen in CARE that, when completed by an MRA or program provider, identifies community supports needed to achieve an individual's permanency planning outcomes and provides information necessary for approval to provide supervised living or residential support to the individual.

(23) [~~(18)~~] Program provider -- An entity that provides HCS program services under a waiver program provider agreement with the department as defined in Chapter 419, Subchapter O of this title (relating to Enrollment of Medicaid Waiver Program Providers).

(24) [~~(19)~~] Service coordinator -- An employee of an MRA responsible for assisting an individual or the individual's LAR on behalf of the individual in accessing medical, social, educational, and other appropriate services including HCS Program services

(25) [~~(20)~~] Service planning team -- A planning team constituted by an MRA consisting of an applicant, the applicant's LAR, service coordinator, and other persons chosen by the applicant and the LAR on behalf of the applicant.

§419.164. Process for Enrollment of Applicants.

(a) Upon written notification by the department of a program vacancy in the MRA's local service area, except as provided in subsection (b) of this section, the MRA notifies the applicant whose name is first on the waiting list of the vacancy.

(b) An applicant who is a member of a target group identified in the approved HCS waiver request may be notified of a program vacancy even though the applicant's name is not the first one on the waiting list.

(c) If an applicant who is notified of a program vacancy in accordance with subsection (a) or (b) of this section indicates an interest in enrolling in the HCS Program, the MRA must:

(1) give the applicant or applicant's LAR the choice of ICF/MR or HCS Program services; and

(2) provide the applicant, the applicant's LAR, and, if the LAR is not a family member, at least one family member both an oral and written explanation of the services and supports for which the applicant may be eligible including the ICF/MR Program -- both state mental retardation facilities and community-based facilities, other waiver programs under §1915(c) of the Social Security Act, and other community-based services and supports.

(d) The MRA must document the applicant's choice of programs or the LAR's choice on behalf of the applicant on the HCS Verification of Choice form. Copies of the HCS Verification of Choice form are available by contacting the Texas Department of Mental Health and Mental Retardation, Office of Medicaid Administration, P.O. Box 12668, Austin, Texas 78711-2668.

(e) If the applicant or the LAR chooses participation in the HCS Program, the MRA will assign a service coordinator who develops a person-directed plan (PDP) in conjunction with the service planning team. At minimum, the PDP must include the following:

(1) a description of the applicant's current services and supports, identifying those that will be available if the applicant is enrolled in the HCS Program;

(2) a description of outcomes to be achieved for the applicant through the HCS Program, including determinations of further service needs through assessments to be accomplished after enrollment, and justification for each service component to be included in the IPC;

(3) if the applicant is under 22 years of age and seeking supervised living or residential support, a description of the desired permanency planning outcomes including:

(A) the natural supports and strengths of the family of an applicant under 18 years of age that, when supplemented by activities and supports provided or facilitated by the program provider or MRA, will enable the applicant to return to the family home;

(B) a family-based alternative that will secure for an applicant under 18 years of age a consistent, nurturing environment and an enduring, positive relationship with a specific adult who will be an advocate for the applicant; or

(C) the natural supports and strengths of an applicant from 18 to 22 years of age that, when supplemented by activities and supports provided or facilitated by the program provider or MRA, will result in the applicant having a consistent and nurturing environment as defined by the applicant and LAR;

(4) documentation that the type and amount of each service component included in the applicant's IPC:

(A) are necessary for the applicant to live in the community, to ensure the applicant's health and welfare in the community, and to prevent the need for institutional services;

(B) do not replace existing natural supports or other non-program sources for the service components; and

(C) when the proposed IPC includes residential support, the reasons that the team concluded that supervision and assistance from awake service providers during normal sleeping hours are required to assure the applicant's health and welfare including but not limited to the applicant's demonstrated needs for staff intervention to respond to:

(i) the applicant's medical condition;

(ii) a behavior displayed by the applicant that poses a danger to the applicant or to others; or

(iii) the applicant's need for assistance with activities of daily living during normal sleeping hours;

(5) a description of all determinations needed to establish the applicant's eligibility for SSI or Medicaid benefits and for an LOC; and

(6) a description of actions and methods to be used to reach identified service outcomes, projected completion dates, and person(s) responsible for completion.

(f) If the applicant is under 22 years of age and seeking supervised living or residential support, the MRA must inform the applicant and LAR that they may request a volunteer advocate to assist in permanency planning.

(g) If an applicant or LAR requests a volunteer advocate or the MRA cannot locate the applicant's LAR, the MRA must designate a volunteer advocate to assist in permanency planning who is:

(1) a person selected by the individual or LAR who is not employed by or under contract with the provider;

(2) an adult relative of the individual; or

(3) a representative from a child advocacy group.

(h) The MRA compiles and maintains information necessary to process the applicant's request, or LAR's request on behalf of the applicant, for enrollment in the HCS Program.

(1) If the applicant's financial eligibility for the HCS Program must be established, the MRA initiates, monitors, and supports the processes necessary to obtain a financial eligibility determination.

(2) The MRA must complete an MR/RC Assessment if an LOC determination is necessary, in accordance with §419.159 and §419.161 of this title (relating to Level of Care (LOC) Determination and Level of Need Assignment, respectively).

(A) The MRA must:

(i) perform or endorse a determination that the applicant has mental retardation in accordance with Chapter 415, Subchapter D of this title (relating to Diagnostic Eligibility for Services and Supports -- Mental Retardation Priority Population and Related Conditions); or

(ii) verify that the applicant has been diagnosed by a licensed physician as having a related condition as defined in §419.203 of this title (relating to Definitions).

(B) The MRA must administer the ICAP and recommend an LON assignment to the department in accordance with §§419.161 and 419.162 of this title (relating Level of Need Assignment and Department Review of Level of Need (LON), respectively).

(3) The MRA must develop a proposed IPC with the applicant or the LAR based on the PDP and in accordance with this subchapter.

(4) If the applicant is under 22 years of age and requesting supervised living or residential support, the MRA must complete a Permanency Planning Review and receive approval from the department to provide such services.

(i) The service coordinator must inform the applicant or the LAR of all available HCS program providers in the local service area. The service coordinator must:

(1) provide information to the applicant or the LAR regarding program providers in the MRA's local service area;

(2) review the proposed IPC with potential program providers as requested by the applicant or the LAR;

(3) arrange for meetings/visits with potential program providers as desired by the applicant or the LAR;

(4) assure that the applicant's or LAR's choice of a program provider is documented, signed by the applicant or the LAR, and retained by the MRA in the applicant's record; and

(5) negotiate/finalize the proposed IPC and the date services will begin with the selected program provider. If the service coordinator and the selected program provider are unable to agree on the proposed IPC, the service coordinator and program provider will consult jointly with the department to achieve resolution.

(j) When the proposed IPC is finalized and the selected program provider has agreed to deliver the services delineated on the IPC, the MRA will submit the enrollment information to the department. When appropriate, the MRA will also submit supporting documentation as required in §419.158(b) of this title (relating to Department Review of Individual Plan of Care (IPC)) and §419.162(b) of this title (relating to Department Review of Level of Need (LON)).

(k) The department will notify the applicant or the LAR, the selected program provider, and the MRA of its approval or denial of the applicant's enrollment. When enrollment is approved, the department must authorize the applicant's enrollment in the HCS Program through the automated enrollment and billing system and issue an enrollment letter that includes the effective date of the applicant's enrollment in the HCS Program.

(l) Upon notification of an applicant's enrollment approval, the MRA must provide the selected program provider copies of all enrollment documentation, and associated supporting documentation including relevant assessment results and recommendations and the applicant's PDP.

(m) The selected program provider must not initiate services until notified of the department's approval of the individual's enrollment.

(n) The selected program provider must develop an initial ISP in accordance with §419.174 of this title (relating to Certification Principles: Service Delivery) based on the PDP and IPC as developed by the service planning team.

§419.165. Maintenance of HCS Program Waiting List.

The local MRA must maintain an up-to-date waiting list of applicants living in and waiting to receive HCS Program services in the MRA's local service area.

(1) The MRA must assign an applicant's placement on the waiting list chronologically by:

(A) date of receipt of a written request for HCS Program services; or

(B) date of receipt of notification given to the MRA in accordance with Texas Government Code, 531.154 (relating to Notification Required) that an individual under 22 years of age has been admitted to an ICF/MR, nursing home, institution for the mentally retarded licensed by the Texas Department of Protective and Regulatory Services, or a foster group home licensed by the Texas Department of Protective and Regulatory Services.

[~~(1) The MRA must assign an applicant's placement on the waiting list chronologically by date of request for HCS Program services.~~]

(2) (No change.)

(3) Except as specified in paragraph (6) of this subsection, the [~~The~~] MRA must remove an applicant's name from the waiting list only if it is documented that:

(A)-(D) (No change.)

(E) the applicant's name has been transferred in accordance with paragraph (5) of this subsection [~~subparagraph (4) of this section~~];

(F) (No change.)

(G) the applicant or the applicant's LAR chooses participation in the ICF/MR Program instead of in the HCS Program when offered this choice in accordance with §419.164(a) of this title (relating to Process for Enrollment of Applicants [~~applicants~~]);

(H)-(I) (No change.)

(4) If an applicant's name is removed from a waiting list in accordance with paragraph (3) or (6) of this subsection, the applicant, the applicant's LAR, or the MRA may request the department to review the circumstances under which the applicant's name was removed from the MRA's waiting list. At its discretion, the department may direct the MRA to reinstate the applicant's name to the waiting list using the previously assigned date.

(5) (No change.)

(6) Until an individual who was registered on the waiting list based on notification received in accordance with Texas Government Code, §531.154, reaches 22 years of age, the MRA must remove such an individual's name from the waiting list only when it is documented that:

(A) the individual is deceased;

(B) the department has denied the individual's enrollment and the individual or the LAR has had an opportunity to exercise the individual's right to appeal the decision according to §419.169 of this title (relating to Eligibility Criteria); or

(C) the individual's name has been transferred in accordance with paragraph (5) of this subsection.

§419.174. Certification Principles: Service Delivery.
The program provider shall:

(1)-(5) (No change.)

(6) ensure that a minor individual who is unable to live in the natural or adoptive family home is supported in a family-based alternative [~~family-like environment, such as a foster family~~];

(7)-(11) (No change.)

(12) ensure that each individual has [~~a current~~]:

(A) a current IPC;

(B) a current ISP; and

(C) a current LOC and LON;

(13) (No change.)

(14) ensure that the ISP of each individual includes objectives derived from assessments of the individual's strengths, personal goals, and needs and are described in observable, measurable, or outcome-oriented terms and, for each individual under 22 years of age receiving supervised living or residential support, includes permanency planning outcomes that identify:

(A) the natural supports and strengths of the family of an individual under 18 years of age that, when supplemented by activities and supports provided or facilitated by the program provider or MRA, will enable the individual to return to the family home;

(B) a family-based alternative that will secure for an individual under 18 years of age a consistent, nurturing environment and an enduring, positive relationship with a specific adult who will be an advocate for the individual; or

(C) the natural supports and strengths of an individual from 18 to 22 years of age that, when supplemented by activities and supports provided or facilitated by the program provider or MRA, will result in the individual having a consistent and nurturing environment as defined by the individual and LAR.

(15)-(48) (No change.)

(49) ensure that supervised living is provided:

(A) by a supervised living provider who provides services and supports as needed by individuals and is present in the residence and able to respond to the needs of individuals during normal sleeping hours;

(B) in a residence in which no more than three individuals receiving supervised living or other persons receiving similar services are living at any one time; [~~and~~]

(C) in a residence in which the program provider holds a property interest; and

(D) only with approval by the department commissioner or designee for the initial six months and one six month

extension and only with approval by the commissioner of the Texas Health and Human Services Commission after such twelve month period, if provided to an individual under 22 years of age;

(50) (No change.)

(51) ensure that residential support is provided:

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

(C) in a residence in which no more than four individuals and other persons receiving similar services are living at any one time and which is approved in accordance with §419.182 of this subchapter (relating to Department Approval of Residences); [~~and~~]

(D) in a residence in which the program provider holds a property interest; and

(E) only with approval by the department commissioner or designee for the initial six months and one six month extension and only with approval by the commissioner of the Texas Health and Human Services Commission after such twelve month period, if provided to an individual under 22 years of age;

(52)-(57) (No change.)

(58) within three days of initiating supervised living or residential support to an individual under 22 years of age, provide the information listed in paragraph (59) of this subsection to the following:

(A) the MRA in whose local service area the residence is located (see http://www.mhmr.state.tx.us/CentralOffice/PublicInformationOffice/DirectoryOfServicesWHAT.html for a listing of MRAs by city);

(B) the community resource coordination group (CRCG) for the county in which the applicant's parent or guardian lives (see www.hhsc.state.tx.us/crcg/crcg.htm for a listing of CRCG chairpersons by county); and

(C) the local school district for the area in which the residence is located, if the individual is at least three years of age or the early childhood intervention (ECI) program for the county in which the residence is located, if the individual is less than three years of age (see www.eci.state.tx.us or call 1-800-250-2246 for a listing of ECI programs by county);

(59) include in the notification given by the program provider in accordance with paragraph (58) of this subsection the following information about an individual:

(A) full name;

(B) gender;

(C) ethnicity;

(D) birth date;

(E) Social Security number;

(F) LAR's name, address and county of residence;

(G) date of initiation of supervised living or residential support;

(H) address where supervised living or residential support is provided;

(I) name and phone number of person submitting the notification; and

(60) ensure that, if an individual is under 22 years of age and receiving residential support or supported living, a Permanency Planning Review is electronically submitted to the department and approval to continue to provide such services is obtained every six months from the department commissioner or commissioner of the Texas Health and Human Services Commission.

§419.175. Certification Principles: Interdisciplinary Team Operations.

(a) (No change.)

(b) The program provider must ensure that, at minimum, the individual's IDT consists of the individual and his or her LAR or family member, the HCS case manager, and a nurse; and when necessary to the service planning process, the team includes other persons who may be assigned to provide or who are currently providing direct services to the individual, a physician and other professional personnel, and other persons chosen by the individual or LAR. For individuals under 22 years of age who receive supervised living or residential support, the program provider must:

(1) inform the individual and LAR that they may request a volunteer advocate to assist in permanency planning; and

(2) if an individual or LAR requests a volunteer advocate or the program provider cannot locate the individual's LAR, designate a volunteer advocate to assist in permanency planning who is:

(A) a person selected by the individual or LAR who is not employed by or under contract with the provider;

(B) an adult relative of the individual; or

(C) a representative from a child advocacy group.

(c)-(i) (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 November 26, 2001.

TRD-200107229
Andrew Hardin
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: January 6, 2002
For further information, please call: (512) 206-5232

♦ ♦ ♦

25 TAC §419.164

(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 Mental Health and Mental Retardation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Mental Health and Mental Retardation (department) proposes the repeal of §419.164 of Chapter 419, Subchapter D, concerning home and community-based services (HCS) program.

The subject matter of the section is reflected in new §419.164 along with provisions that implement the permanency planning requirements of Senate Bill 368, 77th Legislature, which expanded permanency planning requirements in Texas Government Code, Chapter 531, Subchapter D, and the family notification requirements of SB 367, 77th Legislature, which modified the notification requirements in Texas Government

Code, §351.042. New §419.164 is proposed in this issue of the *Texas Register* for public review and comment.

Cindy Brown, chief financial officer, has determined that for each year of the first five year period that the repeal is in effect, enforcing or administering the repeal does not have foreseeable implications relating to costs or revenues of state or local government. It is not anticipated that adopting the repeal will have an adverse economic effect on small businesses or micro-businesses because it does not impose any measurable cost on program providers. It is not anticipated that there will be any additional economic cost to persons required to comply with the repeal. It is not anticipated that the repeal will affect a local economy.

Barry Waller, director, Long Term Services and Supports, has determined that for each year of the first five-year period the repeal is in effect, the expected public benefit is the existence of a new section that implements the provisions of SB 368.

A hearing to accept oral and written testimony from members of the public concerning the proposed repeal has been scheduled for 1:30 p.m., Monday, January 7, 2002, in the department's Central Office Auditorium in Building 2 at 909 West 45th Street, in Austin, Texas. Persons requiring an interpreter for the deaf or hearing impaired should contact the department's Central Office operator at least 72 hours prior to the hearing at TDD (512) 206-5330. Persons requiring other accommodations for a disability should notify the Long Term Services and Supports Division, at least 72 hours prior to the hearing at (512) 206-4706 or at the TDY phone number of Texas Relay, 1/800-735-2988.

Comments concerning this proposal must be submitted in writing to Linda Logan, director, Policy Development, Texas Department of Mental Health and Mental Retardation, by mail to P.O. Box 12668, Austin, Texas 78711, by fax to 512/206-4750, and by e-mail to policy.co@mhmr.state.tx.us within 30 days of publication of this notice.

The repeal is proposed under the Texas Health and Safety Code, §532.015(a), which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide THHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to operate the HCS Program.

The repeal affects Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a) and (c) and Texas Government Code, Chapter 531, Subchapter D and §531.042.

§419.164. Process for Enrollment of Applicants.

This 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 November 26, 2001.

TRD-200107230

Andrew Hardin

Chair, Texas MHMR Board

Texas Department of Mental Health and Mental Retardation

Earliest possible date of adoption: January 6, 2002

For further information, please call: (512) 206-5232

SUBCHAPTER E. ICF/MR PROGRAMS

The Texas Department of Mental Health and Mental Retardation (department) proposes amendments to §§419.203, 419.222-419.223, 419.244, and 419.266-419.268 of Chapter 419, Subchapter E, concerning ICF/MR Programs.

The proposed amendments to §§419.203, 419.222, and 419.244 implement several of the provisions of Senate Bill 368, 77th Legislature (SB 368). First, SB 368 expands the permanency planning requirements in the Texas Government Code, Chapter 531, Subchapter D, to apply to individuals under 22 years of age who receive developmental disability services in an institution, including an intermediate care facility for persons with mental retardation (ICF/MR). Previous law required permanency planning only for individuals under 18 years of age living in certain institutions. Amendments to §§419.203(37) and 419.222 reflect this change in the law. SB 368 also requires the admission of an individual under 22 years of age to an ICF/MR to be approved by the department's commissioner or designee and provides that the individual's initial placement may not exceed six months unless a six month extension is approved by the commissioner or designee after a review of documented permanency planning efforts. The legislation provides that additional six-month extensions are permitted only if recommended by the commissioner or designee and approved by the commissioner of the Texas Health and Human Services Commission (THHSC) or designee. These provisions are reflected in the amendments to §§419.222(g) and 419.244(e)(4), (g), and (h)(4). SB 368 further requires that no later than the third day after an individual under 22 years of age is admitted, the ICF/MR must notify the following entities of the initiation of services: the local mental retardation authority (MRA), the community resource coordination group (CRCG) for the county in which the individual's legally authorized representative (LAR) resides, and the local school district, if the individual is at least three years of age, or the local early childhood intervention (ECI) program, if the individual is under three years of age. This requirement is reflected in the new §419.222(c). New §419.222(d) lists the specific information that must be included in a program provider's notice. SB 368 also requires a volunteer advocate to be designated to assist in permanency planning if the individual or LAR requests an advocate or the individual's LAR cannot be located. These provisions are reflected in the amendments to §419.222(e) and (f).

The proposed amendment to §419.223 requires a program provider, during the annual review of living options, to inform an individual and LAR about other ICF/MR program providers, including state schools and state centers and community-based facilities, waiver programs, and other community-based services and supports. The current language requires only that the program provider address "different types of alternative living arrangements." The amendment will make the rule consistent with other department rules that specify the alternative living arrangements about which the individual will be informed.

The proposed amendments to §§419.266-419.268 re-organize the division to more clearly reflect the processes and types of

actions taken by the department's sanction team. The proposed amendments to §419.266 permit the department's sanction team to take contract action under certain circumstances if a program provider does not meet one or more of the eight ICF/MR conditions of participation (CoPs) or one or more of the ICF/MR standards of participation (SoPs) or is not compliant with one or more state regulations. Currently, the department's rule permits the sanction team to take contract action under certain circumstances if a program provider does not meet one or more of the three CoPs designated in the rule or one or more of the 55 HCFA designated fundamental ICF/MR standards of participation (SoPs). The amendments will also allow contract action under certain circumstances when a program provider fails to correct previous findings of the survey team. The amendments to §419.267 describe the department's processes for imposing a directed plan of correction (DPoC) or vendor hold based on the findings of the state survey agency. The amendments to this section also describe the circumstances under which the department will release a vendor hold. The amendments to §419.268 include the addition of language regarding termination of a provider agreement for failure to implement a DPoC and the imposition of three vendor holds during an 18-month period. That provision was included as subsection (e) of §419.266 and is proposed for deletion. The amendments to §419.268 also include language providing that upon the proposal to terminate a provider agreement, the department may place a vendor hold on payments due to a program provider under the provider agreement as the result of an audit of the program provider's financial records, review of the program provider's fiscal accountability cost report, and resolution of any amounts owed to the department.

The following new terms and definitions are added in §419.203 as a result of the amendments in other sections -- "CARE," "CRCG (community resource coordination group)," "DPoC (directed plan of care)," "family-based alternative," and "permanency-planning review." The definition of "permanency planning" is revised to replace "minor" with "individual under 22 years of age" and the definition of "sanction team" is revised to correct a grammatical error. The term "fundamental standards of participation HCFA" is deleted because the term is not used in the sections as amended.

Cindy Brown, chief financial officer, has determined that for each year of the first five year period that the amendments are in effect, enforcing or administering the amendments do not have foreseeable implications relating to costs or revenues of state or local government. It is not anticipated that adopting the amendments will have an adverse economic effect on small businesses or micro-businesses because these changes do not impose any measurable cost on program providers. It is not anticipated that there will be any additional economic cost to persons required to comply with the amendments. It is not anticipated that the amendment will affect a local economy.

Barry Waller, director, Long Term Services and Supports, has determined that for each year of the first five-year period the amendments related to permanency planning and notification of a family member are in effect, the expected public benefit is that for individuals under 22 years of age who are admitted to or residing in ICFs/MR, service planning will be focused on providing a permanent living arrangement for the individual with the primary feature of an enduring and nurturing relationship with a specific adult who will be an advocate for the individual. The requirement that the local MRA, CRCG, and school district or ECI program be notified within three days of the services being initiated will help ensure that the individual receives services for which the individual is eligible and that are appropriate to the individual's needs.

Ernest McKenney, director, Medicaid Administration, has determined that for the each year of the first five-year period the amendments related to sanctions are in effect, the expected public benefit is that the department's sanction team will have sufficient latitude to respond effectively when a program provider does meet one or more CoPs or SoPs or is not compliant with one or more state regulations.

A hearing to accept oral and written testimony from members of the public concerning the proposed amendments and new section has been scheduled for 1:30 p.m., Monday January 7, 2002, in the department's Central Office Auditorium in Building 2 at 909 West 45th Street, in Austin, Texas. Persons requiring an interpreter for the deaf or hearing impaired should contact the department's Central Office operator at least 72 hours prior to the hearing at TDD (512) 206-5330. Persons requiring other accommodations for a disability should notify the Long Term Services and Supports Division, at least 72 hours prior to the hearing at (512) 206-4706 or at the TDY phone number of Texas Relay, 1/800-735-2988.

Comments concerning this proposal must be submitted in writing to Linda Logan, director, Policy Development, Texas Department of Mental Health and Mental Retardation, by mail to P.O. Box 12668, Austin, Texas 78711, by fax to (512) 206-4750, and by e-mail to policy.co@mhmr.state.tx.us within 30 days of publication of this notice.

DIVISION 1. GENERAL REQUIREMENTS

25 TAC §419.203

The amendments are proposed under the Texas Health and Safety Code, §532.015(a), which provides the Texas Board of Mental Health and Mental Retardation with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to operate the ICF/MR Program.

The proposed amendments affect Texas Government Code, §531.021(a), the Texas Human Resources Code, §32.021(a) and (c), and Texas Government Code, Chapter 531, Subchapter D.

§419.203. Definitions.

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

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

(8) CARE -- The department's Client Assignment and Registration System, an on-line data entry system that provides demographic and other data about individuals served by the department.

(9) [~~(8)~~] Certified capacity -- The maximum number of individuals who may reside in a facility, as set forth in the facility's provider agreement.

(10) [~~(9)~~] CFR (Code of Federal Regulations) -- The compilation of federal agency regulations.

(11) [~~(10)~~] Community MHMR Center -- A community mental health and mental retardation center established under the THSC, Chapter 534.

(12) CRCG (Community Resource Coordination Group) -- A local interagency group composed of public and private agencies that develops service plans for individuals whose needs can be met only through interagency coordination and cooperation. The role and responsibilities of the involved agencies, including MRAs, school districts, and providers, are described in §411.56 of this title (relating to Memorandum of Understanding (MOU) on Coordinated Services to Children and Youths).

(13) [~~(11)~~] Day -- Calendar day, unless otherwise specified.

(14) [~~(12)~~] Department -- The Texas Department of Mental Health and Mental Retardation.

(15) [~~(13)~~] Discharge -- The absence, for a full day or more, of an individual from the facility in which the individual resides, if such absence is not during a therapeutic, extended, or special leave, as described in §419.226 of this title (relating to Leaves).

(16) DPoC (directed plan of care) -- A plan developed by the department's sanction team that requires a program provider to take specified actions within specified timeframes to correct the program provider's failure to meet one or more federal standards of participation (SoPs) or conditions of participation (CoPs) or lack of compliance with one or more state rules.

(17) [~~(14)~~] Excluded -- Temporarily or permanently prohibited by a state or federal authority from participating as a provider in a federal health care program, as defined in 42 USC§1302a-7b(f).

(18) [~~(15)~~] Facility -- An intermediate care facility for persons with mental retardation or a related condition.

(19) Family-based alternative -- A family setting in which the family provider or providers are specially trained to provide support and in-home care for children with disabilities or children who are medically fragile.

(20) [~~(16)~~] Full day -- A 24-hour period extending from midnight to midnight.

[~~(17) Fundamental standards of participation HCFA -- Designated standards of participation that reflect client outcomes with respect to basic rights, safety, health, and participation in active treatment services.~~]

(21) [~~(18)~~] HCFA (Health Care Financing Administration) -- The federal agency that administers Medicaid programs.

(22) [~~(19)~~] ICAP (Inventory for Client and Agency Planning) -- A validated, standardized assessment that measures the level of supervision an individual requires and, thus, the amount and intensity of services and supports an individual needs.

(23) [~~(20)~~] ICF/MR Program -- The Intermediate Care Facilities for Persons with Mental Retardation Program, which provides Medicaid-funded residential services to individuals with mental retardation or a related condition.

(24) [~~(21)~~] IDT (interdisciplinary team) -- A group of people assembled by the program provider who possess the knowledge, skills, and expertise to assess an individual's needs and make recommendations for the individual's IPP. The group includes the individual, LAR, mental retardation professionals and paraprofessionals and, with approval from the individual or LAR, other concerned persons.

(25) [~~(22)~~] IPP (individual program plan) -- A plan developed by an individual's IDT that identifies the individual's training, treatment, and habilitation needs and describes services to meet those needs.

(26) [~~(23)~~] Individual -- A person enrolled in the ICF/MR Program.

(27) [~~(24)~~] IQ (intelligence quotient) -- A score reflecting the level of an individual's intelligence as determined by the administration of a standardized intelligence test.

(28) [~~(25)~~] LAR (legally authorized representative) -- A person authorized by law to act on behalf of an individual with regard to a matter described in this subchapter, and may include a parent, guardian, managing conservator of a minor individual, a guardian of an adult individual, or legal representative of a deceased individual.

(29) [~~(26)~~] LOC (level of care) -- A determination given by the department to an individual as part of the eligibility process based on data submitted on the MR/RC Assessment.

(30) [~~(27)~~] LON (level of need) -- An assignment given by the department to an individual upon which reimbursement for ICF/MR program services is based. The LON assignment is derived from the service level score obtained from the administration of the Inventory for Client and Agency Planning (ICAP) to the individual and from selected items on the MR/RC Assessment.

(31) [~~(28)~~] *Long Term Care Plan for People with Mental Retardation and Related Conditions* -- The plan required by THSC, §533.062, which is developed by the department and specifies, in part, the capacity of the ICF/MR Program in Texas.

(32) [~~(29)~~] MRA (mental retardation authority) -- Consistent with THSC, §533.035, an entity designated by the commissioner to which the Texas Mental Health and Mental Retardation Board delegates its authority and responsibility for planning, policy development, coordination, and resource allocation, and resource development for and oversight of services and supports in one or more local service areas.

(33) [~~(30)~~] Mental retardation -- Significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

(34) [~~(31)~~] NHIC -- National Heritage Insurance Company.

(35) [~~(32)~~] Non-state operated facility -- A facility for which the program provider is an entity other than the department such as a community MHMR center or private organization.

(36) [~~(33)~~] PDP (person-directed plan) -- A plan of services and supports developed under the direction of an individual or LAR with the support of MRA or program provider staff and other people chosen by the individual or LAR.

(37) [~~(34)~~] Permanency planning -- A philosophy and planning process that focuses on the outcome of family support for an individual under 22 years of age [~~a minor~~] by facilitating a permanent living arrangement in which the primary feature is an enduring and nurturing parental relationship.

(38) Permanency Planning Review -- A screen in CARE that, when completed by an MRA or program provider, identifies community supports needed to achieve an individual's permanency planning outcomes and provides information necessary for approval of the individual's initial and continued residence in a facility.

(39) [~~(35)~~] Personal funds -- The funds that belong to an individual, including earned income, social security benefits, gifts, and inheritances.

(40) [~~(36)~~] Petty cash fund -- Personal funds managed by a program provider that are maintained for individuals' cash expenditures.

(41) [~~(37)~~] Pooled account -- A trust fund account containing the personal funds of more than one individual.

(42) [~~(38)~~] Professional -- A person who is licensed or certified by the State of Texas in a health or human services occupation or who meets department criteria to be a case manager, service coordinator, qualified mental retardation professional, or TDMHMR-certified psychologist as defined in §415.161 of this title (relating to TDMHMR-certified psychologist).

(43) [~~(39)~~] Program provider -- An entity with whom the department has a provider agreement.

(44) [~~(40)~~] Provider agreement -- A written agreement between the department and a program provider that obligates the program provider to deliver ICF/MR Program services.

(45) [~~(41)~~] Provider applicant -- An entity seeking to participate as a program provider.

(46) [~~(42)~~] Related condition -- As defined in the Code of Federal Regulations (CFR), Title 42, §435.1009, a severe and chronic disability that:

(A) is attributed to:

(i) cerebral palsy or epilepsy; or

(ii) any other condition, other than mental illness, found to be closely related to mental retardation because the condition results in impairment of general intellectual functioning or adaptive behavior similar to that of individuals with mental retardation, and requires treatment or services similar to those required for individuals with mental retardation;

(B) is manifested before the individual reaches age 22;

(C) is likely to continue indefinitely; and

(D) results in substantial functional limitation in at least three of the following areas of major life activity:

(i) self-care;

(ii) understanding and use of language;

(iii) learning;

(iv) mobility;

(v) self-direction; and

(vi) capacity for independent living.

(47) [~~(43)~~] Sales receipt -- A written statement issued by the seller that includes:

(A) the date it was created; and

(B) the cost of the item or service.

(48) [~~(44)~~] Sanction team -- A group of professionals assembled and employed by the department that[~~, which~~] is overseen by the Health and Human Services Commission to ensure consistency in its determinations.

(49) [~~(45)~~] Separate account -- A trust fund account containing the personal funds of only one individual.

(50) [~~(46)~~] Specially constituted committee -- The committee designated by the program provider in accordance with 42 CFR §483.440(f)(3) that consists of staff, LARs, individuals (as appropriate), qualified persons who have experience or training in contemporary practices to change an individual's inappropriate behavior, and persons with no ownership or controlling interest in the facility. The committee is responsible, in part, for reviewing, approving, and monitoring individual programs designed to manage inappropriate behavior and other programs that, in the opinion of the committee, involve risks to individuals' safety and rights.

(51) [~~(47)~~] State-operated facility -- A facility for which the department is the program provider.

(52) [~~(48)~~] TAC (Texas Administrative Code) -- A compilation of state agency rules published by the Texas Secretary of State in accordance with Texas Government Code, Chapter 2002, Subchapter C.

(53) [~~(49)~~] TDHS -- Texas Department of Human Services.

(54) [~~(50)~~] THSC (Texas Health and Safety Code) -- Texas statutes relating to health and safety.

(55) [~~(51)~~] Trust fund account -- An account at a financial institution in the program provider's control that contains personal funds.

(56) [~~(52)~~] Unclaimed personal funds -- Personal funds managed by the program provider that have not been transferred to the individual or LAR within 30 days after the individual's discharge.

(57) [~~(53)~~] Unidentified personal funds -- Personal funds managed by the program provider for which the program provider cannot identify ownership.

(58) [~~(54)~~] USC (United States Code) -- A compilation of statutes enacted by the United States Congress.

(59) [~~(55)~~] Vendor hold -- Temporary suspension of ICF/MR payments from the department to a program provider.

(60) [~~(56)~~] Working day -- A day when an MRA's administrative offices are open.

This 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 November 26, 2001.

TRD-200107231
Andrew Hardin
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: January 6, 2002
For further information, please call: (512) 206-5232

♦ ♦ ♦

DIVISION 4. PROVIDER SERVICE REQUIREMENTS

25 TAC §419.222, §419.223

The amendments are proposed under the Texas Health and Safety Code, §532.015(a), which provides the Texas Board of Mental Health and Mental Retardation with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to operate the ICF/MR Program.

The proposed amendments affect Texas Government Code, §531.021(a), the Texas Human Resources Code, §32.021(a) and (c), and Texas Government Code, Chapter 531, Subchapter D.

§419.222. Permanency Planning for Individuals Under 22 Years of Age [~~Children~~].

(a) As required by Texas Government Code, §531.153, a program provider must incorporate permanency planning as an integral part of the IPP for each individual [~~child~~] under 22 [~~18~~] years of age residing in the facility [~~on a temporary or long-term basis~~]. The program provider will identify in the IPP, as appropriate to the individual's needs:

(1) the natural supports and strengths of the family of an individual under 18 years of age that, when supplemented by activities and supports provided or facilitated by the program provider or MRA, will enable the individual to return to the family home;

(2) a family-based alternative that will secure for an individual under 18 years of age a consistent, nurturing environment and an enduring, positive relationship with a specific adult who will be an advocate for the individual; or

(3) the natural supports and strengths of an individual age 18 to 22 years of age that, when supplemented by activities and supports provided or facilitated by the program provider or MRA, will result in the individual having a consistent and nurturing environment, as defined by the individual and LAR.

(b) The program provider must take the following actions to facilitate permanency planning [~~a child's placement in a family environment~~]:

(1) discuss with the individual [~~child's family~~] or LAR [~~concerning~~] the problems or issues that led to the individual's [~~child's~~] admission to the program provider's facility;

(2) discuss with the family or LAR of an individual under 18 years of age the [~~child's family or LAR concerning~~] barriers to having the individual [~~child~~] reside in the family home or discuss with an individual age 18 to 22 years of age and LAR the barriers to moving to a consistent and nurturing environment as determined by the individual and LAR;

(3) identify natural supports and family strengths that will [~~enable the child to return to the family home~~] accomplish permanency planning outcomes;

(4) identify, in coordination with the individual's [~~child's designated~~] MRA, activities and supports that can be provided by the family, LAR, program provider, or the [~~individual's~~] MRA to prepare the individual [~~child~~] for an alternative [~~alternate~~] living arrangement;

(5) encourage regular contact between the individual [~~child~~] and the individual's [~~child's~~] family, LAR, life long advocate, and friends in the community to continue supportive and nurturing relationships;

(6) encourage participation in IDT meetings by the individual's [~~child's~~] family, LAR, life long advocate, and friends in the community; and

(7) provide the IPP summary to the individual's [~~child's designated~~] MRA.

(c) Within three days of the admission of an individual under 22 years of age, the program provider must notify the following entities of such admission and provide information in accordance with subsection (d) of this section:

(1) the MRA in whose local service area the facility is located (see http://www.mhmr.state.tx.us/CentralOffice/PublicInformationOffice/DirectoryOfServicesWHAT.html for a listing of MRAs by city);

(2) the community resource coordination group (CRCG) for the county in which the applicant's parent or guardian lives (see www.hhsc.state.tx.us/crcg/crcg.htm for a listing of CRCG chairpersons by county); and

(3) the local school district for the area in which the facility is located, if the individual is at least three years of age, or the early childhood intervention (ECI) program for the county in which the facility is located, if the individual is less than three years of age (see www.eci.state.tx.us or call 1-800-250-2246 for a listing of ECI programs by county);

(d) The program provider's notification given by the program provider in accordance with subsection (c) of this section must include the following information about an individual:

(1) full name;

(2) gender;

(3) ethnicity;

(4) birth date;

(5) Social Security number;

(6) LAR's name, address and county of residence;

(7) date of admission to the facility;

(8) name and address of the facility;

(9) name and phone number of person submitting the notification;

(10) those services from the following listing that will facilitate the individual's permanency planning outcomes:

(A) personal and family support services provided in the individual's home;

(B) residential services provided outside the individual's family or own home;

(C) vocational services; and

(D) training services provided outside of the individual's family or own home, including specialized professional services.

(e) The program provider must inform the individual or LAR that they may request a volunteer advocate to assist in permanency planning.

(f) If an individual or LAR requests a volunteer advocate or the program provider cannot locate the individual's LAR, the program provider must name a volunteer advocate to assist in developing permanency planning outcomes. The volunteer advocate must be:

(1) a person selected by the individual or LAR who is not employed by or under contract with the program provider;

(2) an adult relative of the individual; or

(3) a representative from a child advocacy group.

(g) For an individual under 22 years of age, the individual's residence in a facility is temporary and must be approved every six months. If the individual's IDT determines that an individual's permanency planning outcomes have not been met, the program provider must:

(1) no later than five months after an individual under 22 years of age is admitted to the facility, submit a Permanency Planning Review to the department and obtain approval for continued residence from the department commissioner or designee; and

(2) every six months thereafter, submit a Permanency Planning Review to the department and obtain approval for continued residence from the commissioner of the Health and Human Services Commission or designee to extend an individual's residence in the facility.

(h) The program provider must document compliance with the requirements of this section in the individual's record.

~~[(c) The program provider must document compliance with the requirements of subsection (b) of this section in the child's record.]~~

§419.223. Review of Living Options.

(a) At a facility other than a state school or state center, the IDT must discuss living options with the individual and LAR at least annually or upon the request of the individual or LAR. The facility must use the Community ICF/MR Living Options instrument, copies of which are available on the department's website at www.mhmr.state.tx.us/CentralOffice/Medicaid/i.html or by contacting Office of Medicaid Administration, Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711. State schools and state centers must discuss living options with the individual and LAR in accordance with §412.274 of this title (relating to Consideration of Living Options for Individuals Residing in State MR Facilities).

(1) During the discussion, the IDT must use information obtained from the MRA in whose local service area the facility is located to inform the individual and LAR of the different types of alternative living arrangements, including:

(A) other ICF/MR Program providers -- state schools and state centers and community-based ICF/MRs;

(B) waiver services under §1915(c) of the Social Security Act; and

(C) other community-based services and supports.

(2)-(3) (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 November 26, 2001.

TRD-200107232
Andrew Hardin
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: January 6, 2002
For further information, please call: (512) 206-5232

♦ ♦ ♦

DIVISION 5. ELIGIBILITY, ENROLLMENT, AND REVIEW

25 TAC §419.244

The amendments are proposed under the Texas Health and Safety Code, §532.015(a), which provides the Texas Board of Mental Health and Mental Retardation with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to operate the ICF/MR Program.

The proposed amendments affect Texas Government Code, §531.021(a), the Texas Human Resources Code, §32.021(a) and (c), and Texas Government Code, Chapter 531, Subchapter D.

§419.244. Applicant Enrollment.

(a)-(d) (No change.)

(e) To request an applicant's enrollment, an MRA must, within 15 working days after the MRA receives both notifications described in subsection (c) of this section:

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

(3) request or review an LOC determination and LON for the applicant by:

(A) (No change.)

(B) reviewing the existing MR/RC Assessment for the applicant if the applicant has a current LOC determination and:

(i) (No change.)

(ii) if the MRA endorses the existing MR/RC Assessment, notifying the selected program provider in writing that no changes to the current LOC or LON are recommended; and

(4) if the applicant is under 22 years of age, complete a Permanency Planning Review and electronically submit it to the department.

(f) If an applicant is under 22 years of age, the MRA must inform the applicant and LAR that they may request a volunteer advocate to assist in permanency planning. If the applicant or LAR requests a volunteer advocate or the MRA cannot locate the applicant's LAR, the MRA must designate a volunteer advocate to assist in permanency planning who is:

(1) a person selected by the individual or LAR who is not employed by or under contract with the MRA;

(2) an adult relative of the individual; or

(3) a representative from a child advocacy group.

(g) [~~(f)~~] If the department notifies an MRA that it has authorized an applicant's LOC, the MRA must immediately notify the applicant or LAR of such authorization and provide the selected program provider with copies of all enrollment documentation and associated supporting documentation including relevant assessment results and recommendations and the applicant's ICAP booklet and, if available, the applicant's service plan.

(h) [~~(g)~~] To request an applicant's enrollment, a program provider must ensure that the applicant has a current LOC determination and, if the applicant is under 22 years of age, complete and electronically submit a Permanency Planning Review to the department.

(1) If an applicant does not have a current LOC determination, the program provider must complete and electronically submit an MR/RC Assessment to the department.

(2) If the program provider submits an MR/RC Assessment, the department will notify the program provider electronically if the LOC is authorized or send written notification to the program provider and the applicant or LAR if the LOC is denied.

(i) [~~(h)~~] An applicant's enrollment is complete if:

(1) the department has authorized an LOC for the applicant;

(2) the Social Security Administration has determined that the applicant is eligible for SSI or TDHS determines the applicant is financially eligible for Medicaid; [~~and~~]

(3) the program provider has electronically submitted a completed Client Movement Form to the department; and

(4) if the applicant is under 22 years of age, a Permanency Planning Review has been approved by the department commissioner or designee.

(j) [~~(i)~~] A program provider must maintain a paper copy of the completed MR/RC Assessment with all the necessary signatures and documentation supporting the recommended LOC and LON and the Permanency Planning Review in the applicant's record.

This 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 November 26, 2001.

TRD-200107233
Andrew Hardin
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: January 6, 2002
For further information, please call: (512) 206-5232

♦ ♦ ♦

DIVISION 7. PROVIDER AGREEMENT SANCTIONS

25 TAC §§419.266 - 419.268

The amendments are proposed under the Texas Health and Safety Code, §532.015(a), which provides the Texas Board of Mental Health and Mental Retardation with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to operate the ICF/MR Program.

The proposed amendments affect Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a) and (c).

§419.266. Department Review of State Survey Agency Findings.

(a) The department may impose a directed plan of correction (DPoC), a vendor hold, or both on a program provider [~~or may require implementation of a directed plan of correction in accordance with §419.267 (relating to Department Review of Program Providers), or both~~] if:

(1) [~~a facility of~~] the program provider is determined by the state survey agency to not meet one or more of the federal ICF/MR standards of participation (SoPs) or [~~following~~] conditions of participation (CoPs)[~~, identified by their HCFA ID prefix tags,~~] and the sanction team determines that the program provider's [~~facility's~~] failure to meet such SoPs or CoPs resulted in or may result in [~~a~~] serious injury to or death of an individual residing in the program provider's facility;[~~:~~]

[~~(A) W122, Client Protections;~~]

[~~(B) W266, Client Behavior and Facility Practices; or~~]

[~~(C) W318, Health Care Services; or~~]

[~~(2) a facility of the program provider is determined by the state survey agency to not meet one or more of the HCFA-designated fundamental standards of participation and the sanction team determines that the facility's failure to meet such standards has resulted in or may result in serious harm, injury, or death to an individual; or~~]

(2) [~~(3)~~] [~~a facility of~~] the program provider is determined by the state survey agency to not meet one or more of the SoPs [~~HCFA-designated fundamental standards of participation~~] and the sanction team determines that the program provider's [~~facility's~~] failure to meet such SoPs [~~standards~~] has resulted in a regression in or loss of an individual's functional abilities or indicates a pervasive lack of active treatment;[~~.~~]

(3) the program provider is determined by the state survey agency to not meet one of more of the SoPs or CoPs or to not be compliant with one or more state rules applicable to the ICF/MR program and the sanction team determines, based on its review of previous state

survey agency findings related to the program provider, that the program provider's failure to meet the SoPs or CoPs or non-compliance with state rules indicates:

(A) a pattern of error in a particular discipline, such as nursing or psychology; or

(B) deficient program provider practices or procedures, such as inadequate staffing or insufficient staff training; or

(4) it is determined:

(A) by the state survey agency during a follow-up certification review that the program provider failed to correct previous findings of the survey and did not meet one or more additional SoPs, CoPs, or state rules; and

(B) by the sanction team that the program provider's continued failure to meet the SoPs, CoPs, or state rules indicates significant deficient practices that resulted in or may result in serious injury to or death of an individual residing in the program provider's facility.

~~[(b) A copy of the standards of participation that are fundamental standards of participation may be obtained by contacting the Office of Medicaid Administration, Texas Department of Mental Health and Mental Retardation, P.O. Box 112668, Austin, Texas 78711 or from the department's website at (http://www.mhmr.state.tx.us/CentralOffice/Medicaid/i.html).]~~

(b) [~~(c)~~] When making a determination in accordance with subsection (a) of this section, the sanction team will review the state survey agency's reports [~~report~~] documenting the program provider's [~~facility's~~] failure to meet the SoPs, CoPs, or state rules, [~~standards of participation~~] which may include a description of:

(1) the situation or occurrence that led to the deficiency;

(2) the program provider's [~~facility's~~] response to the situation or occurrence; and

(3) the program provider's [~~facility's~~] practices at the time of the situation or occurrence.

~~[(d) The department will release a vendor hold imposed in accordance with subsection (a) of this section if the state survey agency determines that the facility meets the CoPs or the HCFA-designated fundamental standard of participation that caused the vendor hold.]~~

~~[(e) The department may terminate a provider agreement if, during an 18-month period, three vendor holds are imposed on payments due under that provider agreement in accordance with subsection (a) of this section.]~~

~~[(1) A vendor hold may be used to terminate a provider agreement in accordance with this subsection regardless of whether there was an actual interruption of payment to the program provider.]~~

~~[(2) A vendor hold may be used no more than once to terminate a provider agreement in accordance with this subsection.]~~

§419.267. Directed Plan of Correction and Vendor Hold Based on State Survey Agency Findings [~~Department Review of Program Providers~~].

(a) The department will send written notice to the program provider of its intent to impose a DPoC, a vendor hold, or both in accordance with §419.266 of this title (relating to Department Review of State Survey Agency Findings).

~~[(a) The sanction team will review reports of incidents and complaints substantiated by the state survey agency regarding facilities.]~~

~~[(b) The department may require a program provider to implement a directed plan of correction developed by the department if the sanction team determines that the incidents or complaints regarding one or more facilities of the program provider, indicate:]~~

~~[(1) a pattern of error in a particular discipline, such as nursing or psychology; or]~~

~~[(2) deficient facility practices or procedures, such as inadequate staffing or insufficient staff training.]~~

~~[(c) If the department intends to require implementation of a directed plan of correction, the department will send written notice to the program provider of its intent and the basis for the sanction team's determination made in accordance with subsection (b) of this section.]~~

(b) [~~(d)~~] Within 10 days after receipt of a [~~the~~] notice of intent to impose a DPoC sent [~~provided~~] in accordance with subsection (a)[~~(c)~~] of this section, a [~~the~~] program provider may submit written recommendations to the department regarding the content of the DPoC [~~directed plan of correction~~].

(c) [~~(e)~~] The department will [~~develop and~~] send the final DPoC [~~directed plan of correction~~] to the program provider within 30 days after the date of the notice sent in accordance with subsection (a)[~~(c)~~] of this section.

(d) [~~(f)~~] The department will monitor a program provider to determine if the program provider has implemented or completed the DPoC [~~directed plan of correction~~]. Such monitoring may include reviews of documentation and on-site facility visits.

(e) [~~(g)~~] The department may impose a vendor hold on payments due under one or more provider agreements [~~or terminate one or more provider agreements~~] if the department determines that a program provider has failed to implement the DPoC [~~directed plan of correction in accordance with instructions from the department~~].

(f) [~~(h)~~] The department will release a vendor hold imposed in accordance with subsection (e)[~~(g)~~] of this section if the department determines that the program provider has implemented the DPoC [~~directed plan of correction~~].

(g) The department will release a vendor hold imposed in accordance with §419.266 of this title (relating to Department Review of State Survey Agency Findings) if the state survey agency determines that the program provider meets the SoPs, CoPs, or state rules that caused the vendor hold. Prior to such a determination, the department may release such a vendor hold if the state survey agency determines that circumstances of immediate jeopardy identified by the state survey agency have been removed.

§419.268. Termination of Provider Agreement.

(a) The department may terminate a provider agreement:

(1) for reasons set forth in federal or state laws, rules or regulations, including this subchapter and 1 TAC Chapter 355;

(2) if the program provider fails to comply with the terms of the provider agreement, including failure of the program provider's facility to maintain certification as an ICF/MR;

(3) if federal or state laws, rules or regulations are enacted, amended, repealed or judicially interpreted so as to render the fulfillment of the provider agreement by either the program provider or the department unfeasible or impossible, and the department and program provider cannot agree upon amendments to the provider agreement necessary to comply with such changes to laws, rules or regulation; [~~or~~]

(4) if a certification made by the program provider in the provider agreement is false or becomes inaccurate.

(5) if the department determines that a program provider has failed to implement a DPoC in accordance with §419.267 (relating to Directed Plan of Correction and Vendor Hold Based On State Survey Agency Findings); or

(6) if, during an 18-month period, three vendor holds are imposed on payments due under that provider agreement in accordance with §419.267 (relating to Directed Plan of Correction and Vendor Hold Based On State Survey Agency Findings).

(A) A vendor hold may be used to terminate a provider agreement in accordance with this paragraph regardless of whether there was an actual interruption of payment to the program provider.

(B) A vendor hold may be used no more than once to terminate a provider agreement in accordance with this paragraph.

(b) If the department proposes to terminate a provider agreement, the department may place a vendor hold on payments due to the program provider under the provider agreement until:

(1) an audit of the program provider's financial records, conducted in accordance with §419.269 of this title (relating to Audits) is completed;

(2) a review of the program provider's fiscal accountability cost report, conducted in accordance with 1 TAC §355.452 (relating to Cost Reporting Procedures) and 1 TAC §355.457 (relating to Fiscal Accountability) is completed; and

(3) any amounts owed to the department as a result of the audit and review are resolved.

(c) [~~(b)~~] If a provider agreement is terminated by the department, the department will not enter into a new provider agreement with the program provider until at least two days have elapsed from the effective date of the termination.

(d) [~~(c)~~] The department may enter into a new provider agreement with a program provider that has had its provider agreement terminated if:

(1) within 30 days after termination, the program provider requests a new provider agreement; and

(2) within 90 days after termination, the department or the state survey agency, as appropriate, determines that all deficiencies or actions that led to termination of the provider agreement have been corrected and the program provider is otherwise qualified to enter into a provider agreement.

(e) [~~(d)~~] In determining whether to enter into a new provider agreement in accordance with subsection (c) of this section, the department will consider:

(1) the nature, severity, and pervasiveness of the deficiencies or actions that led to termination of the provider agreement; and

(2) the facility's or the program provider's history of compliance with ICF/MR Program requirements.

(f) [~~(e)~~] The term and effective date of a new provider agreement entered into in accordance with subsection (c) of this section will be determined by the department.

(g) [~~(f)~~] If the department determines not to enter into a new provider agreement:

(1) an MRA must assist the department in relocating individuals who choose to move from the facility; and

(2) the program provider must assist the department or MRA in relocating individuals who choose to move from the facility.

This 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 November 26, 2001.

TRD-200107234
Andrew Hardin
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: January 6, 2002
For further information, please call: (512) 206-5232

♦ ♦ ♦

SUBCHAPTER P. HOME AND COMMUNITY-BASED SERVICES--OBRA (HCS-O) PROGRAM

25 TAC §419.653, 419.661, 419.670, 419.671

The Texas Department of Mental Health and Mental Retardation (department) proposes amendments to §§419.653, 419.661, 419.670, and 419.671 of Chapter 419, Subchapter P, concerning home and community-based services--OBRA (HCS-O) program.

The proposed amendments to §§419.653, 419.661, 419.670, and 419.671 implement several of the provisions of Senate Bill 368, 77th Legislature (SB 368). First, SB 368 expands the permanency planning requirements in the Texas Government Code, Chapter 531, Subchapter D, to apply to individuals under 22 years of age who receive developmental disability services in an institution, including waiver program services in a residence other than the individual's own or foster home. For HCS-O this applies to individuals receiving supported living services in a group home. Previous law required permanency planning only for individuals under 18 years of age living in certain institutions and waiver programs were not included in the definition of "institution." Amendments to §§419.653(22), 419.661(d)(3), and 419.670(14) reflect this change in the law. SB 368 also requires the initiation of supported living in a group home for an individual under 22 years of age to be approved by the department's commissioner or designee and provides that these services may not exceed six months unless a six month extension is approved by the commissioner or designee after a review of documented permanency planning efforts. The legislation provides that additional six-month extensions are permitted only if recommended by the commissioner or designee and approved by the commissioner of the Texas Health and Human Services Commission (THHSC) or designee. These provisions are reflected in new §419.670(52). SB 368 further requires that no later than the third day after supported living in a group home is initiated for an individual under 22 years of age, the program provider must notify the following entities of the initiation of services: the local mental retardation authority (MRA), the community resource coordination group (CRCG) for the county in which the individual's legally authorized representative (LAR) resides, and the local school district, if the individual is at least three years of age, or the local early childhood intervention (ECI) program, if the individual is under three years of age. These requirements are reflected in new §419.670(50). New §419.670(51) lists the specific information that must be included in a program provider's notice. SB 368 also requires a volunteer advocate to be designated to assist in

permanency planning if the individual or LAR requests an advocate or the individual's LAR cannot be located. These provisions have been implemented in §419.661(e) and §419.671(b).

New §419.661(b) implements a provision of SB 367, 77th Legislature, that requires at least one family member of an individual to be informed of all care and support options available before the individual is placed in a care setting.

The following new terms and definitions are added in §419.653 as a result of the amendments in other sections--"CARE," "CRCG (community resource coordination group)," "family-based alternative," "group home," "permanency planning," and "permanency-planning review."

Cindy Brown, Chief Financial Officer, has determined that for each year of the first five year period that the amendments are in effect, enforcing or administering the amendments do not have foreseeable implications relating to costs or revenues of state or local government. It is not anticipated that adopting the amendments will have an adverse economic effect on small businesses or micro-businesses because these changes do not impose any measurable cost on program providers. It is not anticipated that there will be any additional economic cost to persons required to comply with the amendments. It is not anticipated that the amendment will affect a local economy.

Barry Waller, Director, Long Term Services and Supports, has determined that for each year of the first five-year period the amendments are in effect, the expected public benefit is that the for individuals under 22 years of age in the waiver program who are receiving supported living in a group home, service planning will be focused on providing a permanent living arrangement for the individual with the primary feature of an enduring and nurturing relationship with a specific adult who will be an advocate for the individual. The requirement that the local MRA, CRCG, and school district or ECI program be notified within three days of the services being initiated is intended to help ensure that the individual receives services for which the individual is eligible and that are appropriate to the individual's needs.

A hearing to accept oral and written testimony from members of the public concerning the proposed amendments has been scheduled for 1:30 p.m., Monday, January 7, 2002, in the department's Central Office Auditorium in Building 2 at 909 West 45th Street, in Austin, Texas. Persons requiring an interpreter for the deaf or hearing impaired should contact the department's Central Office operator at least 72 hours prior to the hearing at TDD (512) 206-5330. Persons requiring other accommodations for a disability should notify the Long Term Services and Supports Division, at least 72 hours prior to the hearing at (512) 206-4706 or at the TDY phone number of Texas Relay, 1-800-735-2988.

Comments concerning this proposal must be submitted in writing to Linda Logan, Director, Policy Development, Texas Department of Mental Health and Mental Retardation, by mail to P.O. Box 12668, Austin, Texas 78711, by fax to (512) 206-4750, and by e-mail to policy.co@mhmr.state.tx.us within 30 days of publication of this notice.

The amendments are proposed under the Texas Health and Safety Code, §532.015(a), which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide THHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to operate the HCS-O Program.

The proposed amendments affect Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a) and (c) and Texas Government Code, Chapter 531, Subchapter D and §531.042.

§419.653. 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 Texas resident seeking services in the HCS-O program.

(2) CARE--The department's Client Assignment and Registration System, an on-line data entry system that provides demographic and other data about individuals served by the department.

(3) CRCG (Community Resource Coordination Group)--A local interagency group composed of public and private agencies that develops service plans for individuals whose needs can be met only through interagency coordination and cooperation. The role and responsibilities of the involved agencies, including MRAs, school districts, and providers, are described in §411.56 of this title (relating to Memorandum of Understanding (MOU) on Coordinated Services to Children and Youths).

(4) [~~(2)~~] Department--The Texas Department of Mental Health and Mental Retardation.

(5) Family-based alternative--A family setting in which the family provider or providers are specially trained to provide support and in-home care for children with disabilities or children who are medically fragile.

(6) Group home--A residence other than an individual's own home, family home or foster/companion care home in which supported living is provided.

(7) [~~(3)~~] HCS-O--The Home and Community-Based Services--OBRA program operated by the department as authorized by the Health Care Financing Administration (HCFA) in accordance with §1915(c) of the Social Security Act.

(8) [~~(4)~~] HCS-O case manager--An employee of the program provider who is responsible for the overall coordination and monitoring of services provided to an individual enrolled in the HCS-O program.

(9) [~~(5)~~] ICF/MR--The Intermediate Care Facilities Program for Persons with Mental Retardation or Related Conditions.

(10) [~~(6)~~] IDT (interdisciplinary team)--A planning team constituted by the program provider for each individual consisting of, at a minimum, the individual and LAR, HCS-O case manager, and a nurse. Other applicable persons assigned to provide or who are currently providing direct services to the individual and, as appropriate, a physician and other professional personnel may be included as team members as necessary.

(11) [~~(7)~~] IPC (individual plan of care)--A document that describes the type and amount of each HCS-O program service component to be provided to an individual and describes medical and other services and supports to be provided through non-program resources.

(12) [~~(8)~~] IPC cost--Estimated annual cost of program services included on an IPC.

(13) [~~(9)~~] IPC year--A 12-month period of time starting on the date an authorized initial or renewal IPC begins.

(14) [~~(10)~~] Individual--A person enrolled in the HCS-O program.

(15) [~~(11)~~] ISP (individual service plan)--A document developed by the IDT, from which the IPC is derived, which describes the assessments, recommendations, deliberations, conclusions, justifications and outcomes regarding the specific services provided to the individual by the program provider.

(16) [~~(12)~~] LAR (legally authorized representative)--A person authorized by law to act on behalf of a person with regard to a matter described in this subchapter, and may include a parent, guardian, or managing conservator of a minor, or the guardian of an adult.

(17) [~~(13)~~] LOC (level of care)--A determination given to an individual as part of the eligibility determination process based on data submitted on the MR/RC Assessment.

(18) [~~(14)~~] MRA (mental retardation authority)--An entity to which the Texas Mental Health and Mental Retardation Board delegates its authority and responsibility within a specified region for planning, policy development, coordination, and resource development and allocation, and for supervising and ensuring the provision of mental retardation services to people with mental retardation in one or more local service areas.

(19) [~~(15)~~] MR/RC Assessment--A form used by the department for LOC determination and LON assignment.

(20) [~~(16)~~] PDP (person-directed plan)--A plan developed for an applicant in accordance with §419.661 of this title (relating to Process for Enrollment of Applicants) that describes the supports and services necessary to achieve the desired outcomes identified by the applicant or the applicant's LAR on behalf of the applicant.

(21) Permanency planning--A philosophy and planning process that focuses on the outcome of family support for an individual under 22 years of age by facilitating a permanent living arrangement in which the primary feature is an enduring and nurturing parental relationship.

(22) Permanency Planning Review--A screen in CARE that, when completed by an MRA or program provider, identifies community supports needed to achieve an individual's permanency planning outcomes and provides information necessary for approval to provide supported living in a group home.

(23) [~~(17)~~] Program provider--An entity that provides HCS-O program services under a waiver program provider agreement with the department as defined in Chapter 419, Subchapter O of this title (relating to Enrollment of Medicaid Waiver Program Providers)

(24) [~~(18)~~] Service coordinator--An employee of an MRA responsible for assisting an individual, or the LAR on behalf of the individual, in accessing medical, social, educational, and other appropriate services including HCS-O program services

(25) [~~(19)~~] Service planning team--A planning team constituted by an MRA consisting of an applicant, the applicant's LAR, service coordinator, and other persons chosen by the applicant and the LAR.

§419.661. Process for Enrollment of Applicants.

(a) (No change.)

(b) The service coordinator must:

(1) give the applicant or applicant's LAR the choice of ICF/MR or HCS-O Program services; and

(2) provide the applicant, the applicant's LAR, and, if the LAR is not a family member, at least one family member both an oral and written explanation of the services and supports for which the applicant may be eligible including the ICF/MR Program--both state mental retardation facilities and community-based facilities, other waiver programs under §1915(c) of the Social Security Act, and other community-based services and supports.

(c) The MRA must document the applicant's choice of programs or the LAR's choice on behalf of the applicant on the HCS-O Verification of Choice form. Copies of the HCS-O Verification of Choice form are available by contacting the Texas Department of Mental Health and Mental Retardation, Office of Medicaid Administration, P.O. Box 12668, Austin, Texas 78711-2668.

(d) If the applicant, or the LAR on behalf of the applicant, chooses participation in the HCS-O program, the MRA will assign a service coordinator who develops a person-directed plan (PDP) in conjunction with the service planning team. At minimum, the PDP must include the following:

(1) a description of the applicant's current services and supports, identifying those that will be available if the applicant is enrolled in the HCS-O program;

(2) a description of outcomes to be achieved for the applicant through the HCS-O program, including determinations of further service needs through assessments to be accomplished after enrollment, and justification for each service component to be included in the IPC;

(3) if the applicant is under 22 years of age and seeking supported living provided in a group home, a description of the desired permanency planning outcomes, including:

(A) the natural supports and strengths of the family of an applicant under 18 years of age that, when supplemented by activities and supports provided or facilitated by the program provider or MRA, will enable the applicant to return to the family home;

(B) a family-based alternative that will secure for an applicant under 18 years of age a consistent, nurturing environment and an enduring, positive relationship with a specific adult who will be an advocate for the applicant; or

(C) the natural supports and strengths of an applicant from 18 to 22 years of age that, when supplemented by activities and supports provided or facilitated by the program provider or MRA, will result in the applicant having a consistent and nurturing environment as defined by the applicant and LAR;

(4) documentation that the type and amount of each service component included in the applicant's IPC:

(A) are necessary for the applicant to live in the community, to ensure the applicant's health and welfare in the community, and to prevent the need for institutional services; and

(B) do not replace existing natural supports or other non-program sources for the service components;

(5) a description of all determinations needed to establish the applicant's eligibility for SSI or Medicaid benefits and for an LOC; and

(6) a description of actions and methods to be used to reach identified service outcomes, projected completion dates, and person(s) responsible for completion.

(e) If the applicant is under 22 years of age and seeking supported living provided in a group home, the MRA must inform the applicant and LAR that they may request a volunteer advocate to assist in permanency planning. If an individual or LAR requests a volunteer advocate, or the MRA cannot locate the applicant's LAR, the MRA must designate a volunteer advocate to assist in permanency planning who is:

(1) a person selected by the individual or LAR who is not employed by or under contract with the provider;

(2) an adult relative of the individual; or

(3) a representative from a child advocacy group.

(f) The MRA compiles and maintains information necessary to process the applicant's request, or LAR's request on behalf of the applicant, for enrollment in the HCS-O program.

(1) If the applicant's financial eligibility for the HCS-O program must be established, the MRA initiates, monitors, and supports the processes necessary to obtain a financial eligibility determination.

(2) The MRA must complete an MR/RC Assessment if an LOC determination is necessary in accordance with §419.659 of this title (relating to Level of Care (LOC) Determination).

(3) If the applicant is under 22 years of age and is seeking supported living provided in a group home, the MRA must complete a Permanency Planning Review and receive approval from the department to provide such services.

(4) The MRA must develop a proposed IPC with the applicant or the LAR based on the PDP and in accordance with this subchapter.

(5) The service coordinator must inform the applicant or the LAR of all available HCS-O program providers in the local service area. The service coordinator must:

(A) provide information to the applicant or the LAR regarding program providers in the MRA's local service area;

(B) review the proposed IPC with potential program providers as requested by the applicant or the LAR;

(C) arrange for meetings/visits with potential program providers as desired by the applicant or the LAR;

(D) assure that the applicant's or LAR's choice of a program provider is documented, signed by the applicant or the LAR, and retained by the MRA in the applicant's record; and

(E) negotiate/finalize the proposed IPC and the date services will begin with the selected program provider. If the service coordinator and the selected program provider are unable to agree on the proposed IPC, the service coordinator and program provider will consult jointly with the department to achieve resolution.

~~[(b) The service coordinator will inform the applicant or the LAR of the applicant's right to choose between participation in the ICF/MR program in a state school setting or a community-based setting, the HCS-O program, or other services. The MRA must document the applicant's choice of programs or the LAR's choice on behalf of the applicant on the HCS-O Verification of Choice form. Copies of the HCS-O Verification of Choice form are available by contacting the Texas Department of Mental Health and Mental Retardation, Office of Medicaid Administration, P.O. Box 12668, Austin, Texas 78711-2668.]~~

~~[(1) If the applicant, or the LAR on behalf of the applicant, chooses participation in the HCS-O program, the MRA will assign a service coordinator who develops a person-directed plan (PDP) in conjunction with the service planning team. The service planning team must include the applicant and the LAR acting on the applicant's behalf and may include other persons chosen by the applicant and the LAR. At minimum, the PDP must include the following:]~~

~~[(A) a description of the applicant's current services and supports, identifying those that will be available if the applicant is enrolled in the HCS-O program;]~~

~~[(B) a description of outcomes to be achieved for the applicant through the HCS-O program, including determinations of further service needs through assessments to be accomplished after enrollment, and justification for each service component to be included in the IPC;]~~

~~[(C) documentation that the type and amount of each service component included in the individual's IPC:]~~

~~*[(i)* are necessary for the individual to live in the community, to ensure the individual's health and welfare in the community, and to prevent the need for institutional services; and]~~

~~*[(ii)* do not replace existing natural supports or other non-program sources for the service components.]~~

~~[(D) a description of all determinations needed to establish the applicant's eligibility for SSI or Medicaid benefits and for an LOC; and]~~

~~[(E) a description of actions and methods to be used to reach identified service outcomes, projected completion dates, and person(s) responsible for completion.]~~

~~[(2) The MRA compiles and maintains information necessary to process the applicant's request, or LAR's request on behalf of the applicant, for enrollment in the HCS-O program.]~~

~~[(A) If the applicant's financial eligibility for the HCS-O program must be established, the MRA initiates, monitors, and supports the processes necessary to obtain a financial eligibility determination.]~~

~~[(B) The MRA must complete an MR/RC Assessment if a LOC determination is necessary, in accordance with §419.659 of this title (relating to Level of Care (LOC) Determination).]~~

~~[(C) The MRA must develop a proposed IPC with the applicant or the LAR based on the PDP and in accordance with this subchapter.]~~

~~[(3) The service coordinator must inform the applicant or the LAR of all available HCS-O program providers in the local service area. The service coordinator must:]~~

~~[(A) provide information to the applicant or the LAR regarding program providers in the MRA's local service area;]~~

~~[(B) review the proposed IPC with potential program providers as requested by the applicant or the LAR;]~~

~~[(C) arrange for meetings/visits with potential program providers as desired by the applicant or the LAR;]~~

~~[(D) assure that the applicant's or LAR's choice of a program provider is documented, signed by the applicant or the LAR, and retained by the MRA in the applicant's record; and]~~

~~[(E) negotiate/finalize the proposed IPC and the date services will begin with the selected program provider. If the service coordinator and the selected program provider are unable to agree on the proposed IPC, the service coordinator and program provider will consult jointly with the department to achieve resolution.]~~

(g) [~~(c)~~] When the proposed IPC is finalized and the selected program provider has agreed to deliver the services delineated on the IPC, the MRA will submit the enrollment information to the department. When appropriate, the MRA will also submit supporting documentation as required in §419.658 (b) (relating to Department Review of Individual Plan of Care (IPC)).

(h) [~~(d)~~] The department will notify the applicant or the LAR, the selected program provider, and the MRA of its approval or denial of the applicant's enrollment. When enrollment is approved, the department must authorize the applicant's enrollment in the HCS-O program through the automated enrollment and billing system and issue an enrollment letter that includes the effective date of the applicant's enrollment in the HCS-O program.

(i) [~~(e)~~] Upon notification of an applicant's enrollment approval, the MRA must provide the selected program provider copies of all enrollment documentation, and associated supporting documentation including relevant assessment results and recommendations and the applicant's PDP.

(j) [~~(f)~~] The selected program provider must not initiate services until notified of the department's approval of the individual's enrollment.

(k) [~~(g)~~] The selected program provider must develop an initial ISP in accordance with §419.670 of this title (relating to Certification Principles: Service Delivery) based on the PDP and IPC as developed by the service planning team.

§419.670. Certification Principles: Service Delivery

The program provider shall:

(1) - (5) (No change.)

(6) ensure that a minor individual who is unable to live in the natural or adoptive family home is supported in a family-based alternative [~~family-like environment, such as a foster family~~];

(7) - (11) (No change.)

(12) ensure that each individual has [~~a current~~]:

(A) a current IPC;

(B) a current ISP; and

(C) a current LOC;

(13) (No change.)

(14) ensure that the ISP of each individual includes objectives derived from assessments of the individual's strengths, personal goals, and needs and are described in observable, measurable, or outcome-oriented terms and, for each individual under 22 years of age receiving supported living in a group home, includes permanency planning outcomes that identify:[~~,~~]

(A) the natural supports and strengths of the family of an individual under 18 years of age that, when supplemented by activities and supports provided or facilitated by the program provider or MRA, will enable the individual to return to the family home;

(B) a family-based alternative that will secure for an individual under 18 years of age a consistent, nurturing environment and an enduring, positive relationship with a specific adult who will be an advocate for the individual; or

(C) the natural supports and strengths of an individual between 18 and 22 years of age that, when supplemented by activities and supports provided or facilitated by the program provider or MRA, will result in the individual having a consistent and nurturing environment, as defined by the individual and LAR;

(15) - (40) (No change.)

(41) provide supported living services in compliance with paragraph (52) of this section and the definition in the approved waiver request including:

(A) - (H) (No change.)

(42) - (48) (No change.)

(49) provide respite in the residence of an individual or in other locations that meet HCS-O programmatic requirements and afford an environment that ensures the health, safety, comfort, and welfare of the individual;

(A) - (C) (No change.)

(D) The provider must not provide respite services in an institution;[~~.~~]

(50) within three days of initiating supported living services in a group home for an individual under 22 years of age, provide the information listed in paragraph (51) of this section to the following:

(A) the MRA in whose local service area the residence is located (see http://www.mhmr.state.tx.us/CentralOffice/PublicInformationOffice/DirectoryOfServicesWHAT.html for a listing of MRAs by city);

(B) the community resource coordination group (CRCG) for the county in which the individual's parent or guardian lives (see www.hhsc.state.tx.us/crcg/crcg.htm for a listing of CRCG chairpersons by county); and

(C) the local school district for the area in which the residence is located, if the individual is at least three years of age or the early childhood intervention (ECI) program for the county in which the residence is located, if the individual is less than two years of age (see www.eci.state.tx.us or call 1-800-250-2246 for a listing of ECI programs by county);

(51) provide the following information about an individual in accordance with paragraph (50) of this section:

(A) full name;

(B) gender;

(C) ethnicity;

(D) birth date;

(E) Social Security number;

(F) LAR's name, address and county of residence;

(G) date of initiation of supported living in a group home;

(H) address where supported living services in a group home are provided; and

(I) name and phone number of person submitting the notification; and

(52) ensure that, if an individual is under 22 years of age and receiving supported living services in a group home:

(A) such services are provided only with approval by the department commissioner or designee for the initial six months and one six month extension and only with approval by the commissioner of the Texas Health and Human Services Commission (HHSC) after such twelve month period; and

(B) a Permanency Plan Review is electronically submitted every six months to the department to obtain approval to continue such services.

§419.671. Certification Principles: Interdisciplinary Team Operations.

(a) (No change.)

(b) The program provider must ensure that, at minimum, the individual's IDT consists of the individual and his or her LAR or family member, the HCS-O case manager, and a nurse; and when necessary to the service planning process, the IDT [~~team~~] includes other persons who may be assigned to provide or who are currently providing direct services to the individual, a physician and other professional personnel, and other persons chosen by the individual or LAR.

(1) For individuals under 22 years of age for whom supported living provided in a group home is sought, the program provider must inform the individual or LAR that he or she may request a volunteer advocate to assist in developing permanency planning outcomes to be included in the ISP.

(2) If an individual or LAR requests a volunteer advocate or the program provider cannot locate an individual's LAR, the program provider must name a volunteer advocate to assist in developing permanency planning outcomes. The volunteer advocate must be:

(A) a person selected by the individual or LAR who is not employed by or under contract with the provider;

(B) an adult relative of the individual; or

(C) a representative from a child advocacy group.

(c) - (i) (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 November 26, 2001.

TRD-200107235
Andrew Hardin
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: January 6, 2002
For further information, please call: (512) 206-5232

♦ ♦ ♦

TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER O. STATE SALES AND USE TAX

34 TAC §3.289

The Comptroller of Public Accounts proposes an amendment to §3.289, concerning alcoholic beverage exemptions. This section is amended to correct statutory references to Alcoholic Beverage Code, §202.02. The mixed beverage gross receipts tax has been recodified by the legislature as Tax Code, Chapter 183. Additional amendments are made for the purpose of clarity.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant fiscal impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in providing taxpayers with additional information regarding their tax responsibilities. This rule is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §183.021.

§3.289. Alcoholic Beverage Exemptions.

(a) Exemptions.

(1) Sales or use tax is not due on charges for admission to night clubs, dance halls, discos, etc., when the charges are subject to tax under [~~the~~] Texas Alcoholic Beverage Code, §202.02. If the state refunds the mixed beverage gross receipts tax that was previously paid on cover charges, [~~is later refunded~~] then the cover charges that were not taxed under Tax Code, Chapter 183, are subject to[~~,~~] sales tax [~~will be due on the amount collected~~] as a fee for admission to an amusement service. For information on amusement services, see §3.298 of this title (relating to Amusement Services).

(2) Sales or use tax is not due on the sale of mixed beverages, including ice or nonalcoholic beverages that are mixed with, or are intended to be mixed with, alcoholic beverages, and gratuities collected on those sales, if the receipts are taxable under Tax Code, Chapter 183 [~~the Texas Alcoholic Beverage Code, §202.02~~]. If the state refunds mixed beverage gross receipts tax that was previously paid on mixed beverages, ice, and nonalcoholic beverages [~~is later refunded by the Texas Alcoholic Beverage Commission~~], then sales tax is due on the original sales price that was not taxed under Tax Code, Chapter 183.

(b) Issuance of exemption certificates. Persons who hold [~~holding~~] mixed beverage permits, late hour mixed beverage permits, or daily temporary mixed beverage permits issued by the Texas Alcoholic Beverage Commission are entitled to issue exemption certificates to their suppliers in lieu of paying [~~the~~] sales tax on the purchase of alcoholic beverages, ice, mixes, and nonalcoholic beverages, if the receipts from the resale of these items [~~their resale~~] are taxable under Tax Code, Chapter 183 [~~Texas Alcoholic Beverage Code, §202.02~~].

(c) Resale. Sales of liquor, wine, beer, or malt liquor from a licensed manufacturer, wholesaler, or distributor to a retailer licensed under Tax Code, Chapter 183, [~~the Texas Alcoholic Beverage Code~~] are presumed to be for resale. No resale certificate is [~~will be~~] required.

(d) Complimentary drinks. Any person who provides drinks to others without charge owes sales tax on the cost of the ingredients of the drinks.

(e) Private club permittee.

(1) Sales or use tax is not due on the sale of mixed beverages, and gratuities collected in connection therewith, if the beverages are [~~to be~~] served on the premises of the clubs to members or their guests and if the receipts are taxable under Tax Code, Chapter 183 [~~the Texas Alcoholic Beverage Code, §202.02~~].

(2) A private club is required to collect sales tax on the sales price of prepared foods, candy, meals, and other food products prepared, served, or sold for immediate consumption, whether or not sold in connection with the serving of alcoholic beverages. Charges for meals or other food products are subject to sales tax and must be separated from the charges for alcoholic beverages served to members and guests. For discussion of food and drinks sold for immediate consumption, see §3.293 of this title (relating to Food; Food Products; Meals; Food Service).

(3) A private club must pay [~~The~~] sales or use tax [~~must be paid by a private club~~] on all supply items, equipment, and replacement parts that [~~for the equipment which~~] the club uses or consumes in providing service, except for items that qualify for exemption as manufacturing items, as explained in §3.300 of this title (relating to Manufacturing; Custom Manufacturing; Fabricating; Processing). Also see [~~See~~] §3.293 of this title (relating to Food; Food Products; Meals; Food Service).

(4) A private club may issue a resale or exemption certificate [~~may be issued by a private club~~] in lieu of paying [~~the~~] sales tax for the purchase of those items furnished to members and guests with beverages, food products, or meals served for immediate consumption. The items must be of a nonreusable nature or qualify for exemption as wrapping or packaging materials that are used to wrap or package processed food and beverages. See §3.293 of this title (relating to Food; Food Products; Meals; Food Service)and §3.314 (relating to Wrapping, Packing, Packaging Supplies, Containers, Labels, Tags, Export Packers, and Stevedoring Materials and Supplies).

(f) Fraternal and veteran's organizations.

(1) Fraternal and veteran's organizations that [~~, which~~] do not qualify for a private club exemption certificate [~~,~~] may purchase beer, wine, or ale tax free from a distributor or other retailer only when the organization holds and maintains a valid retail dealer's on premise license, issued under Texas Alcoholic Beverage Code, §69.01, or a valid wine and beer retailer's permit, issued under Texas Alcoholic Beverage Code, §26.01. In addition to either of the above licenses, the organization must possess and publicly display a limited sales tax permit as a retailer. When an organization holds the required license and permit, it must collect sales [~~the~~] tax on all taxable sales of beer, wine, or ale.

(2) When a fraternal or veteran's organization that purchases or sells [~~handling~~] alcoholic beverages does not hold either of the retail licenses issued by the Texas Alcoholic Beverage Commission, it must pay sales tax on its purchases of alcoholic beverages.

(g) Certificates required. A seller is required to collect sales tax on the sale of taxable items [~~The burden of proving that a sale is exempt is upon the seller~~], unless the seller accepts, in good faith, an exemption or resale certificate from [~~requires~~] the purchaser , or the exception for resale in subsection (c) of this section applies, or the sale is exempt because it is subject to mixed beverage gross receipts tax under Tax Code, Chapter 183. [~~to furnish an exemption or resale certificate. The exemption or resale certificate relieves the seller from the burden of proof only if taken in good faith.~~] See §3.285 of this title (relating to Resale Certificate; Sales for Resale) and §3.287 of this title (relating to Exemption Certificates).
Figure: 34 TAC §3.289(g) (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 November 20, 2001.

TRD-200107194
Martin Cherry
Deputy General Counsel for Taxation
Comptroller of Public Accounts
Earliest possible date of adoption: January 6, 2002
For further information, please call: (512) 463-3699

♦ ♦ ♦

34 TAC §3.310

The Comptroller of Public Accounts proposes an amendment to §3.310, concerning laundry, cleaning, and garment services. This rule is amended to implement Senate Bill 1125, 77th Legislature, 2001, which enacted Tax Code, §151.3021. That provision allows an exemption for wrapping, packing, and packaging supplies used by a laundry or dry cleaner to wrap, pack, or package laundered or dry cleaned items. This change is explained in subsections (d) and (j) of the amended rule. Additional changes are made for the purpose of clarity.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant fiscal impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in providing taxpayers with additional information regarding their tax responsibilities. This rule is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §151.3021.

§3.310. Laundry, Cleaning, and Garment Services.

(a) Personal services means all services listed under Group 721, Major Group 72 of the Standard Industrial Classification Manual, 1972. Personal services listed in Group 721 are laundry, cleaning, and garment services.

(b) Sales tax is due on laundry, cleaning, and garment services[~~service~~]. A person who performs these services is required to collect sales tax from the customer. Examples of laundry, cleaning, and garment services include, but are not limited to:

(1) carpet cleaning and repairing, except carpet repairing performed in residential structures;

(2) diaper cleaning service;

(3) drapery cleaning services;

(4) dry cleaning services for garments or rugs;

(5) fur garment cleaning, repairing, and storage;

(6) garment alterations and repairs;

(7) ironing or pressing garment services;

(8) mending services;

(9) power and hand laundry services;

(10) rug cleaning, dying, and repairing services;

(11) tailoring garments;

(12) treating or applying protective chemicals to carpet, upholstery, rugs, or drapery;

(13) upholstery cleaning and repairs;

(14) uniform or linen cleaning services that provide only the services to clean or launder the customers' uniforms or linens; and

(15) valet services.

(c) A person who performs services that are taxable under this section must pay sales tax[~~Sales tax is due~~] on cleaning supplies (chemicals, soaps, etc.), machinery, tools, utilities, and equipment used to perform laundry, cleaning, and garment services.

(d) A person who performs services that are taxable under this section may issue a resale certificate in lieu of paying[~~With the exception of wrapping and packaging supplies,~~] sales tax on the purchase of[~~is not due on~~] items that are transferred to the customer [~~customers~~] as an integral part of the laundry, cleaning, and garment personal services. Examples include[~~For example,~~] buttons and thread used in mending or tailoring. Examples of items transferred in residential carpet, drapery, or upholstery cleaning include: carpet protectors, fire retardants, antistatic applications, flea killers, and rust inhibitors. See §3.285 of this title (relating to Resale Certificate; Sales for Resale). Wrapping and packaging supplies do not qualify for the resale exemption, and sales[~~Sales~~] tax is due on the purchase of wrapping and packaging supplies that are used to provide taxable services, unless a laundry or dry cleaner purchases the supplies as provided in subsection (j) of this section.

(e) Sales tax is not due on personal services provided through coin-operated machines that are operated by the customer.

(f) Sales tax is not due on personal services if performed by an employee for his employer as part of employee's regular duties for which he is paid. Sales tax is due on personal services that are performed on a contractual basis between two or more parties.

(g) Sales tax is not due on repairs to carpet in residential real property. See §3.291 of this title (relating to Contractors).

(h) Exemption for labor to restore real or tangible personal property in a disaster area.

(1) Labor to restore, including cleaning, laundering, repairing, treating, or applying protective chemicals to, real or tangible personal property is exempt if:

(A) the amount of the charge for labor is separately itemized; and

(B) the repair is to property damaged within a disaster area by the condition that caused the area to be declared a disaster area.

(2) The exemption does not apply to tangible personal property transferred as part of the repair.

(3) In this subsection, "disaster area" means:

(A) an area declared a disaster area by the governor of Texas under [~~the~~] Government Code, Chapter 418; or

(B) an area declared a disaster area by the president of the United States under 42 United States Code §5141.

(i) Records must be kept on all personal services performed. Sales tax is due on the total receipts if adequate records are not maintained. See §3.281 of this title (relating to Records Required; Information Required).

(j) Sales tax is not due on wrapping, packing, and packaging supplies that are purchased by a person who performs laundry or dry cleaning services, if the supplies are used to wrap, pack, or package an item that the person has pressed and dry cleaned or laundered in the regular course of business. For the purpose of this section, wrapping, packing and packaging supplies include hangers, safety pins, pins, inventory tags, staples, boxes, paper wrappers, and plastic bags. A person who performs laundry or dry cleaning services may issue an exemption certificate in lieu of paying tax to a supplier at the time of the person's purchase of the supplies. See §3.287 of this title (relating to Exemption Certificates). A person who owns coin-operated or other self- service garment cleaning facilities is not considered to be a laundry or dry cleaner.

This 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 November 20, 2001.

TRD-200107193
Martin Cherry
Deputy General Counsel for Taxation
Comptroller of Public Accounts
Earliest possible date of adoption: January 6, 2002
For further information, please call: (512) 463-3699

♦ ♦ ♦

34 TAC §3.314

The Comptroller of Public Accounts proposes an amendment to §3.314, concerning wrapping, packing, packaging supplies, containers, labels, tags, export packers, and stevedoring materials and supplies. This section is amended to implement Senate Bill 1125, 77th Legislature, 2001, which added Tax Code, §151.3021. That provision allows an exemption for wrapping, packing, and packaging supplies used by a laundry or dry cleaner to wrap, pack, or packaged the laundered or dry cleaned items. The change is explained in subsections (c), (h) and (k) of the proposed rule. Amendments are made to subsections (a)(1), (b)(3), (d)(2), (f), and (g) for the purpose of clarity.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant fiscal impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in providing taxpayers with additional information regarding their tax responsibilities. This rule is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §151.3021.

§3.314. Wrapping, Packing, Packaging Supplies, Containers, Labels, Tags, Export Packers, and Stevedoring Materials and Supplies.

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

(1) Containers--Glass, plastic, or metal bottles, cans, barrels, and cylinders. The term does not include any item of a type that is enumerated in paragraph (4) of this subsection.

(2) Manufacturers--Those persons covered by the provisions of §3.300 of this title (relating to Manufacturing; Custom Manufacturing; Fabricating; Processing).

(3) Nonreturnable container--A container other than a returnable container.

(4) Packaging supplies--All internal and external wrapping, packing, and packaging supplies including wrapping paper, wrapping twine, bags, boxes, cartons, crates, crating material, pallets, tape, rope, rubber bands, metal bands, labels, staples, glue, mailing tubes, excelsior, straw, cardboard fillers, separators, shredded paper, ice, dry ice, cotton batting, shirt boards, and hay lath.

(5) Returnable container--A container of a kind customarily returned for reuse by the buyer of the contents.

(b) Manufacturers.

(1) Sales or use tax is not due on containers or packaging supplies purchased by manufacturers for use as a part of the completion of the manufacturing process. For the purposes of this section, the manufacturing process is complete when the tangible personal property being produced has been packaged by the manufacturer as it will be sold. For example, toothpaste may be sold at retail in a tube enclosed in a box. Multiple units of the boxed toothpaste are placed in cardboard boxes by the manufacturer. A label is placed on the cardboard boxes identifying the product. The manufacturer then places these labelled boxes on a pallet and covers them with shrink-wrap for shipment, either to the manufacturer's distribution center, the manufacturer's warehouse, or to the manufacturer's customer. The toothpaste manufacturer may purchase the tubes, boxes, labels, pallets, and shrink-wrap tax free. Any additional packaging necessary to transfer the product from the manufacturer's distribution center, or from the manufacturer's warehouse to the manufacturer's customer would also be exempt from tax.

(2) Sales tax is not due on internal or external wrapping, packing and packaging supplies sold to a person for the person's own use, stored for use, or used in wrapping, packing, or packaging newspapers as defined in §3.299(a) of this title (relating to Newspapers, Magazines, Publishers, Exempt Writings), including those distributed free of charge to the general public.

(3) Sales tax is not due on nonreturnable containers, if the purchaser fills the container and sells the container with its contents. [~~Packaging supplies do not include returnable containers.~~] See subsection (g)(3)[~~(g)~~] of this section regarding returnable containers.

(4) Sales or use tax is not due on ice used by manufacturers and processors inside or outside a package in order to shape, form, preserve, stabilize, or protect the contents of the manufactured product.

(c) Sale of packaging supplies to persons other than manufacturers. Sales or use tax is due on the sale of packaging supplies, including gift wrapping supplies, to persons who repack tangible personal property prior to sale, produce shippers who are not original producers, wholesalers, retailers, and service providers other than laundry and dry cleaners for use in delivering, expediting, or furthering in any way:

(1) the performance of a taxable or nontaxable service;

(2) the rental of tangible personal property; or

(3) the sale of tangible personal property.

(d) Gift wrapping supplies. Sales tax is due on the purchase price of gift wrapping supplies used by persons providing gift wrapping services.

(1) Tax must be paid on the purchase price [~~cost~~] of gift wrapping by the person who provides [~~providing~~] the service whether or not the item being gift wrapped was sold by the person providing the service.

(2) Tax must be collected on a charge for gift wrapping if the person who provides [~~providing~~] the gift wrapping service sold the item that is being wrapped and does not provide the service on a stand-alone basis.

(e) Combination businesses. A business that primarily manufactures tangible personal property for sale may also purchase tangible personal property for resale that was manufactured by another entity. If the business is primarily a manufacturer, all packaging supplies may be purchased tax free even though a portion of the packaging supplies are used in repackaging a product. For example:

(1) fast-food restaurants are considered to be primarily processors of tangible personal property for sale. The restaurant may also sell tangible personal property without further processing, such as soft drinks, doughnuts, or candy. The fast-food restaurant may purchase all packaging supplies tax free even though a portion of the packaging supplies are used in packaging or serving a nonprocessed product;

(2) a grocery store purchases tangible personal property for resale, but also processes food and food products. A grocery store's meat department or snack bar may be processing as well as re- packaging food and food products. If the packaging supplies used by the departments that process are clearly distinguishable from those packaging supplies used in the nonprocessing department, the processing department's packaging supplies may be purchased tax free.

(f) Purchases for resale. A person who purchases packaging[~~Packaging~~] supplies [~~purchased~~] for resale "as is," not as part of a packaged product, may purchase the packaging supplies[~~be purchased~~] tax free by issuing a resale certificate in lieu of paying tax.

(g) Containers. Sales or use tax is not due on:

(1) containers when sold with the contents, if sales or use tax is not due on the sales price of the contents;

(2) nonreturnable containers when sold without the contents to persons who place the contents in the container and sell the contents together with the container. Throwaway glass bottles are examples of nonreturnable containers;

(3) returnable containers when sold with the contents in connection with the retail sale of the contents or when resold for refilling. An example is a person who sells oxygen with[~~would be~~] an oxygen cylinder. The oxygen seller must pay sales[~~Sales~~] or use tax on

[~~is due when~~] the oxygen cylinder at the time of purchase.[~~is purchased initially by the person who will fill it prior to the sale of the contents~~]. If the oxygen purchaser returns the cylinder to be refilled, then no tax is due on the cylinder in that transaction.

(h) Labels and tags. Sales or use tax is due on labels and tags unless they are used as discussed in subsection (b) or are purchased by the type of persons who are described in subsection (k) of this section.

(i) Export packers.

(1) An export packer is a person who packages property to be exported outside the territorial limits of the United States.

(2) Crating and packaging supplies as listed in subsection (a)(4) of this section, when purchased by an export packer to export personal property, are exempt under [~~the export clause of the United States Constitution, and the~~] Tax Code, §151.307, whether used to package the export packer's property, that of vendors shipping such property to their foreign customers, or that of purchasers who contract and pay for such services.

(3) An export packer may give exemption certificates to suppliers on material purchases but must maintain records showing which materials were used for the exempt purpose of exporting tangible personal property.

(4) The export packer need not obtain a sales or use tax permit if all crating and packing supplies are purchased for exporting tangible personal property.

(j) Stevedoring services. Materials and supplies are exempt when purchased by a person providing stevedoring services for a ship or vessel operating exclusively in foreign or interstate coastal commerce if the materials and supplies are loaded aboard the ship or vessel and are not removed before the departure of the ship or vessel.

(k) Laundry and dry cleaners. Sales tax is not due on hangers, safety pins, pins, inventory tags, staples, boxes, paper wrappers, and plastic bags that are purchased by a person who performs laundry or dry cleaning services, if the items are used to wrap, pack, or package an item that the person has pressed and dry cleaned or laundered in the regular course of business. See §3.310 of this title (Relating to Laundry, Cleaning, and Garment 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 November 20, 2001.

TRD-200107192
Martin Cherry
Deputy General Counsel for Taxation
Comptroller of Public Accounts
Earliest possible date of adoption: January 6, 2002
For further information, please call: (512) 463-3699

♦ ♦ ♦

ADOPTED RULES

An agency may take final action on a section 30 days after a proposal has been published in the ***Texas Register***. The section becomes effective 20 daysafter the agency files the correct document with the ***Texas Register***, unless a later date is specified or unless a federalstatute or regulation requires implementation of the action on shorter notice.

If an agency adopts the section without any changes to the proposed text, only the preamble of the notice and statement of legal authority will be published. If an agency adopts the section with changes to the proposed text, the proposal will be republished with the changes.

TITLE 4. AGRICULTURE

PART 2. TEXAS ANIMAL HEALTH COMMISSION

CHAPTER 48. RIDING STABLE REGISTRATION PROGRAM

4 TAC §§48.1 - 48.9

The Texas Animal Health Commission (commission) adopts a new Chapter 48, which is entitled Riding Stable Registration Program, §§48.1-48.9. Section 48.3 is adopted with one change to the proposed text as published in the September 14, 2001, issue of the *Texas Register* (26 TexReg 7009-7176). Sections 48.1, 48.2, 48.4-48.9 are adopted without changes and will not be republished.

During the 77th Texas Legislative session, Senate Bill 685 was passed and signed by the Governor which amends Chapter 2053 of the Texas Occupations Code to transfer from the Texas Department of Health (TDH), the Texas Board of Health (board), and the commissioner of public health (commissioner) to the Texas Animal Health Commission (commission) all powers, duties, rights, and obligations relating to the regulation of riding stables. The bill sets forth procedures regarding the transfer of authority from TDH, the board, and the commissioner to the commission and provides that the transfer is to take place not later than January 1, 2002.

In 1989, the legislature passed provisions regarding riding stables to ensure humane treatment and care of horses rented for riding and carriage purposes. Currently, TDH, the board, and the commissioner of public health are charged with the authority contained in these provisions. However, the protection of animals may not fall under the public health mission of these entities. The commission may have greater resources to work with the farmers and ranchers in Texas since it currently uses its authority to regulate certain facilities with regard to animal health standards. Senate Bill 685 transfers from the TDH, the board, and the commissioner to the commission the authority of regulation of riding stables. This authority is located in Chapter 2053 of the Texas Occupations Code. Rulemaking authority previously delegated to the Texas Board of Health is transferred to the Texas Animal Health Commission.

In order to insure consistency in the program, the commission is proposing the same set of rules that the Texas Department of Health has had in place. The rules have been changed to reflect the Texas Animal Health Commission as the appropriate regulatory agency, but the standards as established by TDH remain the same.

The commission received one comment from the Texas Board of Veterinary Medical Examiners ("Board") regarding the requirement that equine have a rabies vaccination under the supervision of a veterinarian. That requirement is found in Section 48.3 (c) (3) of the proposed rules. The Board noted that under their requirements rabies vaccinations must be done by or under "direct" supervision of a veterinarian. The Commission greatly appreciates the comment from the Board and inserts the term "direct" into this rule so as to insure adherence with the Board requirements.

The new sections are adopted under the following: Senate Bill 685 amends Chapter 2053 of the Texas Occupations Code to transfer from the Texas Department of Health (TDH), the Texas Board of Health (board), and the commissioner of public health (commissioner) to the Texas Animal Health Commission (commission) all powers, duties, rights, and obligations relating to the regulation of riding stables. Rulemaking authority is expressly granted to the Texas Animal Health Commission in Section 3 (Section 2053.012, Occupations Code) of the bill. Section 2053.012 provides that the commission may adopt rules it considers necessary to carry out this chapter.

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

§48.3. Standards.

(a) Housing.

(1) When not at work equines may be stabled in box stalls or kept outside in pens or pastures provided they have access to adequate free-choice natural or artificial shelter and fresh, clean water. Artificial shelter, at a minimum, shall consist of a roof and at least one wall to afford protection against precipitation and north winds in inclement weather. The structure shall not have sharp, protruding objects which might cause injury to the animal: i.e., nails, broken boards, etc.

(2) The premises and stable must be in good state of repair, in a clean and sanitary condition, and adequately ventilated and disinfected when needed.

(3) Equines housed in stalls shall be quartered in clean, dry, well ventilated stalls. Stall floors must be reasonably level. Sufficient bedding of straw, shavings, or other suitable material shall be furnished and changed as often as necessary to maintain them in a clean and dry condition. Bedding for concrete floors shall be at least six inches of materials. Bedding for clay, dirt, or rubber base floor shall be at least three inches of materials.

(4) Minimum indoor standards of shelters shall include the following.

(A) The ambient temperature shall be compatible with the health and comfort of the animal.

(B) Indoor housing facilities shall be adequately ventilated by natural or mechanical means to provide for the health of the animals at all times.

(5) Minimum outdoor standards of shelters shall include the following.

(A) When sunlight is likely to cause heat exhaustion of an animal tied outside, sufficient shade by natural or artificial means shall be provided to protect the animal from direct sunlight.

(B) Natural or artificial shelter appropriate to the local climatic conditions shall be provided as necessary for the health of the animal.

(6) Minimum requirements for both indoor and outdoor enclosures shall include the following.

(A) The housing facilities shall be structurally sound and maintained in good repair to protect the animals from injury and to contain the animals.

(B) Enclosures shall be constructed and maintained so as to provide adequate space. Inadequate space may be indicated by evidence of debility, stress, or abnormal behavior patterns.

(b) Sanitation.

(1) Minimum standards of sanitation for both indoor and outdoor enclosures shall include cleaning as required to prevent accumulation of excreta and other waste materials, dirt, and trash.

(2) Adequate cleaning and disinfecting equipment and disinfectants must be maintained on all premises at all times.

(3) All pens must be adequately drained to preclude animals from standing in mud or water for extended periods of time.

(4) Any insecticides/pesticides used must be labeled "Approved for equines and/or for their use in their environment."

(c) Health and disease control.

(1) Every registered establishment, within two weeks after registration, and at intervals of not more than one year after that date, shall have all equines examined by a veterinarian. The examination shall include the general physical condition of each equine, its teeth, hoofs and shoes, and its stamina and physical ability to carry the loads and to perform the work or duties required of it. The examination shall also include a record of any injury, disease, or deficiency observed at the time, together with any prescription of humane correction or disposition of the same. If any equine is sick, diseased, lame, or injured, the registrant shall take immediate action to obtain any required veterinary treatment, care, and attention. The equine may not:

(A) be moved, ridden, or driven except for the immediate purpose of humane keeping or pasturing and obtaining the medical or surgical care and attention required; or

(B) be used or worked during the recovery or convalescent period unless the owner has in his possession a signed and dated certificate obtained from a veterinarian which duly certifies that the equine's condition will not be impaired or aggravated by the activity.

(2) Any one of the following shall deem an equine unfit for work:

(A) lameness;

(B) untreated sores or wounds;

(C) obvious signs of emaciation, dehydration, or exhaustion;

(D) loose or improperly fitted shoes, or untrimmed hooves; and

(E) body condition score less than five.

(3) All rental equines shall be vaccinated on a yearly basis for rabies, eastern equine encephalomyelitis, western equine encephalomyelitis, and tetanus. Optional immunizations may also be administered at the owner's discretion. There must be documentation with adequate equine identification that the vaccinations were performed. Rabies vaccination must be done by or under the direct supervision of a veterinarian, and National Association of State Public Health Veterinarians Form #51 or its equivalent must be kept on file for each equine.

(4) An internal parasite control program, developed in consultation with a veterinarian knowledgeable in equine practice, shall be implemented and records kept of the date and product used for each equine.

(d) Humane care. Animals not cared for in a humane manner may be considered abused or neglected.

(1) Animals must be provided with adequate food and clean water and while working must have access to clean water at reasonable intervals whether working or at rest.

(2) Adequate and humane care must be provided for the animals at the facility.

(3) Animals kept outside will be provided free-choice protection from weather (shade from the sun, shelter from the rain, snow, and cold) and will be maintained in an area free from accumulations of waste and unsanitary debris.

(4) Owners are responsible for the acts of any person or persons to whom they rent equines for riding or driving purposes with respect to all acts where unjustified physical pain, suffering, or death is inflicted upon any equine from their establishment.

(5) All animals shall be stabled or confined in a manner as to preclude fighting and to assure that they will not stray.

(6) Working animals shall be given rest periods at reasonable intervals. Special attention must be given to animals on very hot days to preclude working when signs of heat stress, dehydration, or exhaustion are present.

(7) Rental equines restrained and under saddle or harnessed while awaiting business during the months of May through October, inclusive, must be shaded unless the ambient temperature is less than 90 degrees Fahrenheit.

(8) Reasonable and effective protective measures for sick equines, or those with body condition score less than five, must be taken when the ambient temperature is less than 50 degrees Fahrenheit.

(9) A saddle equine rider's size must be reasonably compatible with the size of the equine. In no case shall an equine be rented to a person whose weight, including clothing, exceeds 20% of the horse's weight as determined by scales or weight tape. Scales must be available for determining riders' weights, if necessary.

(10) Saddle equines must not be rented to obviously intoxicated persons.

(11) If two people ride simultaneously, the weight restriction in paragraph (9) of this subsection must be enforced except when

one rider is handicapped. In that instance, the total weight of the riders must not exceed 30% of the equine's weight, and the length of the ride must not exceed 30 minutes, with a 30-minute rest required between rides.

(e) Public notice.

(1) Each facility (and each carriage) shall prominently display a notice consisting of the following information: "This facility is operated in compliance with the Texas Riding Stable Registration Requirements. Any person observing a violation of the requirements may report the violation to: Texas Animal Health Commission at 2105 Kramer Lane, Austin, Texas 78758 or P.O. Box 12966, Austin, Texas 78711-12966."

(2) Each facility shall prominently display its current registration certificate.

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 November 21, 2001.

TRD-200107201
Gene Snelson
General Counsel
Texas Animal Health Commission
Effective date: December 11, 2001
Proposal publication date: September 14, 2001
For further information, please call: (512) 719-0714

♦ ♦ ♦

CHAPTER 55. SWINE

The Texas Animal Health Commission (commission) adopts the repeal and new of §55.3, concerning Feeding of Garbage to Swine, which is found in 4 TAC Chapter 55, without changes to the proposed text as published in the September 14, 2001, issue of the *Texas Register* (26 TexReg 7009-7176).

This adoption will repeal the current §55.3 and adopt a new §55.3 which prohibits the feeding of restricted garbage to swine and contains requirements for facilities which feed unrestricted garbage to swine.

House Bill 3673 of the 77th Texas Legislative Session recently amended the statute regarding the registration of facilities that feed garbage to swine. The legislation prohibited the practice of feeding swine any type of garbage that might contain meat or any type of meat derivative product. The reason is because there is a great potential for a foreign animal disease to be introduced into Texas through the feeding of uncooked meat products to swine. The current outbreak is attributed to the feeding of uncooked meat products to swine. The current outbreak of "Foot-and-Mouth" disease in England has proven to be devastating for the agricultural livestock industry as well as the general economy.

Foot-and-Mouth disease is a highly infectious viral disease of cloven-hoofed animals such as cattle, swine, sheep, goats, and deer. It is a very serious threat to Texas as well as the United States livestock industry. In Great Britain, the latest outbreak of Foot-and- Mouth disease has led to over one million animals being slaughtered. A Foot-and-Mouth disease outbreak would necessitate quarantine and depopulation of infected animals, as well as a cessation of livestock movement in the state to prevent the spread of the disease. A new worldwide epidemic of this disease has so far reached 60 countries, and with increased global trade there is a possibility of meat contaminated with Foot-and-Mouth disease being brought into Texas from an infected country. If garbage being fed to swine were to be infected with Foot-and-Mouth disease, the swine would very likely become infected with the disease.

Currently, the Texas Animal Health Commission registers swine garbage feeding facilities. The reason for registration and monitoring is to insure that these facilities adhere to a practice that minimizes the opportunity for a disease outbreak. In order to work toward insuring that such an outbreak does not occur in Texas, the feeding of any type of meat derivative garbage is prohibited after the effective date of the legislation. Under this legislation, the registration program will be focused on a facility that feeds only garbage that is unrestricted to swine. Unrestricted garbage is waste material that does not contain any meat product or meat derivative product. Unrestricted garbage is made of vegetable, fruit, dairy or bakery products.

The commission is repealing the current regulations in order to more clearly indicate the applicable requirements through the rules being adopted. The adopted rules will provide for a number of requirements which are for the purpose of insuring that these facilities have the necessary requirements in place to prevent the introduction and spread of diseases in swine. A summary of those requirements are: 1) prohibiting feeding swine restricted garbage; 2) ability of TAHC to require a brucellosis and pseudorabies negative test prior to issuance of a permit; 3) annual surveys to be conducted by a commission representative to determine disease risk on each registered location; 4) sanitation requirements for water; and 5) prohibiting feeding of feral swine at registered garbage feeding locations.

The commission may assess a registration fee; however, the commission has determined that in order to insure compliance and in order to not put undue hardship on these facilities, that a fee will not be assessed.

The commission did not receive any comments. The Commission did receive a verbal comment at their November 14, 2001 meeting to adopt this Chapter. The comment was made by Ken Horton, with Texas Pork Producers, regarding bone and meat scraps that are commercially processed into meat and bone meal. He wanted to make sure that such commercially produced and marketed meat or bone meal was not considered "prohibited garbage. He noted that he did not believe that to be the legislative intent. In response to this comment it was noted that such scraps and bones are being commercially processed into a commercially marketed product and therefore would not be considered a waste product covered by the definition for "prohibited garbage".

4 TAC §55.3

The repeal is adopted under the Texas Agriculture Code, Chapter 161, §161.041 (a) and (b), and §161.046 which authorizes the commission to promulgate rules in accordance with the Texas Agriculture Code. HB 3673, from the 77th Texas Legislative Session, provides that the commission has the authority to promulgate rules to register facilities that feed unrestricted garbage to swine. This authority is codified in Chapter 165, Section 165.026 (b). Also, Section §165.022, entitled "Method Of Disease Eradication," provides that the commission shall adopt rules which are to further the purpose of eradicating swine disease.

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

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 21, 2001.

TRD-200107202
Gene Snelson
General Counsel
Texas Animal Health Commission
Effective date: December 11, 2001
Proposal publication date: September 14, 2001
For further information, please call: (512) 719-0714

♦ ♦ ♦

4 TAC §55.3

The new section is adopted under the Texas Agriculture Code, Chapter 161, §161.041 (a) and (b), and §161.046 which authorizes the commission to promulgate rules in accordance with the Texas Agriculture Code. HB 3673, from the 77th Texas Legislative Session, provides that the commission has the authority to promulgate rules to register facilities that feed unrestricted garbage to swine. This authority is codified in Chapter 165, Section 165.026 (b). Also, Section §165.022, entitled "Method Of Disease Eradication," provides that the commission shall adopt rules which are to further the purpose of eradicating swine disease.

No other statutes, articles, or codes are affected by the new 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 November 21, 2001.

TRD-200107203
Gene Snelson
General Counsel
Texas Animal Health Commission
Effective date: December 11, 2001
Proposal publication date: September 14, 2001
For further information, please call: (512) 719-0714

♦ ♦ ♦

CHAPTER 56. GRANTS, GIFTS AND DONATIONS

4 TAC §§56.1 - 56.7

The Texas Animal Health Commission (commission) adopts a new Chapter 56, which is entitled Grants, Gifts and Donations, §§56.1-56.7, without changes to the proposed text as published in the September 14, 2001, issue of the *Texas Register* (26 TexReg 7009-7176).

House Bill 1687, 77th Legislature, amended Chapter 161 of the Texas Agriculture Code by adding Section 161.0311, entitled "Acceptance of Gifts and Grants." The legislation gave the Commission authority to accept and solicit grants, gifts and donations consistent with the purposes of Chapter 161. In order to insure that any such grants, gifts or donations follow an established standard, the Commission is adopting these rules which establish standards regarding solicitation of grants, gifts and donations as well as standards of conduct between agency representatives and private donors. These rules also include the necessary requirements as provided by Chapter 575 of the Texas Government Code, related to Acceptance of Gift by State Agency.

Section 56.1 provides the purpose of this chapter; Section 56.2 contains the necessary definitions used in this chapter; Section 56.3 pertains to standards regarding acceptance of grants, gifts and donations; Section 56.4 establishes standards for solicitation of grants, gifts and donations; Section 56.5 provides that the agency can accept restricted and unrestricted grants, gifts and donations; Section 56.6 establishes standards of conduct between employees and officers and private donors; and Section 56.7 prohibits the acceptance of a gift from a party to a contested case with the commission.

The commission did not receive any comments.

The new sections are adopted under the following: House Bill 1687 from the 77th Texas Legislative Session added Section 161.0311 to the Texas Agriculture Code and it provided that the Commission may solicit and accept gifts, grants, and donations for the purposes of this chapter. The rules are proposed under the Texas Agriculture Code, Chapter 161, §161.041 (a) and (b), and §161.046 which authorizes the Commission to promulgate rules in accordance with the Texas Agriculture Code. Also, these rules conform to the requirements contained in Chapter 575 of the Texas Government Code, related to Acceptance of Gift by State Agency.

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

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 21, 2001.

TRD-200107204
Gene Snelson
General Counsel
Texas Animal Health Commission
Effective date: December 11, 2001
Proposal publication date: September 14, 2001
For further information, please call: (512) 719-0714

♦ ♦ ♦

CHAPTER 58. EMERGENCY RESPONSE AND MANAGEMENT

The Texas Animal Health Commission (Commission) adopts a new Chapter 58, which is entitled Emergency Response and Management, §§58.1-58.3. Section 58.1 and §58.2 are adopted with changes to the proposed text as published in the September 14, 2001, issue of the *Texas Register* (26 TexReg 7009-7176). Sections 58.3, 58.11, 58.12, 58.21. 58.22, 58.31, and 58.32 are adopted without changes and will not be republished.

Chapter 58 is intended for the purpose of authorizing the Executive Director of the Commission to act quickly in responding to an animal health emergency under the statutory authority of the commission. The rules provide the appropriate regulatory structure for enacting a quarantine and establish regulatory requirements for restricting movement of livestock in response to an animal health emergency. This chapter also provides regulatory requirements, standards and a statement of intent by the Commission regarding disposal, slaughter and compensation for exposed livestock.

These rules do not in any way reduce the authority or the role of the Commission, through the Governor's appointed Commissioners, in responding to an animal health emergency. The Commission is vested by the state legislature with the responsibility of protecting Texas livestock from such diseases. Even with the adoption of this Chapter the Commissioners retain the ultimate authority to dictate the direction of the agency in responding to such an emergency. This chapter is not intended to reduce or limit the exercise of that authority for any actions taken by the Executive Director through this Chapter. In the event of such an emergency, the Commission would seek to have an open meeting to deliberate and direct agency actions. These rules are intended to establish regulatory standards for how the Executive Director will respond to such an emergency and ensure that the Executive Director is able to exercise the full statutory authority of the Commission in an emergency.

Livestock and wildlife in Texas are subject to a variety of highly contagious, foreign animal diseases (FAD). A FAD may be very contagious; it may affect both farm/ranch animals and wildlife in Texas and it may be extremely difficult to identify, isolate, control, and eradicate. It may spread to other states and other countries. The time delay between the detection of a foreign animal disease and its identification as a FAD may be delayed which could result in long term, very costly deployment of emergency control measures for six (6) months or longer. FADs not identified, isolated, controlled, or eradicated could severely disrupt the economy and even change the culture and well-being of people in this state. Some FADs can adversely affect humans. FADs will severely affect both intrastate, interstate, and international movement of live animals and animal products. Control and eradication of an identified FAD will involve many state and federal agencies, not just those associated with agricultural activities. Positive and prompt actions may have to be taken by government authorities to quarantine and depopulate privately-owned livestock prior to positive identification of a FAD in order to stop the spread of the disease. An animal health emergency could cause a severe impact to, or even destroy, the agricultural economic stability and viability of the State and possibly the Nation.

Recognizing the importance of the Texas livestock industry to the state's economy, the "Texas Emergency Response Team" (TERT) was created by the Commission and USDA, APHIS, VS to coordinate and collaborate in responding to an animal health emergency as well as to seek the input of the state's animal health-related agencies, agriculture industries, and other organizations including universities, local officials, and private veterinary practitioners. TERT has been working on developing the necessary infrastructure to be able to respond to such an event.

On November 1-9, 2000, the Texas Animal Health Commission (TAHC), in conjunction with the USDA and the governments of Mexico and Canada conducted an exercise simulating an outbreak of foot-and-mouth disease (FMD) for the purpose of emergency planning. There were simulation exercises in South Texas, as well as Tamaulipas, Mexico and Ontario and Alberta, Canada. These exercises served to test our readiness in the event of a serious outbreak of an infectious animal disease.

On March 29, 2001, the Governor of Texas signed an Executive Order ("RP-01") designating the Commission as a member of the State Emergency Management Council. On April 5, 2001, the Governor signed a letter establishing the Foreign Animal Disease (FAD) Working Groups charged with developing a state emergency response plan for a FAD. That Plan was approved on June 7, 2001, as Appendix 4 (Foreign Animal Disease) to Annex H (Health and Medical Services) of the Texas Emergency Plan. That Plan was validated in a simulated exercise in late June, 2001 and involved the participation of 23 state and federal agencies as well as stakeholders from the various Texas livestock industries.

Chapter 58 is intended to focus the Commission's current statutory authority into a focused regulatory framework establishing appropriate regulatory standards for restricting the movement of livestock and providing the Executive Director the ability to act under that authority. The Commission has broad-based statutory authority to both eradicate and/or control any disease that impacts Texas livestock. However, that statutory authority has never been coherently focused on responding to an actual animal health emergency.

Chapter 58 takes the agency's statutory authority and provides specific regulatory standards for when the Chapter is to be utilized as well as provides the necessary requirements for issuing and enforcing a quarantine. The Chapter also provides specific movement restrictions that can be put in place throughout the state in order to ensure that a FAD is not being spread to other livestock in the state. Also, the use of these restrictions can be used to demonstrate the state's ability to contain such an outbreak, hopefully, minimizing any quarantines put on Texas by other states. These requirements, when activated, will allow the commission to restrict movement of livestock in order to make an appropriate assessment regarding exposure to a FAD outbreak in Texas and then, when appropriate, authorize movement through authorized agents of the commission. Also, Subchapter D authorizes the Executive Director to take actions to address issues related to disposal, slaughter and compensation for exposed livestock. The Commission realizes that this will be a very difficult issue that the Commission will have to grapple with in responding to such an outbreak; but, in order to protect the livestock of Texas, the Executive Director needs to have the necessary authority to respond to such an emergency.

The Post Exercise Report from the June FAD exercise denotes that the State of Texas, and the Commission, can claim success from the state's Plan, but it also made recommendations to improve the state's preparedness. One recommendation was to "[I]improve the emergency authority for the State Veterinarian by reviewing current controlling legal authorities to enhance streamlined decision making during a FAD incident." (See: Page 27 of "State of Texas Foreign Animal Disease (FAD) Modified Functional Exercise Post-Exercise Report"). Also, the Report recommended to "[s]ustain the effective methods of animal movement control." (See: Page 28 of Report)

Chapter 58 directly supports the recommendation made in the Post- Exercise Report. These rules use current statutory authority to provide clear lines of authority for the State Veterinarian (i.e., Executive Director) to be able to respond quickly and effectively in streamlining the decision making process. It also provides clear regulatory standards that can be used in enacting

an effective quarantine as well as other requirements that can be engaged to restrict the movement of livestock while trying to control and eradicate a FAD.

Chapter 58 creates an appropriate regulatory structure for ensuring that the state of Texas can quickly, adequately and effectively respond to an animal health emergency thus protecting the livestock industry of this state.

Chapter 58 will have four Subchapters. Subchapter A addresses General Requirements; Subchapter B provides requirements relating to quarantine and notice; Subchapter C provides movement restriction requirements and notice; and Subchapter D provides requirements related to slaughter, disposal and compensation.

Subchapter A provides for General Requirements and contains Sections 58.1 through 58.3. Section 58.1 contains the definitions used in the Chapter; Section 58.2 provides for the disease control actions of the agency in responding to an emergency; and Section 58.3 contains general requirements provided for under that chapter.

Subchapter B provides requirements relating to quarantine and notice and contains Sections 58.11 and 58.12. Section 58.11 provides for the establishment of a quarantine and Section 58.12 contains the notice of quarantine requirements.

Subchapter C provides movement restriction requirements and notice and contains Sections 58.21 and 58.22. Section 58.21 provides for livestock movement restrictions in response to an emergency and Section 58.22 provides the notice requirements for livestock movement restrictions.

Subchapter D provides requirements related to slaughter, disposal and compensation and contains Sections 58.31 and 58.32. Section 58.31 provides for requirements for disposal of diseased or exposed livestock and Section 58.32 contains requirements related to compensation of livestock owner.

The Commission received one comment from Dr. Konrad Eugster with the Texas Veterinary Medical Diagnostic Laboratory (TVMDL) regarding an exception for "Bluetongue." In Section 58.2, there is a reference list of "Office International Des Epizooties List A Diseases" which are diseases having the potential for very serious and rapid spread, irrespective of national borders, which are of serious socioeconomic or public health consequence and which are of major importance in the international trade of animals and animal products. Dr. Eugster noted that in Texas all those diseases are reportable, except for the disease "Bluetongue." That is a disease which is on List A, it is already found in Texas livestock, and, therefore, it is not a reportable disease. In recognition of that distinction and in order to insure greater clarity regarding the applicability of these rules, the exception is, therefore, added to Section 58.2 (c). Also, in publishing the rules, the definition for the Texas Emergency Response Team (TERT) was inadvertently left out of the proposal to §58.1. That definition is included in the adoption.

SUBCHAPTER A. GENERAL REQUIREMENTS

4 TAC §§58.1 - 58.3

Chapter 58 is adopted under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code. The commission is vested by statute, Section 161.041 (a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The commission is authorized, by Section 161.041 (b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. The commission may require, through Section 161.0415, the immediate slaughter of livestock if the livestock are exposed to or infected with a disease that is recognized by the United States Department of Agriculture as a foreign animal disease. The commission is also authorized, by Section 161.058, to pay an indemnity to the owner of livestock exposed to or infected with a disease if the commission considers it necessary to eradicate the disease and to dispose of the exposed or diseased livestock. If the commission determines that a disease listed in Section 161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state among livestock, or that livestock are exposed to one of those diseases or an agent of transmission of one of those diseases, the commission shall establish a quarantine on the affected animals or on the affected place. That is found in Section 161.061.

As a control measure, the commission by rule may regulate the movement of animals. The commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. That is found in Section 161.054. An agent of the commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state in order to determine if the shipment originated from a quarantined area or herd; or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or noncommunicable disease. That authority is found in Section 161.048. A person is presumed to control the animal if the person is the owner or lessee of the pen, pasture, or other place in which the animal is located and has control of that place, or exercises care or control over the animal. That is under Section 161.002.

Section 161.007 provides that if a veterinarian employed by the commission determines that a communicable disease exists among livestock, domestic animals, or domestic fowl or on certain premises or that livestock, domestic animals, or domestic fowl have been exposed to the agency of transmission of a communicable disease, the exposure or infection is considered to continue until the commission determines that the exposure or infection has been eradicated through methods prescribed by rule of the commission.

Section 161.005 provides that the commission may authorize the executive director or another employee to sign written instruments on behalf of the commission. A written instrument, including a quarantine or written notice, signed under that authority has the same force and effect as if signed by the entire commission.

Section 161.061 provides that if the commission determines that a disease listed in Section 161.041 of this code or an agency of transmission of one of those diseases exists in a place in this state or among livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl, or that a place in this state or livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl are exposed to one of those diseases or an agency of transmission of one of those diseases, the commission shall establish a quarantine on the affected animals or on the affected place. Under Section 161.062 the commission shall give notice of a quarantine established within this state. Section 161.062 provides that a quarantine that is established for any location has the effect of quarantining all livestock, domestic animals, or domestic

fowl of the kind mentioned in the quarantine notice that are on or enter that location during the existence of the quarantine, regardless of who owns or controls the livestock, domestic animals, or domestic fowl. Section 161.063 provides for quarantine notice requirements.

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

§58.1. Definitions.

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

(1) "Animal" includes livestock, exotic livestock, domestic fowl water fowl, and exotic fowl or any invertebrate or non-invertebrate.

(2) "Animal Product" means hides; bones; hoofs; horns; viscera; parts of animal bodies; litter, straw, or hay used for bedding; and any other substance capable of carrying insects or a disease that may endanger the livestock industry.

(3) "Caretaker of Animal" means a person is presumed to control the animal if the person is the owner or lessee of the pen, pasture, or other place in which the animal is located and has control of that place, or exercises care or control over the animal.

(4) "Dealer" means a person engaged in the business of buying or selling animals in commerce on the person's own account; as an employee or agent of the vendor, the purchaser, or both; or on a commission basis.

(5) "Declaration of State of Disaster" The governor by executive order or proclamation may declare a state of disaster if the governor finds a disaster has occurred or that the occurrence or threat of disaster is imminent.

(6) "Effect of Disaster Declaration" An executive order or proclamation issued by the Governor declaring a state of disaster:

(A) activates the disaster recovery and rehabilitation aspects of the state emergency management plan applicable to the area subject to the declaration; and

(B) authorizes the deployment and use of any forces to which the plan applies and the use or distribution of any supplies, equipment, and materials or facilities assembled, stockpiled, or arranged to be made available under this chapter or other law relating to disasters.

(7) "Emergency Management Plan Council" composed of the heads of state agencies, boards, and commissions and representatives of organized volunteer groups to advise and assist the Governor in all matters relating to disaster mitigation, preparedness, response, and recovery. The commission is a member of that council.

(8) "Emergency Management Plan" is a state prepared plan together with annexes designed to address all emergency management functional responsibilities. This plan defines the organization, establishes operational concepts, assigns responsibilities, and outlines coordination procedures for accomplishing comprehensive emergency management objectives in Texas.

(9) "Emergency Management Plan - Appendix Four to Annex H (Health and Medical Services)" means the State of Texas Emergency Management Plan annex which provides the state guidance for mitigating against, preparing for, identifying and responding to, and recovering from any highly contagious animal disease affecting Texas livestock and wildlife.

(10) "Exotic livestock" means grass-eating or plant-eating, single-hooved or cloven-hooved mammals that are not indigenous to this state and are known as ungulates, including animals from the swine, horse, tapir, rhinoceros, elephant, deer, and antelope families.

(11) "Exotic fowl" means any avian species that is not indigenous to this state. The term includes ratites.

(12) "Exposure or Infection" means if a veterinarian employed by the commission determines that a communicable disease exists among livestock, domestic animals, or domestic fowl or on certain premises or that livestock, domestic animals, or domestic fowl have been exposed to an agent of transmission of a communicable disease, the exposure or infection is considered to continue until the commission determines that the exposure or infection has been eradicated through methods prescribed by rule of the commission.

(13) "Feedlot" means a confined drylot area for finish feeding of cattle on concentrated feed with no facilities for pasturing or grazing. All cattle in a feedlot are considered a "herd" for purposes of these regulations.

(14) "Foreign Animal Diseases" means these are animal diseases recognized by the United States Department of Agriculture as not being found in the United States.

(15) "Hold Order" means a document restricting movement of a herd, unit, or individual animal pending the determination of disease status.

(16) "Livestock" includes cattle, horses, mules, asses, sheep, goats, hogs, domestic fowl, exotic livestock and exotic fowl.

(17) "Livestock market" means a stockyard, sales pavilion, or sales ring where livestock, exotic livestock, or exotic fowl are assembled or concentrated at regular or irregular intervals for sale, trade, barter, or exchange.

(18) "Office International Des Epizooties List A Diseases" are diseases which have the potential for very serious and rapid spread, irrespective of national borders, which are of serious socio-economic or public health consequence and which are of major importance in the international trade of animals and animal products.

(19) "Show, fair, or exhibition" means a show, fair, or exhibition that permits livestock and poultry to enter for the purpose of showing or exhibiting livestock.

(20) "Texas Emergency Response Team" (TERT) is comprised of members of the Commission and the USDA, APHIS, VS. The TERT plans, coordinates, and collaborates in order be able respond effectively and efficently to a foregin animal disease outbreak.

§58.2. Disease Control.

(a) Purpose: The purpose of this chapter is to provide the executive director the necessary authorization to act for the commission in order to respond expeditiously to an animal health emergency. All actions of the executive director, under this chapter, will be in accordance with any direction, action or authorization provided by the commission.

(b) The commission will protect all livestock from any exposure to a disease or an agent of transmission of one of the diseases which:

(1) is recognized by the United States Department of Agriculture as a foreign animal disease;

(2) is named on "List A" of the Office International Des Epizooties; or

(3) is the subject of a state of emergency, as declared by the governor.

(c) If the executive director determines that livestock have been exposed to or infected with a disease, other than bluetongue, or an agent of transmission of one of the diseases listed in subsection (b) and determines that an animal health emergency exists, then the executive director is authorized to exercise all the necessary authority through this chapter to act for the commission to respond as expediently as possible to the emergency.

(d) The executive director is authorized to determine the necessary requirements related to quarantine, disposal, testing, movement, inspection, and treatment.

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 November 21, 2001.

TRD-200107205
Gene Snelson
General Counsel
Texas Animal Health Commission
Effective date: December 11, 2001
Proposal publication date: September 14, 2001
For further information, please call: (512) 719-0714

♦ ♦ ♦

SUBCHAPTER B. QUARANTINE REQUIRMENTS

4 TAC §58.11, §58.12

Chapter 58 is adopted under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code. The commission is vested by statute, Section 161.041 (a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The commission is authorized, by Section 161.041 (b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. The commission may require, through Section 161.0415, the immediate slaughter of livestock if the livestock are exposed to or infected with a disease that is recognized by the United States Department of Agriculture as a foreign animal disease. The commission is also authorized, by Section 161.058, to pay an indemnity to the owner of livestock exposed to or infected with a disease if the commission considers it necessary to eradicate the disease and to dispose of the exposed or diseased livestock. If the commission determines that a disease listed in Section 161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state among livestock, or that livestock are exposed to one of those diseases or an agent of transmission of one of those diseases, the commission shall establish a quarantine on the affected animals or on the affected place. That is found in Section 161.061.

As a control measure, the commission by rule may regulate the movement of animals. The commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. That is found in Section 161.054. An agent of the commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state in order to determine if the shipment originated from a quarantined area or herd; or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or noncommunicable disease. That authority is found in Section 161.048. A person is presumed to control the animal if the person is the owner or lessee of the pen, pasture, or other place in which the animal is located and has control of that place, or exercises care or control over the animal. That is under Section 161.002.

Section 161.007 provides that if a veterinarian employed by the commission determines that a communicable disease exists among livestock, domestic animals, or domestic fowl or on certain premises or that livestock, domestic animals, or domestic fowl have been exposed to the agency of transmission of a communicable disease, the exposure or infection is considered to continue until the commission determines that the exposure or infection has been eradicated through methods prescribed by rule of the commission.

Section 161.005 provides that the commission may authorize the executive director or another employee to sign written instruments on behalf of the commission. A written instrument, including a quarantine or written notice, signed under that authority has the same force and effect as if signed by the entire commission.

Section 161.061 provides that if the commission determines that a disease listed in Section 161.041 of this code or an agency of transmission of one of those diseases exists in a place in this state or among livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl, or that a place in this state or livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl are exposed to one of those diseases or an agency of transmission of one of those diseases, the commission shall establish a quarantine on the affected animals or on the affected place. Under Section 161.062 the commission shall give notice of a quarantine established within this state. Section 161.062 provides that a quarantine that is established for any location has the effect of quarantining all livestock, domestic animals, or domestic fowl of the kind mentioned in the quarantine notice that are on or enter that location during the existence of the quarantine, regardless of who owns or controls the livestock, domestic animals, or domestic fowl. Section 161.063 provides for quarantine notice requirements.

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

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 21, 2001.

TRD-200107206
Gene Snelson
General Counsel
Texas Animal Health Commission
Effective date: December 11, 2001
Proposal publication date: September 14, 2001
For further information, please call: (512) 719-0714

♦ ♦ ♦

SUBCHAPTER C. MOVEMENT RESTRICTION REQUIRMENTS

4 TAC §58.21, §58.22

Chapter 58 is adopted under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code. The commission is vested by statute, Section 161.041 (a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The commission is authorized, by Section 161.041 (b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. The commission may require, through Section 161.0415, the immediate slaughter of livestock if the livestock are exposed to or infected with a disease that is recognized by the United States Department of Agriculture as a foreign animal disease. The commission is also authorized, by Section 161.058, to pay an indemnity to the owner of livestock exposed to or infected with a disease if the commission considers it necessary to eradicate the disease and to dispose of the exposed or diseased livestock. If the commission determines that a disease listed in Section 161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state among livestock, or that livestock are exposed to one of those diseases or an agent of transmission of one of those diseases, the commission shall establish a quarantine on the affected animals or on the affected place. That is found in Section 161.061.

As a control measure, the commission by rule may regulate the movement of animals. The commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. That is found in Section 161.054. An agent of the commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state in order to determine if the shipment originated from a quarantined area or herd; or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or noncommunicable disease. That authority is found in Section 161.048. A person is presumed to control the animal if the person is the owner or lessee of the pen, pasture, or other place in which the animal is located and has control of that place, or exercises care or control over the animal. That is under Section 161.002.

Section 161.007 provides that if a veterinarian employed by the commission determines that a communicable disease exists among livestock, domestic animals, or domestic fowl or on certain premises or that livestock, domestic animals, or domestic fowl have been exposed to the agency of transmission of a communicable disease, the exposure or infection is considered to continue until the commission determines that the exposure or infection has been eradicated through methods prescribed by rule of the commission.

Section 161.005 provides that the commission may authorize the executive director or another employee to sign written instruments on behalf of the commission. A written instrument, including a quarantine or written notice, signed under that authority has the same force and effect as if signed by the entire commission.

Section 161.061 provides that if the commission determines that a disease listed in Section 161.041 of this code or an agency of transmission of one of those diseases exists in a place in this state or among livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl, or that a place in this state or livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl are exposed to one of those diseases or an agency of transmission of one of those diseases, the commission shall establish a quarantine on the affected animals or on the affected place. Under Section 161.062 the commission shall give notice of a quarantine established within this state. Section 161.062 provides that a quarantine that is established for any location has the effect of quarantining all livestock, domestic animals, or domestic fowl of the kind mentioned in the quarantine notice that are on or enter that location during the existence of the quarantine, regardless of who owns or controls the livestock, domestic animals, or domestic fowl. Section 161.063 provides for quarantine notice requirements.

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

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 21, 2001.

TRD-200107207
Gene Snelson
General Counsel
Texas Animal Health Commission
Effective date: December 11, 2001
Proposal publication date: September 14, 2001
For further information, please call: (512) 719-0714

♦ ♦ ♦

SUBCHAPTER D. DISPOSAL REQUIRMENTS

4 TAC §58.31, §58.32

Chapter 58 is adopted under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code. The commission is vested by statute, Section 161.041 (a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The commission is authorized, by Section 161.041 (b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. The commission may require, through Section 161.0415, the immediate slaughter of livestock if the livestock are exposed to or infected with a disease that is recognized by the United States Department of Agriculture as a foreign animal disease. The commission is also authorized, by Section 161.058, to pay an indemnity to the owner of livestock exposed to or infected with a disease if the commission considers it necessary to eradicate the disease and to dispose of the exposed or diseased livestock. If the commission determines that a disease listed in Section 161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state among livestock, or that livestock are exposed to one of those diseases or an agent of transmission of one of those diseases, the commission shall establish a quarantine on the affected animals or on the affected place. That is found in Section 161.061.

As a control measure, the commission by rule may regulate the movement of animals. The commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international

commerce. The commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. That is found in Section 161.054. An agent of the commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state in order to determine if the shipment originated from a quarantined area or herd; or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or noncommunicable disease. That authority is found in Section 161.048. A person is presumed to control the animal if the person is the owner or lessee of the pen, pasture, or other place in which the animal is located and has control of that place, or exercises care or control over the animal. That is under Section 161.002.

Section 161.007 provides that if a veterinarian employed by the commission determines that a communicable disease exists among livestock, domestic animals, or domestic fowl or on certain premises or that livestock, domestic animals, or domestic fowl have been exposed to the agency of transmission of a communicable disease, the exposure or infection is considered to continue until the commission determines that the exposure or infection has been eradicated through methods prescribed by rule of the commission.

Section 161.005 provides that the commission may authorize the executive director or another employee to sign written instruments on behalf of the commission. A written instrument, including a quarantine or written notice, signed under that authority has the same force and effect as if signed by the entire commission.

Section 161.061 provides that if the commission determines that a disease listed in Section 161.041 of this code or an agency of transmission of one of those diseases exists in a place in this state or among livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl, or that a place in this state or livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl are exposed to one of those diseases or an agency of transmission of one of those diseases, the commission shall establish a quarantine on the affected animals or on the affected place. Under Section 161.062 the commission shall give notice of a quarantine established within this state. Section 161.062 provides that a quarantine that is established for any location has the effect of quarantining all livestock, domestic animals, or domestic fowl of the kind mentioned in the quarantine notice that are on or enter that location during the existence of the quarantine, regardless of who owns or controls the livestock, domestic animals, or domestic fowl. Section 161.063 provides for quarantine notice requirements.

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

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 21, 2001.

TRD-200107208

Gene Snelson
General Counsel
Texas Animal Health Commission
Effective date: December 11, 2001
Proposal publication date: September 14, 2001
For further information, please call: (512) 719-0714

♦ ♦ ♦

TITLE 10. COMMUNITY DEVELOPMENT

PART 5. TEXAS DEPARTMENT OF ECONOMIC DEVELOPMENT

CHAPTER 181. TEXAS LEVERAGE FUND PROGRAM

10 TAC §§181.1 - 181.10

The Texas Department of Economic Development (TxED) adopts amendments to Chapter 181, Texas Leverage Fund Program, §§181.1 - 181.10, relating to loans made to local industrial development corporations established pursuant to the Development Corporation Act of 1979, Texas Civil Statutes, Article 5190.6, §4A and §4B, as amended (Act). Sections 181.1, 181.2, 181.5 and 181.7 are adopted with changes to the proposed text published in the August 24, 2001, issue of the *Texas Register* (26 TexReg 6212) and Correction of Error published in the September 21, 2001, issue of the *Texas Register* (26 TexReg 7331). Sections 181.3, 181.4, 181.6, and 181.8 - 181.10 are adopted without changes and will not be republished.

The proposed amendments are needed to accurately reflect current law and to allow for the re-adoption of the rules. The amendments eliminate references to the Texas Department of Commerce and its policy board, which were abolished by Senate Bill 932 of the 75th Legislature, and replace them with references to TxED and its governing board. Minor grammatical corrections have also been made. Incorrect references to §2(10) of the Act have been changed to accurately refer to §2(11). In addition:

Proposed amendments to §181.2 delete wording from the definition of full time equivalent job to clarify the definition and eliminate possible ambiguity or confusion.

Proposed amendments to §181.5 delete text that restated language found in the Act. TxED is deleting the language to eliminate any possible conflict or confusion between the rules and the statute and to refer users of the program directly to the statute for authorized eligible projects.

Proposed amendments to §181.2, the definition of IDC, and §181.7(1)(H) change the order of the wording slightly for clarification.

Comments on the proposed amendments were received from the Texas Municipal League (TML). TML noted that proposed changes to §181.5, Eligible Projects, deleted references to general aviation airports and port-related facilities. The comment stated, "[these projects] are actually authorized in the body of §4(A) at subsection (i) as opposed to §2(11). As a result, the amendments would delete the authority to fund these two projects."

TxED does not agree with the comment. Section 181.5 says that projects must meet the definitions of §2(11), subject to the limitations imposed by §4A(i). Section 2(11) authorizes, "transportation facilities (including but not limited to airports, ports, mass commuting facilities, and parking facilities)." Section 4A(i) further limits eligible transportation facilities for 4A Corporations to certain general aviation airports and port-related facilities. Therefore, the rule amendment as proposed does not change the authorized eligible projects.

TML also noted that §181.5 incorrectly referenced §2(10) of the Act, when the correct reference should be to §2(11). TxED agrees with the comment and has corrected the reference in the text of the rule for adoption. In addition, as a result of TML's comment, TxED reviewed other references to the Act in Chapter 181, and found additional incorrect references to §2(10) in §181.2. These references have also been corrected in the text for adoption.

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

Texas Government Code, Chapter 481, is affected by this adoption.

§181.1. General Rules.

(a) Introduction. Pursuant to the authority granted by the Texas Government Code, Chapter 481, as amended and the Administrative Procedure Act, Texas Government Code, Chapter 2001, Subchapter B, Rulemaking, as amended, the Texas Department of Economic Development (Department) prescribes the following rules regarding practice and procedure applicable to local industrial development corporations established pursuant to the Development Corporation Act of 1979, Texas Civil Statutes, Article 5190.6, §4A and §4B, as amended. The rules relate to loans made to industrial development corporations under the Department's Texas Leverage Fund Program.

(b) Authority.

(1) Pursuant to the provisions of the Constitution of the State of Texas, Article III, §52-a, adopted by the voters of the State of Texas on November 3, 1987, and the Texas Government Code, Chapter 481, as amended, the Texas Department of Economic Development, an agency of the State of Texas, is authorized to provide for the issuance of revenue bonds or notes for the purpose of providing money to fund economic development programs.

(2) The Department's Governing board adopted a Master Resolution as of September 9, 1992, establishing a $300,000,000 Taxable Commercial Paper Note Program Series A for the purpose of providing money to establish certain Department loan programs. By First Supplemental Resolution dated as of September 9, 1992, the Governing board authorized the issuance of $25,000,000 in aggregate principal amount at any one time outstanding of its Taxable Commercial Paper Notes Series A to fund economic development programs.

(c) Delegation of Authority to Executive Director. Pursuant to the Texas Government Code, §481.075(a) and the Master Resolution, the Governing board has delegated to the executive director, or his/her designee, the authority to approve each loan made under the Texas Leverage Fund Program. Further, the Governing board delegated to the executive director, or his/her designee, all necessary authority in regard to collection, settlement and enforcement of each and every loan approved and funded under this program.

§181.2. 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 Development Corporation Act of 1979, Texas Civil Statutes, Article 5190.6, as amended.

(2) Applicant--An IDC filing an application for a Texas Leverage Fund program loan.

(3) Application--The information submitted by an applicant to the Department, including supporting documentation and schedules, required by the Department for loan underwriting and loan approval under this program.

(4) Approval--The executive director's, or his/her designee's, approval of the terms and conditions for a program loan and loan agreement between the Department and the IDC.

(5) Bank--The financial institution providing credit facilities for this program.

(6) Blighted or economically depressed areas--As defined by the Act, §2(11)(C) and §180.2(a)(3)(D) of this title (relating to Industrial Revenue Bond Program).

(7) Board of directors--The governing body of an IDC.

(8) City--The governmental entity creating the IDC.

(9) Department-- The Texas Department of Economic Development.

(10) Cost--As defined by the Act, §2(4) as applied to the use of program loan proceeds to fund eligible projects.

(11) Debt Service Coverage Ratio--The ratio of the projected or actual sales and use tax receipts generated by the levy and collection of the economic development sales and use tax by the city for the benefit of an IDC, which sales and use tax receipts shall be determined by using the lowest 12 consecutive months of sales and use tax receipts of the 18 months immediately preceding the date of determination thereof, to the scheduled maximum annual principal of and interest on the program loan plus the scheduled maximum annual principal of and interest on any other debt or obligation existing on the date of the program loan secured in whole or in part by and payable from such economic development sales and use tax on a parity with the proposed program loan and giving the holder thereof an equal and ratable claim to the proceeds of the economic development sales and use tax. In the event that an economic development sales and use tax has not been previously collected or has not been collected for at least 18 months, then there shall be estimated by the Department the economic development sales and use tax that may have been collected over that period had such economic development sales and use tax been in place.

(12) Development areas--As defined by the Act, §2(11)(B) and §180.2(a)(3)(L) of this title.

(13) Economic development sales and use tax--That certain sales and use tax that may be levied by a city for the benefit of an IDC under either §4A or §4B of the Act.

(14) Executive director--The executive director of the Department of Economic Development.

(15) Federally assisted new communities--As defined by the Act, §2(11(C) and §180.2(a)(3)(O) of this title.

(16) Full time equivalent job--Permanent employment for 1,820 hours or more per year.

(17) IDC--An industrial development corporation created by a city pursuant to, §4A or §4B of the Act.

(18) Interest rate--The floating prime or base rate published in the Wall Street Journal from time to time (Wall Street Journal Prime Rate) or the interest rate in effect under the Program guidelines from time to time.

(19) Largest Four Year Sales Tax Decline--A decline in the total sales tax receipts of the city calculated as follows: (HIGH - LOW) / HIGH X 100. For the purpose of this definition "LOW" shall mean the lowest sum of sales tax revenue receipts collected by a city for any calendar year (adjusted for changes in sales tax rates) during the four year period preceding the date of calculation, as determined from the most recent June 30 or December 31, as applicable, for which sales tax data is available, and "HIGH" shall mean the highest sum of sales tax revenue received collected for any calendar year (adjusted for changes in sales tax rates) during the four year period preceding the date of calculation, as determined from the most recent June 30 or December 31, as applicable, for which sales tax data is available and which occurred in a calendar year preceding the calendar year in which the "LOW" occurred.

(20) Largest Fifteen Year Sales Tax Decline--A percentage decline in the total sales tax receipts of a participating city calculated as follows: (HIGH - LOW) / HIGH X 100. For purposes of this definition "LOW" shall mean the lowest sum of sales tax revenue receipts collected by the city for any calendar year (adjusted for changes in sales tax rates) during the 15 year period preceding the date of calculation, as determined from the most recent December 31, and "HIGH" shall mean the highest sum of sales tax revenue receipts collected for any calendar year (adjusted for changes in sales tax rates) during this same period and which occurred in a calendar year preceding the calendar year in which the "LOW" occurred.

(21) Parity debt--Debt or other obligations, existing or incurred during the term of the program loan, secured in whole or in part by and payable from the economic development sales and use tax receipts of the city on a parity with the program loan and giving the holder an equal and ratable claim to the proceeds of the economic development sales and use tax.

(22) Governing board--The Texas Department of Economic Development Governing board.

(23) Program--The Texas Leverage Fund.

(24) Program guidelines--The Department guidelines relating to the program in effect at any particular time pursuant to the Act and the authority granted by the Governing board to the Department under the Master Resolution and First Supplemental Resolution, as amended.

(25) Program loan--Loan from the Department to the IDC under the program.

(26) Project--An eligible project as defined by the Act.

(27) Projected Debt Service--The scheduled maximum annual debt service on all parity debt including any program loan.

(28) Rating--The long-term general obligation debt rating assigned by a rating agency. Any reference in these rules to the rating structure of one rating agency shall be deemed to include a reference to the equivalent rating or ratings of the other rating agency.

(29) Rating agency--Standard Poor's Corporation, Moody's Investors Service and Fitch Investors Service, Inc.

(30) Resolution--The resolution, order, ordinance, or other official action by the governing body of the city or IDC.

(31) Rules--The rules of the Department.

(32) State--The State of Texas.

(33) Texas Enterprise Zone Act--Texas Government Code, §§2303.001 et seq., as amended.

(34) Texas Leverage Fund--The economic development program of the Department pursuant to which the Department makes loans, meeting certain criteria approved by the Governing board in accordance with the Master Resolution and First Supplemental Resolution, as amended, to certain local industrial development corporations to fund the cost of certain eligible projects as defined by the Act and which loans are secured by and paid from the economic development sales and use tax receipt proceeds.

(35) Trustee--A corporation with corporate trust powers serving in the capacity of trustee under the Texas Department of Economic Development Taxable Commercial Paper Notes Series A pursuant to a trust agreement between the corporation and the Department as authorized by the Governing board under the Master Resolution and First Supplemental Resolution, as amended.

(36) User--An individual, partnership, corporation, or any other private entity, whether organized for profit or not for profit, or a city, county district, or any other political subdivision or public entity of the state or federal government.

§181.5. Eligible Projects.

(a) Section 4A City Projects. The projects of an applicant created pursuant to the Act, §4A must meet the definition of "Project" as that term is defined by the Act, §2(11), subject to the limitations imposed by the Act, §4A(i).

(b) Section 4B City Projects. An applicant created pursuant to the Act, §4B must meet the definition of "Project" as that term is defined by the Act, §4B(a)(2).

(c) Special Rules for Commercial Projects in Blighted or Economically Depressed Areas and Development Areas. Under the Act, the financing of the cost of eligible projects for commercial use is confined to, among others, geographic areas within the corporate limits of a city found and determined by the governing body of such city to be either a blighted area or economically depressed (or areas immediately adjacent thereto) or a development area. Rules for establishing a blighted area are set forth in §180.2(b)(9)(A) of this title (relating to Industrial Revenue Bond Program). Rules for establishing an economically depressed area or a development area are set forth in §180.2(b)(9)(B) of this title. Such rules are applicable to commercial projects located in blighted or economically depressed areas and development areas for which application is made for a program loan.

§181.7. Contents of Application.

Required information. Applications must set forth the information necessary for the Department to determinate program eligibility. Applications shall include the following information:

(1) IDC information, including:

(A) applicant's legal name;

(B) corporate charter number;

(C) date of incorporation;

(D) federal employer identification number;

(E) physical and mailing addresses;

(F) telephone and fax numbers;

(G) contact name and title; and

(H) whether the IDC was created under §4A or §4B of the Act.

(2) information on the election for economic development sales and use tax, including:

(A) election date;

(B) date tax effective;

(C) expiration date (if any);

(D) rate of tax adopted;

(E) date tax proceeds first received from comptroller; and

(F) limitations/restrictions on use of tax receipt proceeds.

(3) information on any election for an additional sales and use tax under Chapter 321, Texas Tax Code, including:

(A) election date;

(B) date tax effective;

(C) rate of tax adopted;

(D) date tax proceeds first received from the comptroller;

(E) date tax was repealed or modified after passage; and

(F) if applicable, describe any changes to the tax.

(4) names and titles of IDC officers and board of directors;

(5) names, addresses, and telephone and fax numbers of mayor, city manager and city attorney;

(6) executed acknowledgment that all underwriting responsibilities for loans to a user are those of the IDC and city, and that the Department has no responsibility for loan repayment by the user;

(7) completion of the debt service coverage ratio worksheet in accordance with the instructions provided by the Department, including:

(A) the city's general obligation bond rating;

(B) the rating agency;

(C) the target funding date for the program loan;

(D) the program loan amount;

(E) the terms of program loan;

(F) the IDC's annual debt service amount; and

(G) the IDC's parity debt service amount.

(8) a listing of all parity and non-parity debt obligations, including:

(A) creditor's name, address, and telephone and fax numbers;

(B) loan origination date;

(C) original loan amount;

(D) current loan balance;

(E) monthly loan payment;

(F) maturity date; and

(G) collateral description and value.

(9) user information, including:

(A) business name, address, and telephone and fax numbers;

(B) contact name and title;

(C) type of legal entity;

(D) minority or woman-owned ownership percentage;

(E) business description including:

(i) the standard industrial classification code number;

(ii) industry category;

(iii) current number of employees;

(iv) total annual sales;

(v) number of years in business;

(vi) date started doing business; and

(vii) brief description of business;

(10) a summary of the project, including:

(A) project address and the county in which located;

(B) the number of full time equivalent jobs created and/or retained as a result of project;

(C) a concise description of the type of project, including:

(i) primary purpose of project;

(ii) ownership of project such as IDC, city, or user;

(iii) components of project such as land, buildings, infrastructure, equipment, facilities, and improvements;

(iv) whether project is located in one of the following designated areas:

(I) blighted or economically depressed area;

(II) development area;

(III) federally designated empowerment zone and enterprise community designated under the Internal Revenue Code of 1986, §1391;

(IV) federally assisted new community;

(V) enterprise zone designated under the Texas Enterprise Zone Act.

(v) applications for §4B projects must include documentation that the project has been published for at least 60 days as required by the Act, §4B(a-1) or §4B(a-2) and that no petition from 10% or more of the registered voters of the city requesting an election has been received by the city; and

(vi) applications for §4B projects must also include documentation that at least one public hearing was held on the proposed project as required by the Act, §4B(n).

(11) a cost breakdown of the project specifying sources of funds (such as program loan, equity and other) and uses of funds (such as land, infrastructure, building, machinery, equipment, professional fees, debt, working capital and other);

(12) a certification that the representations made by the IDC are true and that no relevant facts have been intentionally omitted;

(13) IDC's articles of incorporation and bylaws;

(14) §4A or §4B sales and use tax ballot proposition (actual wording);

(15) city's economic development plan (infrastructure projects only);

(16) documents in support of the designation by the city of a blighted or economically depressed area or development area;

(17) documents in support of federal designation of empowerment zones or enterprise communities;

(18) documents in support of grants received under of the Housing and Community Development Act of 1974, §107(a)(1), as amended, for federally assisted new communities;

(19) documents in support of enterprise zone designation under the Texas Enterprise Zone Act; and

(20) such other information as may be required by the Department in order to make a prudent loan decision on the project application and to insure that the project and cost are eligible under 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 November 20, 2001.

TRD-200107173
Tracye McDaniel
Deputy Executive Director
Texas Department of Economic Development
Effective date: December 10, 2001
Proposal publication date: August 24, 2001
For further information, please call: (512) 936-0177

♦ ♦ ♦

TITLE 22. EXAMINING BOARDS

PART 24. TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

CHAPTER 571. LICENSING

SUBCHAPTER A. EXAMINATION

22 TAC §571.3

The Texas Board of Veterinary Medical Examiners adopts amendments to §571.3, concerning Eligibility for Examination and Licensure. The amended section is adopted without changes to the proposed text as published in the July 13, 2001, issue of the *Texas Register* (26 TexReg 5191).

The current section allows a graduate of a school of veterinary medicine not accredited by the Council on Education of the American Veterinary Medical Association ("AVMA") to be licensed as a veterinarian in Texas if, among other requirements, the graduate possesses an Educational Commission for Foreign Veterinary Graduates ("ECFVG") certificate. The ECFVG program is administered by the AVMA. The amended section will allow the graduate to secure, as an alternative to the ECFVG certificate, a Program for Assessment of Veterinary Education Equivalency ("PAVE") certificate. The PAVE program is being developed by the American Association of Veterinary State Boards ("AAVSB").

By letter dated August 28, 2001, the Texas Veterinary Medical Association ("TVMA") opposes amendment of the rule because (a) the adoption of alternative processes for certification of graduates of non-certified schools is not beneficial to the public or the veterinary medical profession; and (b) the PAVE program has yet to be completed and could ultimately undermine the current system of veterinary school accreditation.

In response, the Board feels that the TVMA has provided no justification for its assertions. The Board finds instead that graduates of non-accredited schools and the public benefit from having a choice of equivalency programs. The graduate can choose either depending on his or her circumstances. The PAVE will be ready for full implementation within the next few months.

The amended section is adopted under the authority of the Texas Occupations Code, §801.151(a). The Board interprets §801.151(a) as authorizing it to adopt rules necessary to administer Chapter 801, including rules for licensing.

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 November 20, 2001.

TRD-200107185
Ron Allen
Executive Director
Texas Board of Veterinary Medical Examiners
Effective date: December 10, 2001
Proposal publication date: July 13, 2001
For further information, please call: (512) 305-7555

♦ ♦ ♦

22 TAC §571.18

The Texas Board of Veterinary Medical Examiners adopts amendments to §571.18, concerning Provisional Licensure. The amended section is adopted without changes to the proposed text as published in the July 13, 2001, issue of the *Texas Register* (26 TexReg 5193).

The section sets out requirements for applicants applying for a provisional license who want to practice prior to the time the regular Texas licensure examination is offered. The section requires an applicant to show proof of graduation from a college of veterinary medicine accredited by the Council on Education of the American Veterinary Medical Association ("AVMA") or possession of an Educational Commission for Foreign Veterinary Graduates ("ECFVG") certificate. The ECFVG education equivalency program is administered by the AVMA. The proposed amendments to the section allow an applicant for provisional license to possess an alternate equivalency certificate, the Program for Assessment of Veterinary Education Equivalency ("PAVE"), which is being developed by the American Association of Veterinary State Boards ("AAVSB").

By letter dated August 28, 2001 the Texas Veterinary Medical Association ("TVMA") opposes amendment of this rule because: (a) the adoption of alternative processes for certification of graduates of non-certified schools is not beneficial to the public or the veterinary medical profession; and (b) the PAVE program has yet to be completed and could ultimately undermine the current system of veterinary school accreditation. In response, the Board

feels that the TVMA has provided no justification for its assertions. The Board finds instead that graduates of non-accredited schools and the public benefit from having a choice of equivalency programs. The graduate can choose either depending on his or her circumstances. The PAVE will be ready for full implementation within the next few months.

The amended section is adopted under the authority of the Texas Occupations Code, §801.151(a). The Board interprets §801.151(a) as authorizing it to adopt rules necessary to administer Chapter 801, including rules for licensing.

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 November 20, 2001.

TRD-200107187
Ron Allen
Executive Director
Texas Board of Veterinary Medical Examiners
Effective date: December 10, 2001
Proposal publication date: July 13, 2001
For further information, please call: (512) 305-7555

♦ ♦ ♦

CHAPTER 573. RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER B. SUPERVISION OF PERSONNEL

22 TAC §573.10

The Texas Board of Veterinary Medical Examiners adopts amendments to §573.10, concerning Supervision of Non-Licensed Employees. The amended section is adopted with changes to the proposed test as published in the July 13, 2001, issue of the *Texas Register* (26 TexReg 5194).

The change corrects the initials for the Texas Animal Health Commission from TACH to TAHC in subsection (d)(4). The amendments update and reorganize the section and clarify the definition of a registered veterinary technician ("RVT") and the degree of supervision required of a veterinarian for a RVT and non-RVT. The amended section also addresses the issue of supervision of non-licensed persons who conduct brucellosis testing at livestock markets. The livestock markets have experienced critical difficulties in securing enough veterinarians to perform the testing or to directly supervise the technicians that perform the testing. Direct supervision requires the physical presence of a veterinarian. The amendments will help alleviate this difficulty by providing that an animal health technician approved by the Texas Animal Health Commission may perform the testing under the general supervision of an approved veterinarian, who does not have to be physically present during each testing, without compromising public health.

The Texas Veterinary Medical Association and the Texas Animal Health Commission have submitted written comments in support of the amended section.

The amended section is adopted under the authority of the Texas Occupations Code, §801.151(a). The Board interprets §801.151(a) as authorizing it to adopt rules necessary to administer Chapter 801.

§573.10. Supervision of Non-Licensed Employees.

(a) General Supervision. A veterinarian required to generally supervise a non-licensee must be readily available to communicate with the person under supervision.

(b) Direct Supervision. A veterinarian required to directly supervise a non-licensee must be physically present on the same premises as the non-licensee under supervision.

(c) Immediate Supervision. A veterinarian required to immediately supervise a non-licensee must be within audible and visual range of both the animal patient and the person under supervision.

(d) Delegation Relating to Official Health/Test Documents

(1) A licensee must personally sign any official health documents issued by the licensee provided, however, that rabies certificates may be authenticated by either:

(A) the licensee's personal signature; or

(B) use of a signature stamp in accordance with the requirements of §573.51 of this title (relating to Rabies Control).

(2) The issuance of any pre-signed or pre-stamped official health documents by a licensee is a violation of this rule.

(3) Unless otherwise prohibited by law, and except as provided in paragraph (4) of this subsection, a licensee may permit a non-licensed employee under the licensee's direct supervision to collect samples from animals for official tests.

(4) A person approved by the Texas Animal Health Commission (TAHC) and under the general supervision of a TAHC approved veterinarian may perform testing for brucellosis at a livestock market.

(5) A veterinarian shall only allow the use of the veterinarian's signature stamp by a non-licensed employee under direct supervision of the veterinarian.

(e) Responsibility for Acts of Non-Licensed Employees. A licensee may determine a non-licensed employee's qualifications necessary to perform routine patient care and treatment. The licensee is directly responsible for all actions of non-licensed employees acting under the licensee's directions or authorization. A licensee failing to properly supervise a non-licensed employee or improperly delegating care and/or treatment responsibilities may be subject to disciplinary action by the Board.

(f) Prohibited Services. An unlicensed individual shall not perform the following health care services:

(1) surgery;

(2) invasive dental procedures;

(3) diagnosis and prognosis of animal diseases and/or conditions; or

(4) prescribing drugs and appliances.

(g) Level of Supervision of Non-Licensed Employees.

(1) A licensee shall determine when general, direct or immediate supervision of a non-licensee's actions is appropriate, except where such actions of the non-licensee may otherwise be prohibited by law. A licensee should consider both the level of training and experience when determining level of supervision and duties of non-licensed employees.

(2) When feasible, a licensee should delegate greater responsibility to a registered veterinary technician (RVT) than to a non-RVT. An RVT is a person who performs the duties specified by the American Veterinary Medical Association's Committee on Veterinary Technician Education and Activities and is qualified and registered by the Texas Veterinary Medical Association. Under the direct or immediate supervision of a licensee, an RVT may:

(A) suture existing surgical skin incisions; and

(B) induce anesthesia.

(3) The procedures authorized to be performed by an RVT in paragraph (2) of this subsection may be performed by a non-registered veterinary technician only under the immediate supervision of a veterinarian.

(4) Euthanasia may be performed by a veterinary technician only under the immediate supervision of a veterinarian.

(h) Emergency Care. In an emergency situation where prompt treatment is essential for the prevention of death or alleviation of extreme suffering, a licensee may, after determining the nature of the emergency and the condition of the animal, issue treatment directions to a non-licensee by means of telephone, electronic mail or messaging, radio, or facsimile communication. The Board may take action against a veterinarian if, in the Board's sole discretion, the veterinarian uses this authorization to circumvent this rule. The veterinarian assumes full responsibility for such treatment. However, nothing in this rule requires a licensee to accept an animal treated under this rule as a patient under these circumstances.

(i) Care of Hospitalized Animals. A non-licensee may, in the absence of direct supervision, follow the oral or written treatment orders of a veterinarian who is caring for a hospitalized animal; provided however, that the veterinarian has examined the animal(s) and that a valid veterinarian/client/patient relationship exists.

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 November 20, 2001.

TRD-200107186
Ron Allen
Executive Director
Texas Board of Veterinary Medical Examiners
Effective date: December 10, 2001
Proposal publication date: July 13, 2001
For further information, please call: (512) 305-7555

♦ ♦ ♦

TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

CHAPTER 70. ENFORCEMENT
SUBCHAPTER A. ENFORCEMENT GENERALLY

30 TAC §70.4

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts new §70.4, Enforcement Action Using Information Provided by Private Individual. Section 70.4 is adopted *with changes* to the proposed text as published in the September 7, 2001 issue of the *Texas Register* (26 TexReg 6841).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The rule concerns the participation of private individuals in the agency's enforcement activities, and implements new law concerning this matter. During the 77th legislative session the agency underwent the sunset review process, leading to the passage of House Bill (HB) 2912 (the "Sunset bill"). Sunset bill, §1.24 added Texas Water Code, (TWC), §7.0025 concerning the initiation of enforcement using information provided by a private individual. This section specifies that the commission may initiate enforcement using information provided by a private individual, gives certain limits on the use of such information, and authorizes the commission to adopt rules that set criteria for the TNRCC executive director's (ED's) evaluation and use of the information. Sunset bill, §18.10(a) requires the commission to adopt rules to implement the new law no later than December 1, 2001. Section 18.10(b) directs that the new law applies only to information provided by a private individual on or after January 1, 2002. This rulemaking is necessary to implement HB 2912, §1.24 and §18.10.

HEARINGS AND COMMENTERS

Six public hearings on the proposal were held in the following cities on the dates listed: 1.) El Paso on September 24, 2001; 2.) San Antonio on September 25, 2001; 3.) Waco on September 27, 2001; 4.) Arlington on October 1, 2001; 5.) Corpus Christi on October 2, 2001; and 6.) Houston on October 4, 2001.

Written comments were submitted by the Alliance for a Clean Texas (ACT); Baker Botts L.L.P., on behalf of the Texas Industry Project (TIP); the Big Bend Regional Sierra Club; the Bayou Preservation Association (BPA); the City of Austin Water and Wastewater Utility (City of Austin Utility); Clean Air Clear Lake; the Galveston Bay Conservation and Preservation Association (Galveston Bay Association); the Galveston Bay Foundation; the Harris County Attorney's Office; the Harris County Public Health & Environmental Services Pollution Control Division (HCPCD); Hispanics for Clean Air and Safe Environments (HCASE); the Sierra Club, Houston Regional Group (Sierra Club (Houston)); Jobe Concrete Products, Inc. (Jobe); the Lone Star Chapter of the Solid Waste Association of North America (TxSWANA); Mothers for Clean Air; the Reserve Technology Institute (RTI); the Southeast Texas Bucket Brigade (STBB); Texas Cattle Feeders Association (TCFA); Texas Chemical Council (TCC); the Texas Municipal League (TML); the Texas City Attorneys Association (TCAA); the Texas Mining and Reclamation Association (TMRA); the Texas Poultry Federation (TPF); Texas Watch; and 92 individuals. Oral comments were provided during the public hearings by the office of State Representative Dora Olivo; ACT; Citizens for Environmental Justice (CEJ); Clean Water Action (CWA); Sierra Club (Houston); Quality of Life El Paso (QLEP); Jobe; Texas Watch; the Sustainable Energy and Economic Development Coalition (SEED Coalition); the SEED Coalition on behalf of the Director of STBB; the Texas Water Quality Association; the City of Waco; and 35 individuals. The comments are addressed in the SECTION DISCUSSION AND RESPONSE TO COMMENT section of this preamble.

SECTION DISCUSSION AND RESPONSE TO COMMENT

General

Almost all of the commenters generally supported the rule as a means to increase citizens' participation in the commission's enforcement activities, and to allow the commission's use of new sources of information for such activities. Several commenters favorably compared the rule to neighborhood watch programs established by local law enforcement authorities. Clean Air Clear Lake and an individual supported the proposed rule because it would allow for a new source of information to prove a violation that occurred at a particular time. In the past when they called the agency to submit a complaint an agency investigator would arrive days later to gather evidence showing the violation. But by that time the evidence of a violation had dissipated.

One individual opposed the rule, saying that under the rule the commission would impose penalties on entities based on citizen evidence that was not confirmed by agency staff.

The commission responds that it adopts the rule in order to comply with the legislative directive in HB 2912, as previously explained in this preamble. The commission would also note that evidence of a violation, whether gathered by a citizen or by agency staff, must be able to withstand scrutiny during either administrative and/or judicial proceedings. The new rule will lead to the commission's assessment of penalties only if there is competent evidence of a violation.

The public comment also proposed changes to specific provisions in the rule. The remainder of the public comment focused on the implementation of the rule once it was adopted. The commission will first respond to comment that proposed changes to the rule itself, and then respond to comment concerning implementation of the rule.

Texas Poultry Federation recommended that throughout the rule either the term "private individual" or "individual" should be consistently used. The commenter was concerned that the rule as proposed could cause confusion, or that the commission intended some particular meaning for each of these terms that was not evident in the rule.

The commission has struck the word "private" in §70.4(c)(3) in response to this comment. The commission intends the adopted rule to apply to private individuals, as distinguished from the agency's own staff. The rule was drafted so that in each subsection the term "private individual" is used. If a particular subsection required an additional reference to private individuals then "individual" was used. This is intended as a shortened reference to "private individual." The commenter correctly pointed out that the drafting style was not consistently followed in §70.4(c)(3) and so the commission has made the change to make the style consistent.

Sierra Club (Houston) and one individual asserted that the proposed rule was too restrictive and was designed to intimidate citizens rather than encourage them to submit information to the commission.

The commission makes no changes in response to these comments. The commenters did not explain exactly how the rule would intimidate citizens nor did they propose alternative rule language that would address their concerns. The commission believes the commenters may be concerned that the rule makes specific requirements on the submission and use of citizen information. Those requirements for the most part track the requirements in HB 2912, or are intended to ensure that information is sufficiently reliable so that the commission may use it in administrative or judicial proceedings. As was explained in the preamble to the proposed rule, the ED can pursue an enforcement action only if he/she knows the information he/she relies on will be admissible as evidence at the hearing. Commission enforcement actions are processed under the Texas Administrative Procedure Act (APA), Texas Government Code, Chapter 2001. An enforcement action, if contested by the alleged violator, is processed as a contested case hearing held before the State Office of Administrative Hearings (SOAH), and in the hearing the Texas Rules of Evidence apply. The purpose of the Rules of Evidence is to ensure that the truth is ascertained and that proceedings are justly determined. The ED must comply with these requirements in an enforcement action whether the violation is based on information from private individuals or from agency investigators. Of course, the Rules of Evidence apply to judicial proceedings too. The adopted rule is not intended to intimidate citizens. Rather, the rule is intended to ensure that an enforcement case based on citizen evidence may successfully withstand administrative and judicial review.

Sierra Club (Houston) and an individual requested that the commission define "enforcement action" as used in the preamble to the proposed rules.

The commission has made no changes to the adopted rule in response to these comments. The commission's use of the term "enforcement action" means the efforts taken by the ED to enforce the law under the commission's jurisdiction against a particular entity. The ED may pursue an enforcement action in three forums, being administrative, civil, or criminal proceedings. When agency staff decide what enforcement action to take they refer to the Field Operations Division's enforcement criteria. The criteria takes into consideration the entity's compliance history and the severity of the alleged violations. Depending on the circumstances, the enforcement criteria may direct staff to issue to the entity a notice of violation and to take no further action. But the more serious the violation the more stringent will be the ED's response. The criteria may direct staff to begin an administrative enforcement action in which the ED would seek a commission order requiring the entity to pay a penalty and to return to compliance. In a civil enforcement action the ED would refer the case to the Texas Attorney General for filing of a court petition. In a criminal enforcement action the ED would refer the case to the appropriate prosecuting authority. No matter the forum, the ED generally seeks both a penalty plus requirements that the violator return to compliance.

One individual requested that the commission make numerous changes to its rules concerning the land application of sludge. The commenter also proposed that the commission amend §1.6 of this title (relating to Inscriptions on Commission Vehicles).

The commission has made no changes to the rule in response to the comments because the proposed changes are outside the scope of the current rulemaking project.

Section 70.4.(a)

TIP commented that it supports the requirement that private individuals submit information to the ED rather than to the commission.

The commission has made no changes in response to this comment.

Section 70.4(b)

This subsection specifies that the ED may initiate an enforcement action based on information received from a private individual if that information, in the ED's judgment, is of sufficient value and credibility to warrant the initiation of an enforcement action. Also, the ED may initiate an enforcement action based on any combination of information provided by private individuals or by the ED's own investigations.

Galveston Bay Association and Galveston Bay Foundation commented that, to avoid confusion, the commission should define the ED's determination of the "sufficient value and credibility" of citizen evidence.

The commission has made no changes in response to this comment. The legislature directed the commission to adopt criteria for the ED to use in evaluating the value and credibility of citizen information. The legislature did not direct the commission to define exactly how the ED should exercise his/her prosecutorial discretion, and the commission believes that it is not advisable to do so on its own initiative. If the rule defined "sufficient and credible" evidence or imposed criteria of some sort, all in an effort to manage the ED's prosecutorial discretion, the focus of an enforcement proceeding would likely be on the ED. For example, the respondent would challenge whether the ED had followed the rule. The commission believes that the focus of an enforcement proceeding based on citizen evidence should be on the alleged violations. The commission would note that the agency's Field Operations Division has promulgated and follows enforcement initiation criteria. When a citizen submits information, the ED will evaluate the value and credibility of the information, and consistent with the enforcement initiation criteria, determine whether to initiate an enforcement action.

Three individuals commented that the ED should be directed to initiate an enforcement action whenever a citizen submits information showing a violation. In contrast, TIP commented that it supports the proposed rule because it maintained the ED's discretion to initiate enforcement.

The commission makes no changes in response to these comments. As previously noted, the legislature directed the commission to establish criteria by which the ED would evaluate the sufficiency and credibility of citizen information. Using those criteria, the ED may evaluate the value and credibility of citizen information and the merits of any proposed enforcement action based on that information. The commission believes the commenters' proposal conflicts with that legislative directive. Also, practically speaking it does not make sense to require the ED to initiate enforcement whenever a citizen submits information showing an alleged violation. The ED has limited resources to pursue enforcement actions so discretion should be maintained on how best to use those resources.

QLEP and three individuals recommended that if the ED reviews certain citizen information and determines not to pursue an enforcement action based on the information, then the citizen should have a right to appeal the ED's decision. QLEP suggested a grievance procedure. One individual suggested an appeal to the commission.

The commission has made no changes in response to these comments. The commission believes an appeal process was not contemplated by the legislature, would take resources away from enforcement activities, and would be counterproductive if adopted. The legislature has directed that the ED is responsible for evaluating information, whether gathered by a private individual or by the ED's own staff, and where appropriate, initiating an enforcement case (TWC, §5.230 and TWC, Chapter 7, Subchapters C and D). In an administrative enforcement case, the ED prosecutes the case and the commission acts as the judge. In a civil enforcement case, the ED acts on behalf of the commission and refers an enforcement case to the attorney general, and the attorney general in turn prosecutes the case in court. There is nothing in the law granting citizens the right to appeal these decisions by the ED. The commission believes that such right to appeal would in effect grant to the citizen the right to prosecute a commission enforcement case. A citizen "appeal" would itself be an enforcement case in which the citizen would attempt to prove the alleged violations. Both the ED and the alleged violator would surely want to participate in such an appeal. Again, there is nothing in the law that allows for transferring the ED's responsibilities to a citizen. The commission believes that appeals of this sort could consume a substantial portion of agency resources devoted to enforcement and expend them on matters not directly related to enforcement. Finally, the commission believes that appeals of this sort would be counterproductive. If the ED elected not to initiate enforcement based on certain citizen information, the citizen appealed the decision, and the citizen "won" the appeal, then the ED would be required to initiate enforcement. However, the alleged violator could then use the information generated during the appeal which showed that the ED argued against that very enforcement action that the ED was now pursuing.

An individual recommended the addition of "and violators' own records" to the end of the second sentence of §70.4(b). It appears the proposed change was intended to expand the scope of possible sources of information that may be used in an enforcement action.

The commission has made no changes in response to this comment. As explained in the preamble to the proposed rule, this language does not limit the ED's sources to private individuals and agency investigations. Rather, the ED may continue to gather information from all possible sources such as other governmental entities (or a violator's records). The purpose of this sentence is merely to give notice that an enforcement case may be based on both information gathered by citizens and information gathered by agency staff.

Sierra Club (Houston) criticized the statement in the preamble to the proposed rule concerning when the ED may pursue an enforcement case based entirely on information provided by a private individual (and no information provided by agency staff). The preamble stated that the ED would take this action only if the information showing a violation was "very strong." The commenter argued that this statement would cause confusion and make citizens believe the commission intended to sabotage their participation.

The commission has made no changes in response to this comment. It is the ED's duty to carry out his/her enforcement authority in a manner that is both prudent in its use of limited enforcement resources, and that is effective in enforcing the law. When the ED pursues an enforcement case based on the information gathered by agency staff he generally can rely on one of several particular staff members to testify if needed to establish the alleged violations. But, if the ED relies on the information provided by a private individual then the ED must rely on that particular individual to participate in the entire enforcement process to prove that violation. The commission's statement that the ED would rely solely on a private individual's information only if the information were "very strong" was merely an admission that the ED

must use his enforcement resources prudently. Even if a private individual has provided the information showing a violation, there remain many subsequent steps in the enforcement process. The ED must use his enforcement resources prudently to carry out the particular case plus many other cases.

Section 70.4(c)

This subsection concerns the criteria the ED shall use when evaluating the value and credibility of citizen information and determining the use of such information in an enforcement action.

Several groups which represent regulated facilities commented on the first criteria, that a citizen submitting information must be willing to submit a sworn affidavit. TMRA recommended that all citizens submitting information be required to submit an affidavit in order to facilitate sanctioning those who submit false information. The TPF recommended that the rule explicitly require affidavits from all persons in the chain of custody of citizen information. TxSWANA, TML, and TCAA all recommended that the rule require a citizen's affidavit to have attached to it a copy of the relevant agency protocol, and require the citizen to affirm that he or she complied with the protocol. In a related comment, TCC was concerned that a citizen submitting information might remain anonymous. TIP supported the criteria set out in this subsection.

The commission has made no changes in response to these comments. As explained in the preamble to the proposed rule, the ED would not require affidavits from every private individual who provides information because such practice could discourage public input. To prevent that from happening the ED would ask a private individual to sign an affidavit only when the ED has determined that an enforcement case should be initiated based on the information provided by the private individual. The requirement that a citizen sign an affidavit will ensure that the citizen understands he/she is beginning a process in which the ED will rely on the citizen's information in an adjudicatory process. The ED's preparation of the affidavit and the citizen's review and execution will help them both define and understand the exact role and purpose of the ED's use of the citizen's information. Also, the affidavit provides assurance that the information is credible. That is the commission's intent in adopting this criteria. The commission disagrees with TMRA's recommendation because the purpose of this requirement is not to facilitate sanctioning anyone. While the commission understands the TPF's concern on chain of custody, the commission does not believe that the rule should be amended. The ED has the burden of proof in an enforcement proceeding and he/she must ensure that the case meets all requirements, including chain of custody, to prove the alleged violations. There is no need to state in this rule a requirement that already exists. For similar reasons, there is no need to require the affidavit have attached to it the relevant protocol. The commission would note that the proposed rule already required the citizen to affirm they followed the relevant protocols. Finally, in response to TCC's concern that a citizen submitting information may remain anonymous, the commission notes that if the ED elects to initiate an enforcement action based on the citizen information the citizen will be required to sign an affidavit. The affidavit (and therefore the citizen's identity) will necessarily be available for inspection.

There were numerous comments concerning the requirement that a private individual gathering physical or sampling data must do so in accordance with commission protocols. The Harris County Attorney's Office, HCPCD, and Sierra Club (Houston) recommended that the commission delete the requirement, arguing that citizens are not as expert as agency staff and so citizens should not be held to the same standards when gathering information showing a violation. One individual called the requirement "absurd." Another individual requested the word "protocol" be struck because its meaning is unclear. Another individual commented that the ED should be allowed some flexibility in deciding on the weight of the evidence submitted, and that information should not be excluded merely because it fails to meet narrowly defined criteria in specific protocols. However, Mothers for Clean Air stated that citizens must follow strict protocols.

The commission has made no changes in response to the comments by Harris County Attorney's Office, HCPCD, and Sierra Club (Houston). The legislature directed that if the commission relies on the information submitted by a private individual then any physical or sampling data must be collected and gathered in accordance with commission protocols. Commission protocols are specific practices concerning the collection of physical or sampling data. Protocols are procedures that are generally accepted by the scientific community as producing scientifically reliable and reproduceable information. The commission's protocols are intended to produce information the commission may use in enforcement cases. Some commission enforcement actions are processed under the APA, Texas Government Code, Chapter 2001. An enforcement action, if contested by the alleged violator, is processed as a contested case hearing held before the SOAH, and in the hearing the Texas Rules of Evidence apply. The purpose of the Rules of Evidence is to ensure that the truth is ascertained and that proceedings are justly determined. Of course, the Rules of Evidence would apply if the ED pursued his/her enforcement action in a judicial proceeding. The commission follows its protocols so that its information may be admitted into evidence as reliable information showing a violation. The ED must comply with these requirements in an enforcement action whether the violation is based on information from private individuals or from agency investigators. The adopted rule continues to use the word "protocols" because it is the word commonly used to describe the matters discussed in this paragraph.

The commission takes this opportunity to comment on a statement made in the preamble to the proposed rule. In that preamble the commission recognized that a private individual may wish to submit information to the ED that is not in the form of data or analysis, but is nonetheless useful information for enforcement. For this information there is no relevant agency protocol. The commission then gave two examples but in those examples the commission mistakenly stated that there were no relevant agency protocols. The examples concerned air emissions that create a nuisance condition, and photographic information. Concerning an air nuisance violation there is a protocol and the person whose personal experience establishes the violation must follow the protocol. However, the ED may use additional information from other persons to show how the emissions adversely affected their health or welfare. Concerning photographic evidence, the commission does have a protocol for recording such information. The protocol is simple, requiring the person to record on the back of the photo the date, time, location, name of person taking the photo, brief description of the photo, and photo series (e.g. photo 1 of 5). The discussion in this paragraph concerns only when information is not in the form of data or analysis, but is nonetheless useful information for enforcement. When proof of a violation requires data or other analysis, that

data and analysis must be collected in accordance with agency protocols.

ACT and an individual commented that the commission must maintain enforcement authority equal to the authority held by the United States Environmental Protection Agency (EPA). They cited EPA's "credible evidence" rules adopted on February 24, 1997 (62 FR 8313). They argued that the commission's rule must allow for citizens providing all manners of credible evidence. While they did not propose alternative rule language, they seemed to object to the requirement in the proposed rule that citizens providing data and analysis must follow commission protocols.

The commission has made no changes in response to these comments. The purpose of the EPA rules is different compared to the rule adopted by the commission. The EPA rulemaking focused on one matter: correcting the EPA's then-existing rules for its air program. Some had read EPA's rules to allow only very limited amounts of information, namely reference tests conducted by regulated entities upon initial start up and upon periodic tests, to be used as evidence of violations. The EPA amended the rules to show that the EPA could use all credible evidence of a violation. The EPA explained that with respect to this other credible evidence, "...EPA generally expects that most if not all of that data EPA would consider as potentially credible evidence of an emission violation at a unit subject to monitoring under the agency's CAM {continuous air monitoring} rule would be generated through means of appropriate, well- designed parametric or emission monitoring submitted by the source itself and approved by the permitting authority, or through other requirements in the source's permit." In other words, EPA contemplated that the credible evidence of a violation would be based on accepted, credible practices for gathering information. The commission's requirement to use protocols to gather and preserve evidence is consistent with EPA's practice. Also, the commission would note that EPA explained that its credible evidence rulemaking "creates no new rights or powers for citizen enforcers." The commission is not obligated to give new rights to citizens based on federal law when the federal law itself does not give new rights. Nor, has any other state implemented the EPA's credible evidence rules in the fashion proposed by the commenters. The commission is unaware of any other state that has a provision similar to the rule adopted by the commission.

ACT, Harris County Attorney's Office, and QLEP each recommended that the commission strike the requirement that the citizen affirm they "knew" relevant agency protocols when collecting data.

The commission agrees with these comments and has struck the requirement from the adopted rule. The commission agrees that the relevant inquiry is whether a citizen followed agency protocols when collecting data. The additional requirement that the citizen affirm they "knew" the protocol is vague, and would likely lead to disputes over a requirement that is not central to the rule's purpose.

ACT and an individual suggested that the commission adopt a rule or protocol that allows the ED on a case-by-case basis to determine whether or not physical or sampling data is of sufficient value and credibility to be used in an enforcement case. ACT and another individual suggested that the commission follow the example of the EPA in its adoption of the credible evidence rules. The commission should, like the EPA, omit any list of protocols to be used, and rather determine appropriate protocols on a case-by-case basis. Taking the opposite tack, TCFA, Galveston Bay Association, Galveston Bay Foundation, and an individual commented that the rule should give exact guidance on what are the agency protocols that a citizen must comply with when submitting information to the ED. Galveston Bay Foundation requested that the term "relevant agency protocols" be defined.

The commission has changed the adopted rule in response to these comments. The commission would first note that it must comply with the legislative directive in TWC, §7.0025(d) that any physical or sampling data must have been collected or gathered in accordance with commission protocols. The commenters have two equally important goals. They do not want the rule to serve as a roadblock against the ED's use of reliable information. However, they do want the rule to give fairly exact notice of the methods that may be used to gather and preserve information to be used as evidence in an enforcement action. The commission, like the commenters, wants the rule to help, not hurt, the ED's efforts to review citizen information and make sound decisions on whether to initiate an enforcement action based on that information. To address these issues, the commission has changed the adopted rule to add a sentence to give further guidance concerning what are the "relevant agency protocols," and, as described in further detail in other parts of this preamble, will take certain actions in implementing the rule to make sure there is fair notice of protocols.

The commission has changed the adopted rule in §70.4(c)(3) to add a sentence that the "relevant agency protocols" are those used or determined acceptable by the ED. These are protocols deemed reliable by the ED and they may originate from sources outside the commission. Currently, the commission uses numerous protocols from a variety of sources to gather information showing violations. There is no comprehensive list of such protocols and they are subject to change. The list may expand as new technologies for data collection are developed. The list may contract because a protocol is superceded or simply because a protocol is not used any more. Some protocols were created by the commission, and the commission may be deliberate in its decisions to amend or repeal one. But some commission protocols were created by other entities such as EPA or professional associations, and adopted by the commission. When the source entity updates a protocol the commission may or may not decide to follow the updated protocol. The commission believes its decision to not define or list the exact "relevant agency protocols" in the rule is consistent with the EPA's adoption of its credible evidence rules discussed earlier in this preamble. In that rulemaking, the EPA proposed but declined to adopt a list of "presumptively credible evidence" because it was potentially confusing and unnecessary. The EPA recognized that both judicial and administrative tribunals routinely make determinations concerning the admissibility and weight of evidence on a case-by-case basis (62 FR 8313, 8316). Similarly, the rule would give the ED discretion to determine if the protocol used by a citizen is reliable and would have been used by the ED under similar circumstances. Under this definition of "relevant agency protocol," the ED retains flexibility to initiate enforcement when presented with reliable physical or sampling data.

While furthering the goal of ensuring that the ED retains discretion to use reliable physical and sampling data, the ED will strive to ensure that acceptable protocols are made known and available to the public to the greatest extent practicable. As discussed later in this preamble, while it is not necessary or practical to include numerous voluminous protocols in the text of the rule, the commission will ensure that its web site provides a list of as

many protocols as possible used by the ED to gather and preserve physical and sampling data.

Several commenters suggested changes to the rule to prohibit the commission's use of information that was gathered illegally. TML, TCAA, TxSWANA, and TMRA requested such changes to the rule. TML, TCAA, and TxSWANA requested an additional provision that a private individual could not gather evidence on the premises of a regulated entity without the express permission of the regulated entity. This provision would apply even if the private individual was not otherwise acting illegally. The TPF and Jobe requested the rule specify that the affidavit required to be signed by a private individual state that the information gathered was not the result of trespass or other illegal means. The purpose would be to put everyone on notice that the commission would not use information gathered illegally. In contrast to these arguments, one individual stated that private individuals must be allowed to enter the property of regulated entities at any time in order to gather information.

The commission has changed the adopted rule in response to some of these comments. With regard to the last comment, the commission notes that HB 2912 does not authorize a private individual to enter the property of another person. Nor does the adopted rule grant any such authorization to private individuals.

The commission has changed §70.4(c) by adding a new paragraph (4) that states the commission will not use in an enforcement case information gathered by an individual illegally. The commission believes it is best to make the adopted rule explicit on this matter to prevent any inference that the commission wishes to encourage illegal activity by private individuals. Also, the provision may well be necessary to positively exclude the illegal information from the commission's administrative and civil enforcement cases. In criminal proceedings the prosecuting authority's use of information gathered illegally is prohibited by the exclusionary rule (Texas Code Criminal Procedure Art. 38.23(a) (Vernon Supp. 2001)). The exclusionary rule applies to evidence gathered illegally both by an officer or by an "other person." However, in administrative or civil proceedings whether information gathered illegally may be used depends on an analysis of numerous factors concerning the gathering and use of the information (*Vara v. Sharp*, 880 S.W.2d 844, 848 (Tex. App. Austin 1994, no writ)). The commission believes that the issue of gathering information unlawfully would arise most frequently when a private individual trespasses. The public comment all discussed trespass. The commission does not want to encourage private individuals to trespass onto the property of regulated entities, even if that encouragement is only by inference. Trespassing would risk the safety of the private individual and of the employees of the regulated entity. There is no need for trespassing by private individuals when agency employees have statutory rights to enter the premises of a regulated entity (See, e.g., Texas Health and Safety Code, §361.032 and §382.015). While the comments all focused on trespass, the commission also wishes to declare that it will not use a private individual's information gathered by any other illegal means. The commission makes no changes in response to the remaining comments. The commission does not believe the rule should contain an additional restriction that a private individual must obtain authorization from the regulated entity to gather information when the individual is otherwise acting lawfully. The commission believes that the focus of enforcement proceedings should remain on the violations. The commission does not wish to create subsidiary issues for hearing or trial concerning whether a private individual obtained the proper authorization to gather information. The commission also does not believe it is necessary to add a requirement concerning the form of the affidavit because the adopted rule gives adequate notice that the commission will not use information gathered illegally.

Numerous commenters suggested that the commission protocols should be adopted as rules. This would be a more deliberate process than the commission proposed, which was to publish the protocols on the commission's web site. Two individuals wanted the rule to be very specific about how to gather and preserve information. ACT and an individual argued that the protocols are a "rule" as defined in the APA, and therefore the commission must adopt the protocols through rulemaking. Galveston Bay Foundation commented that the "relevant agency protocols" need to be defined in the rule. One individual commented that the public should participate in the development of protocols because it is their well-being that is at stake. TMRA, TML, and TCAA argued that the rulemaking process would ensure the public an opportunity to review the protocols and to educate the public. TMRA and TxSWANA argued that the commission's failure to publish the protocols as proposed rules denies the need for public input into what should be the commission protocols. Finally, Galveston Bay Foundation argued that the rule should at least list the commission web page that identifies the protocols.

The commission has made no changes in response to these comments. The purpose of commission protocols is to set the practices by which agency staff gather and preserve information showing a violation. The practices are designed so that staff gather information in a manner that produces data and analysis that is scientifically reliable, allowing its admission into evidence in an adjudicatory proceeding. The commission protocols that the ED uses to gather and preserve information are numerous. The commission has adopted a rule on protocols for water quality sampling (30 TAC §319.11). The commission rule in turn adopted by reference protocols established by EPA and by a professional association. To a great extent, commission protocols are EPA protocols adopted by reference. For example, the commission has adopted by reference an EPA rule on characterizing hazardous waste (30 TAC §335.31). The EPA rule in turn adopts by reference protocols established by professional associations (40 CFR §260.11). However, there are many commission protocols that have not been adopted as rules. For example, commission protocols on many monitoring and analytical methods for air sampling are not rules and are not official EPA protocols.

The law does not require the commission to adopt a protocol as a rule. First and foremost, the protocols are to be used by the ED in carrying out his duties under TWC, §5.230 and TWC, Chapter 7, Subchapters C and D to enforce the laws under the commission's jurisdiction. A given protocol would be applied to a specific regulated entity only if agency staff collected data and analysis in accordance with the protocol and used it as the basis for an enforcement action. Under those circumstances the regulated entity could challenge the protocol in the adjudicatory proceeding. Agencies may use their informed discretion to choose adjudication as a means of making law and policy, rather than rulemaking, when an agency possesses both adjudicatory and rulemaking powers (*Brinkley v. Texas Lottery Commission*, 986 S.W.2d 764, 769 (Tex. App. Austin 1999, no writ)). Adopting every protocol as a rule would mean that each of the numerous protocols would have to go through the rulemaking process. As explained earlier in the preamble, the protocols change over

time. If all protocols were adopted as rules the commission's efforts to use new protocols to match new circumstances would be substantially hindered.

House Bill 2912 and the adopted rule do not change the law that it is the ED who is responsible to enforce the laws under the commission's jurisdiction. The commission acknowledges that private individuals who wish to provide data or analysis showing a violation must follow commission protocols too. But this requirement does not mean the protocols are "rules" of general applicability that affect a private individual's rights or privileges. The scope of HB 2912 is that it allows the commission to use information provided by a private individual to carry out the commission's duty to enforce the law.

The commission acknowledges that if it were to adopt all protocols as rules this would allow for greater public participation in the development of them. The commission believes that this benefit is outweighed by the administrative burden of having rulemaking proceedings for the numerous, and ever changing, protocols used by the commission. Also, the commission would note that a great many of the protocols that it uses are EPA protocols or protocols generated by professional associations. The commission generally adopts these protocols in whole or not at all, because it frequently does not make sense to adopt portions of them. Protocols are designed so that each step is crucial to the taking of reliable information. The commission generally will not adopt its own protocols when there is an established protocol set by EPA or by a professional association. To do so would require the commission to undergo a thorough review and proof that its proposed protocol was equally or more reliable. While the commission welcomes public comment on its protocols, the scope of public comment in many instances would necessarily be limited to whether the commission should adopt or not adopt a given protocol. Later in this preamble the commission discusses how it will attempt to make the protocols more user-friendly. The commission welcomes any public comment on how that may best be done. Finally, the commission does not believe the adopted rule should contain a reference to the agency web site. To administer future changes, the commission believes it is best that information be located in the brochure (discussed later in this preamble), not in the rule.

Section 70.4(d)

Sierra Club (Houston) and an individual objected to the portion of the rule specifying that a private individual who is called to testify in an enforcement proceeding is subject to all sanctions under law for knowingly falsifying evidence. Sierra Club (Houston) stated that the commission was purposely attempting to frighten away citizens from submitting information to the commission. The individual stated that this provision should apply to regulated entities too.

The commission has made no changes in response to these comments. The adopted rule merely tracks the language in HB 2912 (codified at TWC, §7.0025(d)), and the commission believes it is appropriate to give notice in its rule that private individuals are subject to sanctions for falsifying evidence. The commission does not believe it appropriate to make this specific provision apply to regulated entities because the rule concerns the submission of information by private individuals, not by regulated entities. Other law already provides that a regulated entity is subject to all sanctions under law for knowingly falsifying evidence.

Section 70.4(e)

This subsection provides that if the ED determines not to initiate an enforcement action based on information received from a private individual, the ED will process the information received from the individual as a complaint. TMRA recommended two clarifying additions be made to the rule: 1.) that if a private individual submits information "which is not credible or reliable" it will be considered an unsubstantiated complaint; and 2.) that if a private individual makes repeated unsubstantiated complaints or repeated submissions of non credible or unreliable information, then the ED will consider this fact if the individual submits new information in the future.

The commission has made no changes in response to these comments. The commission believes that the first recommendation would mischaracterize the complaint process, and would not clarify the rule. The purpose of this subsection is to acknowledge that when the ED elects not to initiate enforcement based on the private individual's information, the ED will initiate a complaint investigation. When the ED conducts the complaint investigation the ED may not be able to document the violation alleged by the private individual. But this fact alone does not mean the private individual has made an "unsubstantiated complaint." It may be simply that the same conditions do not exist at the time when the agency investigator visits the site of the alleged violation. The commission also declines to adopt the second recommendation. The commission already has a policy in the Field Operation Division's standard operating procedure concerning private individuals who repeatedly make unsubstantiated complaints. The commission does not believe that there is a need to adopt the procedure as a rule because it only concerns commission directions to agency staff. The procedure allows staff to take into consideration that a person has made repeated unsubstantiated complaints.

Other Proposed Changes to the Rule

Two individuals requested that the rule give the private individual submitting information the right to appeal a decision in the related enforcement case. The individuals argued that the private individual should have the same right to appeal as does the defendant. It was not clear, but the commission believes the commenters seek a right to appeal both administrative and judicial decisions.

The commission has made no changes in response to these comments. As previously discussed, HB 2912 authorizes the commission to use information provided by an individual in an enforcement action, but the law does not give new rights to private individuals. The commission does not believe it would be appropriate for it to adopt a rule giving a substantial new right to private individuals in the course of implementing a legislative directive that does not cover the issue.

Jobe requested that the commission add a provision to the rule requiring private individuals to maintain a record of all steps taken to gather and preserve information.

The commission has made no changes in response to this comment. The ED has the burden of proof in enforcement proceedings, so the commission believes it should leave it to the ED's discretion to determine if he/she has adequate documentation of a violation, whether gathered by a private individual or by agency staff. The ED will share with the alleged violator the documentation the ED believes shows a violation. Also, if an enforcement case leads to an adjudicatory hearing, the alleged violator will have the opportunity for formal discovery.

TxSWANA requested the commission to add a provision that a private individual's information showing a violation occurring on several days should be counted as one event for purposes of calculating a proposed penalty. The commenter was concerned that private individuals may intentionally delay their reporting information showing a violation in an effort to generate a higher penalty. The commenter also requested that a private individual be required to submit information showing a violation to the commission within 24 hours. The commenter was concerned that without this requirement a regulated entity would not have the opportunity to timely gather its own information concerning circumstances on a particular day.

The commission has made no changes in response to these comments. The commission already has in place a penalty policy that is used by agency staff to calculate a proposed penalty, which gives direction on how to calculate the number of penalty events when a violation is continuous over a period of time. While the policy does not contemplate that the person gathering information of a violation would intentionally delay producing the information, the commission does not believe there is a need to change the policy (or the adopted rule) to cover this issue. Section 70.4(b) in the adopted rule shows that the ED will use his discretion in electing whether and how to pursue an enforcement case. The commission does not believe there is a need to require private individuals to submit information to the commission within 24 hours. Currently, the agency's own investigators conduct complaint investigations without first giving notice to the regulated entity and without necessarily immediately sharing information with the regulated entity. The ED will not pursue a case when the information showing a violation has been manipulated by any person.

One individual requested that the commission add a provision to the rule which would give a general description of the rules of evidence. The commenter suggested that the rule should cover the evidentiary matters that will be most commonly at issue when the ED pursues an enforcement case that is based on information provided by a private individual. The commenter stated that he was concerned the commission's failure to have this provision in the rule would inhibit public participation in the enforcement process. ACT requested that the commission make it clear that information provided by private individuals would not be subjected to standards more stringent than the rules of evidence and the APA.

The commission has made no changes in response to these comments. As explained in the preamble to the proposed rule, the commission decided against summarizing evidentiary requirements in the rule because it would likely cause confusion or be so general as to mislead the public. The relevant law concerning admission of evidence is the Texas Rules of Evidence, and Texas Government Code, §2001.081 (for administrative hearings).

One individual requested that the commission add a provision to the rule that prohibits a regulated entity from harassing a private individual who submits information to the commission. The commenter stated that she had heard that harassment has occurred in the past and that it should be prohibited. TCC commented that there is no statutory authority for the commission to regulate retaliation by regulated entities, and that there already exist adequate civil and criminal protections.

The commission has made no changes in response to these comments. While the commission is certainly against a regulated entity harassing private individuals who submit information to the commission, the commission believes that the adopted rule is not the appropriate place to address the issue. The commission agrees that there already exist adequate civil and criminal protections.

The City of Austin Utility requested the commission add a provision to the rule that if a private individual submits information but later refuses to sign an affidavit or testify concerning the matter, then the commission shall not use that information in a subsequent enforcement proceeding. The commenter stated that this provision would protect the regulated community against frivolous allegations.

The commission has made no changes in response to this comment. If a private individual submits information to the commission but then refuses to participate in the enforcement action, the ED would not be able to use that information anyway. The ED would not have the appropriate witness to sponsor the evidence in the adjudicatory hearing. The exception, of course, would be if a private individual submitted information to the commission that could be used at hearing without a sponsor. For example, a private individual could submit public records showing a violation. The ED could offer those public records into evidence (under the hearsay exception for public records) without the testimony of the private individual. The commission does not believe the rule should prevent the use of such information merely because a private individual had brought the information to the commission's attention.

TML, TCAA, and TxSWANA requested that a regulated entity be allowed to split samples with any individual taking samples that are intended to show a violation. The regulated entity should at least be allowed to take its own sample at the same site as did the individual. The commenters argued that it is common practice for a regulated entity to split samples with an agency investigator, and this practice should apply when private individuals take samples too.

The commission has made no changes to the adopted rule in response to these comments. The commission agrees that the credibility of certain evidence is improved when all parties have the opportunity to conduct their own analyses concerning what the evidence shows. However, the commission believes the issue of how much weight to give to certain evidence is best left to the trier of fact. Currently, the ED splits samples with regulated entities but there is no rule requiring this. If the adopted rule imposed procedures of some sort the focus of an enforcement proceeding would likely be on the procedures. The commission believes that the focus of an enforcement proceeding based on citizen evidence should be on the alleged violations.

TxSWANA requested that the adopted rule allow the ED to use information gathered by a private individual showing a violation only if the ED's own investigation confirmed the violation. The commenter believed this was necessary to prevent a violation being based entirely on biased evidence that cannot be rebutted.

The commission has made no changes in response to this comment. The commission would first note that all testimonial evidence is "biased" in the sense that a particular person brings their own experiences and outlook to their perceptions. As the commission stated earlier in this preamble, the ED would base an enforcement action solely on a private individual's information only when that information is "very strong." Not only is that because the ED must use his enforcement resources in the most prudent and effective manner possible, but also because he or

she knows the trier of fact will consider the same matters of bias that concern the commenter.

Public Comment Concerning the Implementation of the Rule

Four individuals stated that the commission should have made available to the public the commission protocols during the public comment period in this rulemaking. One commenter requested the commission to extend the public comment period to allow an extra 30 days for the public to comment on the protocols.

The commission is currently gathering into one list as many of the protocols as possible, and the commission will publish this list on its web site. Many of the protocols on the list will have links to the actual protocols. The commission regrets that it could not complete this work before the end of the public comment period, but the commission did make available to several commenters sample lists of the protocols. The substantial work to put the list together does not include drafting the protocols because the protocols already exist. But never before has there been an effort to prepare a comprehensive list of the protocols. Concerning the commenter's request to extend the public comment period, the commission's general counsel issued a letter that denied that request. House Bill 2912 directed the commission to adopt rules no later than December 1, 2001, which prevents the commission from extending the comment period. As discussed earlier in the preamble, the commission does not believe that the protocols should be adopted as rules. An additional result of that decision is that the commission may accept public comment on its protocols at any time without the formality of a public comment period.

TCFA requested the commission publish a guidance document that specified all the commission protocols. Seventy-five individuals each submitted the comment that the commission should create clear print and electronic materials letting the public know that citizen evidence may be accepted and explaining the process for submission of the information. ACT commented that an early draft of the brochure did not contain enough detailed information concerning the submission of information.

The commission is preparing a brochure that will describe both the complaint and citizen information processes. The brochure will in turn refer to a toll-free telephone number and a web page to obtain information on protocols. The commission has taken into consideration the public comment received on this matter and has revised the brochure.

Numerous commenters suggested that the commission use its web site to disseminate information on how private individuals may submit information to the commission. Galveston Bay Association suggested the web site give detailed protocols to be used. Seventy-six individuals encouraged the commission to publish clear materials concerning how to gather and preserve information. An individual and the Sierra Club (Houston) were concerned with access to such information. The individual said the commission's web site is already difficult to navigate, so the commission should ensure the information on citizen information is easy to find. Sierra Club (Houston) said the commission should not assume everyone has access to the internet and so this information should be available in hard copy too. Sierra Club (Houston) assumed the commission would not make this information available in hard copy, and stated that this showed the commission's intent to minimize citizen input.

The commission is continuing to work on its draft web page which will be posted before January 1, 2002. The web page will explain generally the process for private individuals to submit information to the commission. It will contain a list of as many commission protocols as possible. In many instances the viewer will be able to click on a list and review the full text of a given protocol. The commission will endeavor to make sure the particular web page is as easy to find as possible. With respect to the last comment, the commission would respond that it has a free telephone number that the public may use to contact the agency 24 hours a day, 1-888-777- 3186. A person may call that number and request a hard copy of a given protocol which can be faxed or mailed to the person.

HCPCD, Texas Watch, and two individuals recommended that the commission make equipment available to private individuals so that they may use it to gather information. HCPCD and Texas Watch also objected to a statement in the preamble to the proposed rules in the DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION. They disagreed with the commission's statement that the costs that private individuals may incur gathering information are not significant.

The commission does not at this time have adequate resources to loan or give equipment to private individuals. Concerning the commission's comment in the preamble to the proposed rules, the commission would note that its analysis was focused on the requirements of Texas Government Code, §2001.0225 concerning the promulgation of "major environmental rules" as defined by that statute. The statute required the commission to determine the costs the rules would impose on the public by mandate. However, the adopted rule does not require any person's compliance. It is voluntary. The commission does acknowledge, as HCPCD and Texas Watch point out, that some monitoring equipment is expensive. However, a private individual's gathering of information under the adopted rule can be in many forms, and many forms do not require the use of expensive equipment.

Numerous commenters requested that the commission train private individuals on how to gather and preserve information in accordance with commission protocols. Further, if over time private individuals are submitting information that does not comply then the commission should upgrade its training efforts. BPA suggested that the training could be made over the internet. However, Mothers for Clean Air stated that the commission's provision of information over the internet alone is not adequate training for the public. HCPCD and Galveston Bay Foundation suggested that the commission host seminars and workshops. One individual suggested that the commission prepare training videos. One individual suggested the commission work with universities and colleges to conduct training. ACT suggested that the commission contract a third party to conduct the training. Several commenters suggested the commission should pay for the training. ACT suggested that the commission have specified staff to train the public. One individual suggested that the commission's Office of Public Interest Counsel should be responsible for training the public. Two individuals suggested that the commission should certify persons who successfully completed a training program. Some commenters spoke against the commission training the public. TCC's comment suggested the commission should not train the public because HB 2912 did not specifically authorize it, and because there are no state funds to pay for it. TCC suggested that the public may be trained by Texas Watch, which already receives commission grants. Jobe commented that the commission would better spend its funds on training agency investigators.

The commission will publish both a brochure and a web page as explained earlier in this preamble. Concerning the commission making additional efforts to train the public, TCC is correct that

there is no specific funding to carry out the task. Nevertheless, the commission will conduct training, and will consider all of the proposals suggested in the comment. When a person seeks information concerning a particular protocol they should call the commission's free 24-hour telephone number, 1-888-777-3186. That number is staffed by the Field Operations Division, the staff most knowledgeable about commission protocols. The commission does not believe it should "certify" persons as having taken training concerning commission protocols. There is no funding to support a certification program. Also, if such a program existed then it would suggest the commission could not use information provided by private individuals who were not "certified" even though they otherwise gathered the information in compliance with commission protocols.

Many commenters were concerned that commission protocols are long, technical documents that the public will not understand and will not be able to comply with when gathering information showing a violation. One commenter called them "intimidating." One commenter suggested the commission seek the advice of a reading analyst to make sure the protocols are clear. They urged the commission to rewrite the protocols so that they are easy to understand and use. SEED commented that when the commission adopts a protocol it must balance the need for scientifically reliable information versus the need to have protocols the public can understand. Texas Watch commented that the less training available to the public the more likely the simplification of protocols would lead to private individuals gathering information that is not reliable. QLEP commented that if it becomes evident that private individuals are submitting information that cannot be used, then the commission should rewrite the protocols to make them easier to use. ACT suggested that the commission's protocol for private well disinfection and water sampling was a good example of a protocol with a step-by-step guide. SEED suggested the commission use protocols used by STBB because they are easy to understand. The office of State Representative Dora Olivo recommended the commission prepare packages of information to give to persons when they seek information on a specific protocol. HCPCD recommended the commission conduct research into making sure the protocols are as cost-effective as possible. Mothers for Clean Air and two individuals recommended the protocols be translated into Spanish.

The commission will clarify the protocols as much as possible. The commission can begin this process with the least technical protocols, for example, the protocol for taking photographic documentation of a violation. However, as some of the commenters recognized, there is only so much simplification that can be done when at its heart a protocol is a precise methodology to gather information in a scientific and reproduceable manner. The commission explained earlier in this preamble that many of its protocols were generated by EPA or professional associations and are adopted by the commission. The commission believes any attempt to simplify one of these adopted protocols would be a change in the commission protocol, and require the commission to undergo a thorough review and proof that its proposed protocol was equally or more reliable. Concerning the latter comments, the commission believes that its publication of the brochure and web page, plus the availability of the 24-hour toll-free number, will provide a comprehensive source of information for the public. If a person seeks additional information they may call the toll-free number and they will be provided with the information they request. The commission does not at this time intend to translate its protocols into Spanish, although the brochure will be available in Spanish. The commission believes that the administrative burden of translating its protocols into Spanish would not be justified by the limited number of requests to see the protocols in Spanish.

One individual requested that the commission mail a copy of its brochure explaining the complaint and citizen information processes to all persons who submitted written or oral comments on the proposed rule.

The commission will mail the brochure to the persons who submitted written comment and those persons who submitted oral comment that gave the commission their mailing address.

Numerous commenters said the commission should give a written response to an individual that submits a complaint or information showing a violation. The response should explain the commission's response and why or why not the commission will pursue an enforcement action. ACT, BPA, Clean Air Clear Lake, Galveston Bay Association, and 81 individuals made this comment. ACT recommended a response within ten days, and one individual recommended seven days. ACT recommended that the written response have attached to it a copy of the commission brochure explaining the complaint and citizen information processes. The commenters recommended the response include an explanation of what action the ED will take. One individual commented that the ED's response should be available for public inspection.

The agency's Field Operations Division has a policy to give a written response to complaints explaining what action the ED has taken. This policy will be applied to a private individual's submission of information too. The ED will explain why the ED initiated or did not initiate an enforcement action based on the information. The policy does not have a deadline to respond within a certain number of days. It takes varying amounts of time to respond to a given complaint or submitted information depending on the content and complexity of the complaint or information. The ED's response will be available for public inspection. The ED's response will not have a copy of the brochure, but the brochure will remain available to the public. The commission already must implement the requirements in Sunset bill, §1.15 concerning giving to complainants a copy of the commission's policies and procedures on complaint investigation and resolution. The commission will implement this requirement by having agency investigators give the brochure to individuals when they conduct the investigation. Accordingly, there is no need to give the brochure to the individual when the agency investigator later sends the written explanation of the ED's response.

Numerous individuals commented that the ED should take prompt enforcement action when a private individual submits information showing a violation.

The ED will process enforcement actions in as expeditious a manner as possible, whether based on information provided by private individual or by agency investigators.

An individual commented that all complaints submitted to the commission should be made available to the public.

All complaints are public records and are open for the public's review. The exception is information showing the identity of a private individual who submits a complaint. If the agency gets a request for the identity of the complainant, the standard process is to submit to the Texas Attorney General a request to keep that information confidential.

An individual requested that all complaints submitted to the commission should be published in a local newspaper and given to local governmental authorities within ten days.

The commission does not believe that the proposed procedures are necessary or a prudent use of commission resources. When a private individual submits a complaint to the commission concerning a matter within the commission's jurisdiction it is the commission's responsibility to pursue the matter. While the public and other governmental entities are welcome to review the records of the commission, there is no need for the procedures recommended by the commenter.

An individual recommended that when an agency investigator conducts an investigation in response to a complaint, the investigator should first check in with the person who submitted the complaint. Further, the investigator must conduct his/her investigation on the day the complaint is made.

The commenter did not explain the reason for having the investigator first check in with the complainant, and so the commission has made no changes in response to this comment. The Field Operations Division has written policy concerning the agency's response to a complaint, including that management first prioritizes a complaint according to the potential threat to human health and safety, and the environment. The ED prioritizes complaints because the ED does not have the resources to respond to all complaints on the day they are made.

Numerous commenters requested that the commission track the public's submission of information to the agency, including the number of submissions made, the number of submissions which information could not be used, and the number of submissions that are used to initiate an enforcement action. Some commenters requested that this information be reported on a quarterly basis. Comments were made on this subject by ACT, Clean Air Clear Lake, Galveston Bay Association, and 76 individuals.

The commission will ensure that agency staff keep records of the submission and use of information provided by private individuals. The commission will prepare reports on this matter on an as needed basis.

TCFA commented that a regulated entity will want access to the information submitted by a private individual. The commenter was concerned that the private individual may remain anonymous, and that the regulated entity would have to pursue formal discovery in an adjudicatory proceeding in order to review the information.

When the ED determines to pursue an enforcement action based on a private individual's information the affidavit signed by the private individual and the other information submitted by the private individual will be made available for review by the alleged violator.

Three individuals commented on the penalties assessed against violators that are based on information provided by a private individual. They suggested the penalties should go towards training citizens on how to comply with commission protocols.

The penalties paid to the commission as a result of an enforcement action are deposited to the state's general revenue fund. That fund is controlled by the legislature. If presented with a proposal, the commission will consider an supplemental environmental project involving environmental sampling and/or training.

Mothers for Clean Air requested that certain agency staff be designated to assist a private individual track the agency's use of their information in an enforcement action. QLEP and Texas Watch requested that there be a specific infrastructure in place including designated staff to assist persons on how to comply with commission protocols.

The ED's written response to a private individual's complaint or submission of information will list an agency staff member that may be contacted for additional information. As explained earlier in this preamble, the ED has a 24-hour toll-free number that private individuals may call to obtain information on how to submit information showing a violation.

An individual requested that the commission identify qualified laboratories that may analyze physical or sampling data. Jobe questioned whether the ED would scrutinize the laboratories used by private individuals. Jobe also questioned whether the laboratory must be certified.

The commission's web page that lists commission protocols will also list laboratories that the agency itself uses. This will not be an exclusive list of laboratories that private individuals must use. In response to the latter comments, the ED will scrutinize all information submitted by a private individual including whether the laboratory prepared reliable analyses. House Bill 2912 added a new requirement that the commission may use data from a laboratory for enforcement actions only if the laboratory is certified by the commission (ł1.12 adding new TWC, §5.127). This requirement applies to information submitted by a private individual. However, the requirement will apply only when the commission has implemented this portion of HB 2912 and that has not yet occurred.

Clean Water Action requested that when a private individual submits information to the ED to show a violation, the ED should also use the information for other purposes, for example collecting information to show the status of a water body.

The commission will attempt to use particular information submitted by a private individual as appropriate.

An individual commented concerning when a private individual submits information to the ED and the ED elects not to pursue an enforcement action based on that information. The commenter noted that the individual remains free to submit the same information to his or her local governmental authority that has enforcement authority.

The commission agrees with the comment.

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. The rulemaking does not meet the definition of a major environmental rule because the specific primary intent of the rule is procedural in nature, establishing procedures allowing the commission to initiate an enforcement action on a matter under its jurisdiction based on information it receives from

a private individual. The rule does not concern an existing or new regulatory program that would 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 adopted rule does not prescribe control requirements or any other requirements that would normally be associated with a commission environmental rulemaking. The adopted rule does not require implementation by any entity, though individuals wishing to submit information to the agency for use in an enforcement case must use equipment and/or methods prescribed by agency protocols. In certain cases, this may result in costs for sampling, equipment, certification, or analysis, though these costs are not considered to be significant.

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 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 statute: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice; 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 HB 2912, §18.10, which expressly requires the commission to adopt rules implementing TWC, §7.0025 concerning the commission initiating an enforcement action based on information provided by a private individual. This adoption does not adopt a rule solely under the general powers of the agency, but rather under specific state law (i.e., HB 2912, §18.10; TWC, §7.0025; 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 several comments related to the statement in the draft regulatory impact analysis. The comments concerned the commission's description of the costs that may be incurred by citizens that wish to submit information to the commission. The commission's response to those comments are set forth in the SECTION DISCUSSION AND RESPONSE TO COMMENT portion of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rule and performed a final analysis of whether Texas Government Code, Chapter 2007 is applicable. The commission's final analysis indicates that Chapter 2007 does not apply to the adopted rule. Nevertheless, the commission further evaluated the adopted rule and performed a final analysis of whether the adopted rule constitute a takings under Chapter 2007.

The specific primary purpose of the rule is to implement certain provisions in HB 2912. The adopted rule implements provisions in HB 2912 that allow the commission to initiate an enforcement action on a matter under its jurisdiction based on information it receives from a private individual if that information, in the ED's judgment, is of sufficient value and credibility to warrant the initiation of an enforcement action. The rule will substantially advance the stated purpose by providing specific criteria on how the ED will evaluate information from private individuals. Promulgation and enforcement of the rule will not affect private real property which is the subject of the rule because the proposed language consists of a new section relating to the commission's procedural rules rather than any substantive requirements. The adopted rule does not require implementation by any entity.

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 rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, nor will they affect any action/authorization identified in §505.11. Therefore, the adopted rule is not subject to the Texas Coastal Management Program.

STATUTORY AUTHORITY

The new section is adopted under HB 2912, §1.24 and §18.10, which require the commission to adopt rules to implement new TWC, §7.0025.

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; 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 when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency; and §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule.

Additionally, the new section 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.

§70.4. Enforcement Action Using Information Provided by Private Individual.

(a) A private individual with information demonstrating possible violations of law within the commission's jurisdiction should notify the executive director (ED). The ED may initiate an administrative enforcement action, or he/she may refer to the appropriate prosecuting authority a civil or criminal enforcement action.

(b) The ED may initiate an enforcement action based on information received from a private individual if that information, in the ED's judgment, is of sufficient value and credibility to warrant the initiation of an enforcement action. The ED may initiate an enforcement action based on any combination of information provided by private individuals or by the ED's own investigations.

(c) In evaluating the value and credibility of information provided by a private individual and determining the use of such information as evidence in an enforcement action, the ED shall consider the following criteria:

(1) the individual providing the information must be willing to submit a sworn affidavit attesting to the facts that constitute the alleged violation and authenticating any writings, recordings, or photographs provided by the individual;

(2) the individual providing the information must be willing to testify in any enforcement proceedings regarding the alleged violations;

(3) if the ED relies on any physical or sampling data submitted by an individual to prove one or more elements of an enforcement case, such data must have been collected or gathered in accordance with relevant agency protocols. The individual submitting the physical or sampling data must be willing to submit a sworn affidavit demonstrating that the individual followed relevant agency protocols when collecting the data. The relevant agency protocols are those used or determined acceptable by the ED; and

(4) the commission will not use in an enforcement case information gathered by an individual illegally.

(d) A private individual who submits information on which the ED relies for all or part of an enforcement case may be called to testify in the enforcement proceedings and is subject to all sanctions under law for knowingly falsifying evidence.

(e) If the ED determines not to initiate an enforcement action based on information received from a private individual in accordance with this section, the ED will process the information received from the individual as a complaint, subject to applicable complaint investigation procedures. The ED may ultimately initiate an enforcement action that is based on information the ED develops during 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 November 21, 2001.

TRD-200107197
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: December 11, 2001
Proposal publication date: September 7, 2001
For further information, please call: (512) 239-6087

♦ ♦ ♦

CHAPTER 90. REGULATORY FLEXIBILITY AND ENVIRONMENTAL MANAGEMENT SYSTEMS

The Texas Natural Resource Conservation Commission (commission or TNRCC) adopts amendments to §90.1, Purpose; and §90.2, Applicability and Eligibility. The commission also adopts new §90.30, Definitions; §90.32, Minimum Standards for Environmental Management Systems; §90.34, Regulatory Incentives; §90.36, Evaluation of an Environmental Management System by the Executive Director; §90.38, Requests for Modification of State or Federal Regulatory Requirements; §90.40, Executive Director Action on Request for Regulatory Incentives through the Use of an Environmental Management System; §90.42, Termination of Regulatory Incentives under an Environmental Management System; and §90.44, Motion to Overturn. Sections 90.2, 90.30, 90.32, 90.34, 90.36, 90.38, 90.40, 90.42, and 90.44 are adopted *with changes* to the proposed text as published in the September 7, 2001 issue of the *Texas Register* (26 TexReg 6845). Section 90.1 is adopted *without change* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The 77th Legislature, 2001, passed House Bill (HB) 2997 which amended Texas Water Code (TWC), §5.127, Environmental Management Systems and HB 2912, §1.12, which amended TWC, §5.131 to encourage the use of environmental management systems (EMS) by the regulated community through the use of regulatory incentives. In this rulemaking, an EMS is a management system that addresses applicable environmental regulatory requirements through the use of an organizational structure, environmental planning activities, and delineation of responsibilities, practices, procedures, processes, and resources for developing, implementing, achieving, reviewing, and maintaining an environmental policy directed toward continuous improvement and compliance assurance.

The legislation requires that the commission adopt a comprehensive program that provides regulatory incentives to encourage the use of EMS by regulated entities, state agencies, local governments, and others. Additionally, the legislation requires that any rules adopted by the commission meet the minimum standards outlined in the bill. Further, the commission must integrate the use of EMS into its regulatory programs, develop EMS for small business and local governments, and establish environmental performance indicators to measure the program's performance. Finally, the legislation requires that the commission consider the use of an EMS in an applicant's compliance history for an applicant's facility for demonstration of compliance and potential use of an EMS to improve compliance history. The commission notes that the statutory language does not endorse any specific EMS standard over another standard to meet the minimum statutory requirements. Therefore, these rules do not specify how the EMS must be implemented, only that they must meet the minimum requirements contained in the statutory language.

While the legislation encourages the use of EMS to achieve regulatory flexibility, the commission cannot modify federally-mandated state requirements without approval from the United States Environmental Protection Agency (EPA). This will severely limit the ability of the program to offer real incentives for the adoption of EMS. It also affects the commission's ability to create a broad performance-based regulatory structure. The commission is pursuing discussion of these issues with EPA. Additionally, the adopted rules are structured to allow the approval of these types of incentives. Until the commission and the EPA come to an agreement on how to approve incentives related to federally-mandated state requirements, any request made for these incentives requires EPA approval on a case-by-case basis. The commission specifically requested comments on this issue. Discussion of and responses to these comments may be found in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS portion of this preamble.

Other factors the commission must consider in developing these rules include the type of review completed by the executive director of an EMS through the potential use of approved third-party auditors to complete the evaluations and also how members of

the public should be involved in the EMS development and approval process. The commission specifically requested comments on these items. Discussion of and responses to these comments may be found in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS portion of this preamble.

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. A major environmental rule means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. As the intent of the rules is to implement HB 2997 and HB 2912, §1.12, which require the commission to adopt rules establishing a regulatory process that voluntarily encourages the use of an EMS by regulated entities, these adopted rules do not meet the definition of a major environmental rule. Furthermore, the rulemaking does not meet any of the four applicability requirements listed in §2001.0225(a). Specifically, the adopted rules do not exceed a federal standard, exceed an express requirement of state law, or exceed a requirement of a delegation agreement. Finally, the adopted rules were not developed solely under the general powers of the commission, but were specifically developed to implement HB 2997 and HB 2912, §1.12, as passed by the Texas Legislature and signed by the governor. The commission solicited and received no comments specific to the regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these adopted rules and performed a final assessment of whether these adopted rules constitute a takings under Texas Government Code, Chapter 2007. The following is a summary of that evaluation and final assessment. The specific purpose of these adopted rules is to implement HB 2997 and HB 2912, §1.12, which require the commission to adopt rules establishing a regulatory process that encourages the voluntary use of EMS by regulated entities. The adopted rules would substantially advance this stated purpose by creating an administrative process allowing regulated entities to seek regulatory incentives from the commission for the voluntary implementation of EMS. Promulgation and enforcement of these adopted rules would be neither a statutory nor a constitutional taking of private real property. Specifically, these rules do not affect a landowner's rights in private real property because this rulemaking does not burden; nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, these rules provide for an administrative process which allows regulated entities to seek regulatory incentives from the commission for the voluntary implementation of EMS. There are no burdens imposed, through the implementation of a voluntary EMS program, on private real property under this rulemaking as the adopted rules neither relate to nor have any impact on the use or enjoyment of private real property, and there is no reduction in value of the property as a result of this rulemaking.

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 or 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 September 27, 2001 at 10:00 a.m. in Room 131E of TNRCC Building C, located at 12100 Park 35 Circle, Austin. One individual provided oral comments at the hearing. The following provided oral comments and/or written comments during the comment period: Sierra Club-Lone Star Chapter on behalf of the Alliance for a Clean Texas (ACT); Argent Consulting Services, Inc. (Argent); Association of Electric Companies of Texas, Inc. (AECT); BP Amoco (BP); Chevron Phillips Chemical Company, LP (Chevron); ExxonMobil Refining and Supply Company (ExxonMobil); Industry Council on the Environment (ICE); Lone Star Steel Company (LSS); Office of Public Interest Counsel of the TNRCC (OPIC); Roehrig and Associates, Inc. (Roehrig); Texas Chemical Council (TCC); and Baker Botts, L.L.P. on behalf of the Texas Industry Project (TIP).

The following commenters generally supported the proposal: ACT, Argent, AECT, BP, Chevron, ExxonMobil, ICE, LSS, OPIC, Roehrig, TCC, and TIP. No commenters generally opposed the proposed rules. The following commenters suggested changes to the proposal as stated in the SECTION BY SECTION/RESPONSE TO COMMENTS portion of the preamble: ACT, Argent, AECT, BP, Chevron, ExxonMobil, ICE, LSS, OPIC, Roehrig, TCC, and TIP.

SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS

The commission modified the title of Chapter 90 from Regulatory Flexibility to Regulatory Flexibility and Environmental Management Systems to address the addition of the EMS regulatory incentives program to this chapter and more accurately reflect the contents of the chapter.

General

OPIC commented during the public hearing that the legislature intended that there be significant mechanisms for public participation in these rules and that these rules were intended to increase the accountability of participants to both the public and to the agency. OPIC further commented that the proposed rules contained no effective public accountability mechanism.

In written comments filed on October 8, 2001, OPIC withdrew and clarified these verbal comments made at the September 27, 2001 public hearing. The commission responds to that clarification in the following comment and response.

In written comments, OPIC stated that the rules should provide for more effective public participation and public accountability.

The commission believes the rules establish effective public participation and public accountability. Section 90.40(b)(2) specifically requires the executive director to consider the efforts made by the person that submitted the EMS to incorporate stakeholder involvement and environmental reporting of their EMS internal and external to the organization. Additionally, §90.43(3) states, "Persons who request modifications of state or federal regulatory requirements which cannot be authorized by any other approval except a commission order must follow the requirements

of Subchapter B of this chapter." Subchapter B, §90.16 specifically provides, in the regulatory process, an opportunity for the public to receive reasonable notice, an opportunity to comment upon the modifications, and the ability to request a contested hearing. Any rule change that would authorize an incentive "by rule" would be governed by the Texas Administrative Procedure Act (APA), Texas Government Code, Chapter 2001. The APA requires public notice, an opportunity for a public hearing, and an opportunity to make comments on the proposed rules.

In order to receive federal regulatory incentives, an EMS must include public participation and effective stakeholder involvement in the EMS.

OPIC commented that regulatory incentives should be more closely linked to EMS implementation. OPIC further commented that incentives should be media-specific and site-specific.

The commission responds that regulatory incentives will be linked to each company's EMS implementation. The executive director will review each person's EMS and the executive director or an approved third-party auditor will conduct an on-site evaluation of each EMS before it is approved to support a regulatory incentive. Further, the executive director will conduct evaluations at least every three years to ensure that the person is still implementing an EMS at the site. Finally, the commission's existing procedures allow the executive director to terminate a person's regulatory incentive if the site has a violation that so warrants. Therefore, the granting of any incentive is directly linked to the implementation of the EMS.

Additionally, the legislature established this program to be voluntary and to encourage the use of EMS by offering qualifying entities regulatory incentives for the development and implementation of an EMS. The statutory language does not link regulatory incentives to specific media, therefore, it would be inappropriate for the commission to so limit this regulatory incentive program.

Finally, to clarify that the commission will look at an individual site rather than the company as a whole, the commission has added a definition of "site" to §90.30. The commission agrees that each site should be eligible to receive regulatory incentives if each site maintains an EMS that meets the requirements of these rules. The commission has clarified in the rule language that a single large corporation with multiple sites in Texas can seek incentives for each of its eligible Texas sites for which there is an EMS in place rather than a single statewide plan.

OPIC commented that the commission should recognize EMS success through a tiered approach.

The commission responds that the intent of this rulemaking is only to encourage the use of EMS through regulatory incentives. HB 2912 requires the agency to develop a strategic structure through which regulatory incentives are offered by an entity's place in a tiered regulatory process. That rulemaking will address the strategic structure of the commission as a whole in its environmental regulatory process, including the structuring of tiers for EMS and regulatory incentives.

ACT commented that the legislation requires that the commission "establish environmental performance indicators to measure the program's performance" and the rules contain no such performance measures. ACT commented that without adequate measures, the EMS program will end up like audit privilege program: competing claims that it works or doesn't work to improve environmental conditions, but no data to really answer the questions. ACT recommended that the commission use the model laid out in EPA's August 2001 "Action Plan for Promoting the Use of EMS" to define performance measures for evaluating the state's EMS program that will at a minimum assess actual emissions and compliance performance at all or some sufficient subset of facilities that have been granted incentives based on their use of EMS and compile that information into a useful database. ACT commented that the commission's rules should spell out the performance measures that will be used to evaluate the EMS program. The EPA's August 2001 "Action Plan for Promoting the Use of EMS" provides a good model for performance evaluation.

The commission responds that it will establish performance indicators in compliance with HB 2997. But, the commission will not include those measures in the rule language itself. The commission is currently studying many models for EMS measurement including EPA's model and anticipates submitting these measurements to the Legislative Budget Board (LBB) as required by HB 2997. The commission notes that the EPA has not yet adopted their performance indicators for EMS by rule and therefore EPA also maintains the flexibility to adjust or adapt indicators as needed. Further, the commission notes that the LBB measurements are typically adopted separately from rulemaking to allow the commission to change an indicator that may not be valid after implemented or to add an additional indicator that the commission determines is needed to measure the success of the program without additional rulemaking. The commission will make available to the public the performance indicators for the first phase of the EMS program through their public website and upon request. No change has been made in response to these comments.

ACT commented that the EMS documentation system should be properly cross-referenced with permit and compliance information on a facility. This will improve program management and will be needed to evaluate the performance of the program, as required by HB 2912 and HB 2997.

The commission responds that the use of a commission-approved EMS will be noted in the public compliance history database regarding a site's compliance history. This information system will be developed to address the requirements of HB 2912. Therefore, public information on compliance history and permits will be linked to the use of an EMS and available in compliance with legislative requirements. Because this is already required by legislation governing the commission, no specific change has been made to the EMS rules in response to this comment.

ACT commented that it must be acknowledged that an EMS does not in any way guarantee compliance with applicable laws, regulations, or permit terms, nor is the use of EMS intended to replace the regulatory system.

The commission responds that the proper implementation of an EMS that is based on compliance assurance does provide better compliance assurance than other traditional mechanisms the commission uses to ensure compliance with applicable requirements. A comprehensive compliance-based EMS includes all compliance endpoints within the management system with measures to locate, correct, and prevent the reoccurrence of noncompliance; therefore, it goes above and beyond traditional compliance programs and should be more protective than traditional environmental programs that rely on inspections only to detect noncompliance. The commission notes that this voluntary EMS program is intended to allow persons to meet their compliance obligations in a more flexible or streamlined manner as a reward for establishing an EMS program that is more protective of the

environment than if they did not have an EMS established. No change has been made in response to this comment.

ACT commented that a clear recordkeeping system must be established in order for the commission to track the performance of the EMS incentive program, as required by legislation, and in order for the public to be able to evaluate the costs and benefits of this program. ACT commented that the most straightforward approach would be to establish a separate EMS file for a site that requests incentives based on its adoption of an EMS and that file should be cross-referenced to permit and compliance files for the site. ACT also commented that it should include at a minimum the following: EMS documentation submitted to the agency; evaluation and incentive requests; evaluation results; correspondence between the agency and regulated site related to EMS, its evaluation, and the requested incentives; a record of decision or other documentation of incentives provided; and documentation of the three-year evaluation results.

The commission does not plan to establish a separate cross-referencing procedure for the EMS program outside of what is already being created to comply with the requirements of HB 2912 for compliance history and public information. The commission responds that all data relating to an EMS collected by the commission will be available unless marked confidential by a person. Additionally, the commission responds that the statutory language did not provide for funding to establish a separate file maintenance program outside of current commission practices. However, since the EMS will also be associated with the compliance history of a site in one public database, the site, its compliance history and its associated permits, would be able to be linked through existing file procedures. All of the items listed in the comment would be included in such files because they are elements of the review and approval process. No change has been made in response to these comments.

TCC commented that it understands that the EMS must set priorities, goals, and targets for continuous improvement as per the statute. TCC further noted that there are many different ways to organize an EMS, and suggested that the commission should attempt to obtain legislative relief on this requirement in the future.

The commission disagrees with TCC's comment that the commission should attempt to obtain legislative relief on the different ways to organize EMS. The language of the legislation is not prescriptive in how a person must develop an EMS only that the EMS must contain specific components. Priorities, goals, and targets are common components to all EMS standards and these can be defined specific to a site's operations. No change has been made in response to this comment.

Both BP and Chevron Phillips commented that they do not agree with the TNRCC statement in the rule preamble that the cost to implement an EMS program is anticipated to range from no cost to approximately $89,000. Chevron estimated that for a complicated chemical facility with several hundred emission points and many hundreds of applicable regulatory requirements, it could cost upwards of $200,000 per facility to establish and quality check the database. BP commented that while some costs are proportional to the size and complexity of the site, the costs to the BP Texas City site, for example, to implement ISO 14001 have been in excess of $500,000.

The commission acknowledges that the cost to implement an EMS will range widely based on site-specific requirements and whether the system has received ISO 14001 certification. The costs provided in the fiscal note for the proposal related to this rule were based on data available as an average. Depending on the size of the site, the ability to use existing procedures and programs versus creating new ones, and other site-specific factors, costs could vary below or far in excess of the costs stated in the fiscal note. Given that the choice to request regulatory incentives under these rules is voluntary, no change has been made in response to this comment.

ACT and OPIC commented that the proposed commission rules attempt to go far beyond the types of incentives that the legislature authorized.

The commission disagrees that the proposed rules attempt to go beyond the types of incentives that the legislature authorized. Section 5.127(b) of HB 2997 states: "The incentives may include:...." While HB 2997 lists four different incentives, the commission responds that it is not limited to those four listed incentives. Specifically, Texas Government Code, §311.016(1) defines the term "may" in the Code Construction Act as creating discretionary authority or granting permission or a power. As such, the commission has the ability to expand the list of authorized incentives beyond the four listed in HB 2997. Further, the types of incentives in the rule are similar in nature to the ones in the legislation. No change has been made in response to this comment.

AECT and ICE commented that companies may face detriments if they choose not to participate in the EMS program, which would effectively make it voluntary in name only. AECT and ICE requested that the commission include statements in the preamble to the final rules that a company with a good compliance history will not cease to receive announced agency compliance inspections solely because it chooses not to participate in the EMS program and that no other detriments will occur to companies who choose not to participate in the program. Further, AECT and ICE agreed that EMS should be voluntary, rather than mandatory. AECT and ICE expressed concern, however, that companies may face detriments (beyond the detriment of not getting to take advantage of the incentives offered by the program) if they choose not to participate in the EMS program, which would make the EMS program voluntary in name only.

The commission responds that it is not the intent of the rulemaking to make the development and use of an EMS anything other than voluntary, regardless of a company's participation. Further, the rules as drafted do not suggest that a company will face detriments if they chose to not participate in an EMS program. However, the commission appreciates the concerns raised by ICE and AECT. The commission will clearly state in the preamble that the EMS program is a voluntary program. No change has been made in response to this comment.

AECT and ICE expressed concern that a company with a good compliance history might cease to receive announced compliance inspections from the executive director solely because it chooses not to participate in the EMS program. AECT and ICE requested that the commission include statements in the preamble to the final rules that a company with a good compliance history will not cease to receive announced compliance inspections solely because it chooses not to participate in the EMS program, and that no other detriments will occur to companies who choose not to participate in the voluntary EMS program.

The commission responds that HB 2912, as adopted, states that the commission by rule shall, at a minimum, prohibit a person

whose compliance history is classified in the lowest classification from receiving an announced inspection. However, the determination of a site's compliance history classification and how compliance history will be used is not the subject of this rulemaking. No change has been made in response to this comment.

ACT commented that the rules should provide that the commission will integrate the use of EMS into enforcement orders for facilities that have a consistent pattern of violations, as the EPA has now done. ACT commented that the commission should take this opportunity to make an explicit commitment to this approach.

The commission recognizes that the use of EMS will be a positive tool for companies that have a consistent pattern of violations. The commission does not intend to make the use of EMS mandatory for these entities as that is out of the scope of this rulemaking. The proposed rules only cover a *voluntary* program to encourage the use of EMS, not the use of EMS for rehabilitation of poor performers. It is anticipated that poor performers will want to use an EMS as a method to improve their compliance history. The use of EMS in determining compliance history will be addressed in other rulemakings proposed by the commission.

Subchapter A: Purpose, Applicability, and Eligibility

Section 90.1, Purpose, is adopted without changes to the proposed text. This adopted section will clarify that the purpose of this chapter is to create the EMS regulatory incentives program for regulated entities as authorized under TWC, §5.127 and §5.131.

Section 90.2, Applicability and Eligibility, is adopted with changes to the proposed text. This adopted section will outline the applicability and eligibility requirements to qualify for regulatory incentives for using an EMS and for regulatory flexibility orders (RFOs). This section will provide that any site is eligible to receive regulatory incentives, except a person that has been referred to the Texas or United States attorney general for an environmental violation and incurred a judgment against the specific site requesting the incentives is not eligible for a period of three years from the date of the judgment. Additionally, a person is ineligible to receive regulatory incentives if that person has been convicted of willfully or knowingly committing an environmental crime regarding the site for a period of three years from the date of the conviction.

Concerning §90.2, Chevron requested that clarification be added to the rule in case the "person" is a corporation with multiple facilities to allow the separation of the corporation into manufacturing locations or business lines. OPIC also commented that the word "person" should be replaced with the word "site."

The commission agrees that the language of HB 2997 suggests that the rule was intended to be applied at the site or facility level. Therefore, the commission has added a definition of "site" to §90.30. A single large corporation with multiple sites in Texas may now seek incentives for each of its eligible Texas sites for which there is an EMS in place.

Concerning §90.2, Chevron stated that a separation of a company into manufacturing locations or business lines will allow a company to maintain regulatory incentives at locations with certifiable EMS and penalize only the location with the judgment. For example, Chevron stated all of a corporation's regulatory flexibility orders could be in jeopardy if the company acquires or purchases a plant with an environmental judgment or less than an optimal compliance record. Chevron requested that the commission clarify the definition of "person" in regard to the limitation that certain "persons" are ineligible to receive incentives from EMS implementation for three years.

The commission agrees that each site should be eligible to receive regulatory incentives if each site maintains an EMS that meets the requirements of these rules. Therefore, if a company were to acquire a plant with an environmental judgment, the judgment would not affect other plants who were already granted regulatory incentives as long as those plants maintained their EMS and compliance history according to the eligibility requirements in these rules. Thus, to clarify that the commission will look at individual sites rather than the company as a whole, the commission has added a definition of "site" to §90.30.

Concerning §90.2, Chevron suggested an alternative option to allow a qualified company that purchases an unqualified company three years to get the unqualified company into compliance with the appropriate standards before the EMS incentives are rescinded.

The commission agrees that a company as a whole should not be penalized for the purchase of a site which does not have a qualifying EMS in place. The commission has modified the proposed rule language in §90.30 to include a definition for "site" which separates a company into separate physical locations. Additionally, the commission has added the term "site" to clarify that these requirements apply to individual sites and not a company as a whole. If a company were to purchase an unqualified company, it would have no effect on the purchasing company's regulatory incentives at a different site, as long as the qualifying site maintained its EMS.

Concerning §90.2, ACT commented that the compliance performance eligibility threshold for the EMS incentive program is far too low and that the commission should require that regulated entities have a "history of sustained compliance" which is consistent with EPA's performance track language and would be a sensible way of implementing the HB 2912 performance-based criteria for innovative programs.

The "history of sustained compliance" language is not contained in HB 2997 or HB 2912. This is language that EPA uses to govern its policy on compliance history evaluation. The commission is required by HB 2912 to develop its own standard for evaluating compliance history. The commission's rules on compliance history will comply with the requirements outlined in the statutory language. Additionally, the commission may also consider "history of sustained compliance" in a future rulemaking related to strategically directed regulatory structure. Therefore, the language of the EMS rules has been crafted in a general fashion to allow for later inclusion of the compliance history or strategically directed regulatory structure language. No change has been made in response to this comment.

Concerning §90.2, ACT requested that if the commission believes it is prohibited from changing this threshold at this time, the commission should cite the specific statutory provision that contains such a prohibition and clearly indicate in the preamble when the rules will be revised to provide a more reasonable eligibility threshold.

House Bill 2997 and HB 2912 gave the commission deadlines to adopt specific rules to address EMS, compliance history, and a strategically-directed regulatory structure. Although the statutes adopted general requirements in each of these areas, the statutes mandated that the commission adopt rules to

implement the requirements by specific dates. The compliance history rules governing the definition of compliance history and the use of compliance history are scheduled for adoption in February 2002 and September 2002, respectively. The commission will not adopt into the EMS rules compliance history requirements that may conflict with future planned rulemaking regarding compliance history that is legislatively required to be adopted by specific dates. The commission will address incorporation of the compliance history rules requirements into the EMS rules as soon as the compliance history rules are adopted by the commission. The commission has placed language in the EMS proposed rules to allow the commission to consider compliance history in the granting of incentives. The generic nature of the language contained in §90.40 of the EMS rule allows compliance history to be immediately considered under the most currently adopted regulatory standard governing compliance history. The commission made no change in response to this comment.

Concerning §90.2(c), ExxonMobil stated that a person who meets the minimum standards for the state's EMS program is only *eligible* for regulatory incentives. Exxon Mobil commented that this language should be strengthened to *provide access* to regulatory incentives, otherwise it does not provide incentive to industry as all their efforts could be denied by commission staff.

While the commission recognizes that industry would prefer to have a stronger guarantee of regulatory incentives than currently contained in the proposed rule language, the commission notes that HB 2997 and HB 2912 require the commission to consider compliance history before granting incentives. If a site has an acceptable compliance history, the likelihood of regulatory incentives being granted greatly increases under the evaluation process. However, should a site have an unacceptable compliance history or request an incentive in a specific media for which it has compliance deficiencies, the likelihood of being granted that specific incentive is much lower. It is important to note that the process for requesting regulatory incentives is not a one-time occurrence and if a person does not receive an incentive initially, it may request that incentive or additional incentives once its EMS has been approved. In addition, for federal incentives, meeting the minimum standards for an EMS will not guarantee the award of those incentives. The EPA additionally requires that a person that is seeking incentives under the commission's EMS program must meet the National Environmental Performance Track (NEPT) standards. The commission has added clarifying language to §90.38 that states that entities must meet the requirements of the NEPT to qualify for federal incentives. Thus, for the reasons previously stated, even if a site meets the minimum standards for an EMS, the commission cannot guarantee that the person will receive the specific incentives they have requested. Therefore, no change has been made in response to the comment.

Concerning §90.2(e), ExxonMobil commented that the restriction from receiving regulatory incentives for three years after incurring a judgment under the Texas or United States attorney general referral provides an unjustifiably broad penalty for large corporations. Additionally, ExxonMobil stated that the commission's proposal under §90.2(e) would appear to prevent any of these companies from receiving regulatory incentives for implementing a complying EMS program for three years and therefore, this exclusion must be deleted.

The commission notes that the language of HB 2997 suggests that the rule was intended to be applied at the site or facility level. Therefore, to ensure compliance with the statutory language, the commission has added a definition of "site" to §90.30. This change clarifies that eligibility for regulatory incentives will be determined on a site-specific basis. Further, the commission disagrees that it is inappropriate to have this restriction in the rule with clarifying language to specifically apply the eligibility criteria at the site level. The commission responds that it is appropriate to make those persons that have been referred to the Texas or United States attorney general and whose referral results in a final judgment to be ineligible for EMS regulatory incentives at that site until they have demonstrated the site operation has addressed those issues which incurred the judgment. These eligibility requirements parallel rules currently adopted by the commission in Chapter 90, Regulatory Flexibility. Additionally, HB 2912 requires the commission to consider the compliance history of all participants in any new or previously established incentive program.

Subchapter C: Regulatory Incentives for Using Environmental Management Systems

The commission will create new Subchapter C, Regulatory Incentives for Using Environmental Management Systems, to accommodate the new rule sections that outline how a person would become eligible to request regulatory incentives for using an EMS.

New §90.30, Definitions, is adopted with changes to the proposed text. This adopted section will provide the meanings of the terms; environmental aspect; environmental impact; environmental management system; and site as they are used in Chapter 90. The definition for environmental management system is from HB 2997. The definitions for environmental impact and environmental aspect are from the International Organization of Standards (IOS) ANSI/ISO 14001 standard for "Environmental management systems - Specification with guidance for use," 1996. The definition for site is from the definition of a "person" in 30 TAC Chapter 3 with additional language added to make it site-specific instead of corporation-specific. Additionally, the commission replaced the letters with numbers and added an introductory sentence to conform with standard definition format.

Concerning §90.30, TCC commented that the definitions of environmental aspect and environmental impact are too broad in the current writing and should be revised to add flexibility and clarity. TCC recommended removing the word "any" at the beginning of each definition and starting the definitions with "elements" and "changes." Additionally TCC commented that these terms are used in §90.32 where an EMS must identify environmental aspects and impacts and that under the definition in the proposed rule, any element and any change that can interact with the environment would have to be included in the EMS. Finally, TCC stated that it is more appropriate to include "elements" and "changes" in the EMS but not all (any).

The commission responds that the definitions of environmental aspect and environmental impact are intentionally broad to ensure that the commission is not prescriptive in the EMS development process. These definitions allow the company the latitude to customize these terms to their operations.

The commission notes that the inclusion of the word "any" in §90.30 in the definition of "environmental aspect" was a typographical error and the original source from which the definition was derived does not contain this term. Accordingly, the commission has deleted the word "any" from that definition.

In regard to impacts of a particular aspect, the commission maintains that persons should identify any positive or negative impacts associated with a particular aspect at a site. The exclusion of an impact is not acceptable because it might change the priorities that a company places on a specific aspect and thereby change what goals and targets they establish under the EMS. Therefore, no change has been made to the definition of "environmental impact" in response to this comment.

Concerning §90.30, BP commented that the since the proposed definitions for environmental aspect, environmental impact, and environmental management system are from the IOS ANSI/ISO 14001 standard for "Environmental Management Systems - Specification with Guidance for Use" as published in 1996, that facilities that are ISO 14001 certified should not be required to go through an additional evaluation under §90.36 for program acceptance.

The commission responds that as noted in the preamble to this rule the definition for "environmental management system" was not taken from IOS's ANSI/ISO 14001 but directly from the language in HB 2997 which is different from the ISO 14001 definition for the same term. The definitions for environmental aspect and environmental impact were taken from the ISO 14001 standard because they were universally understood and acknowledged definitions for those terms. The language of HB 2997 places stronger emphasis on certain aspects of an EMS than ISO 14001, specifically in the areas of continuous improvement of environmental performance and compliance assurance; therefore, the commission asserts that obtaining ISO 14001 certification may or may not meet the requirements of this standard. No change has been made in response to these comments.

New §90.32, Minimum Standards for Environmental Management Systems, is adopted with changes to the proposed text. This adopted section will provide the minimum standards for an EMS that a site must follow in order to request regulatory incentives. The minimum standards are taken from HB 2997. The standards include: adoption of a written environment policy directed toward continuous improvement; identification and prioritization of the environmental aspects by the significance of the impacts of the site's activities; sets of priorities, goals, and targets for continuous improvement in environmental performance and for ensuring compliance with environmental laws, regulations, and permit conditions applicable to the facility; assignment of clear responsibility for implementation, training, monitoring, and corrective action to ensure compliance with environmental laws, regulations, and permit conditions applicable to the facility; documentation of procedures for and results of the use of the EMS; and routine intervals for scheduled evaluation and refinement of the EMS and demonstration of improved attainment of priorities, goals, and targets set, as well as improvement of the EMS itself.

Concerning §90.32, OPIC commented during the public hearing held on Thursday, September 27, 2001, that in listing the essential elements of an EMS, the list is incomplete.

In written comments filed on October 8, 2001, OPIC withdrew and clarified this verbal comment that was made at the September 27, 2001 public hearing. The commission responds that the rule language contains all of the standards the legislators intended to include in the statutory language. Additionally, the specific example cited by OPIC regarding emergency preparedness and corrective action is included in the evaluation of aspects. Under the proposed rule language, if an aspect has a significant emergency response element, a person would need to indicate how the site would mitigate that existing risk. In addition, emergency preparedness and response is a regulatory requirement and since an EMS requires compliance with regulatory requirements this would also be included in the EMS under regulatory obligations. Finally, corrective action is specifically mentioned in HB 2997 under §1 which amends the language of TWC, §5.127(c)(4) as an element of the EMS.

Concerning §90.32, ICE and ACT requested that the commission include a clear statement in the preamble to the final rules that the minimum standards in §90.32 will not be interpreted or implemented so narrowly that only certain types of EMS will be able to meet such standards and be approved under the EMS program.

The intent of this rulemaking is not to endorse any specific EMS standard but to encourage entities to develop EMS as they see fit that meet the minimum standards contained in this rule. The commission has added a clear statement to the preamble to clarify that a person's site can meet the standards for an EMS contained in these rules without using any specific standard already in existence for the development of an EMS.

Concerning §90.32, ACT commented that two crucial elements are missing from the list of minimum standards for an EMS including: a "commitment to sharing information with external stakeholder on environmental performance against all EMS objectives and targets," and a "commitment to pollution prevention that emphasizes source reduction." ACT commented that adding these two criteria would provide much more complete and useful guidance for EMS and help ensure consistency with EPA's standards for National Performance Track program. Finally, ACT stated that it could also help build public support for this approach, if justified, by providing the public with information needed to assess the usefulness of EMS in providing actual public health or environmental benefits.

The commission acknowledges that the sharing of information with external stakeholder groups is a positive element to include in the development of an EMS. The proposed rule contains language to indicate that a person's involvement of outside stakeholders in the site's EMS will be considered before granting any regulatory incentive. The commission disagrees, however, that this should be mandatory for all persons. Many small businesses already have resource constraints and to add the additional requirement for outside stakeholder involvement is a disincentive to developing an EMS.

The commission has commenced discussions with EPA on the NEPT program requirements. For the commission to grant federal incentives, the EPA will require the EMS to meet the standards contained in the NEPT program. Therefore, the commission added clarifying rule language to §90.38 regarding the modification of federal regulatory requirements to note that modifications of these requirements will only be approved if the EMS meets the NEPT program standards, but will not require this of all entities as part of the EMS regulatory incentive program.

In addition, the commission declines to make any changes in response to the suggestion regarding a "commitment to pollution prevention that emphasizes source reduction." All pollution prevention efforts should be recognized as positive elements of continuous improvement whether or not they meet the definition of source reduction. Additionally, some entities, including small businesses, may not have the resources or options to prevent or reduce pollution through source reduction. The proposed

rule language requires "continuous improvement in environmental performance." The commission responds that either improvements in compliance or pollution prevention are both acceptable methods of demonstrating continuous improvement in environmental performance. The commission further notes that the legislation does not preclude a person from receiving a regulatory incentive if the site's continuous improvement in environmental performance is not focused on source reduction.

Concerning §90.32, LSS commented that the commission should accept an organization's third-party certification to the ISO 14001 standard as sufficient documentation that its EMS meets the minimum standards of §90.32, and therefore, should allow the organization to receive regulatory incentives under this chapter.

The commission responds that the ISO 14001 standard, although the most widely accepted standards for the development of an EMS, does not necessarily ensure compliance with the minimum standards of this rule for EMS. Also, ISO 14001 is not the only accepted standard for the development of an EMS. ISO 14001 is written in general terms to make it applicable to all sources internationally, and does not have the very clear language of HB 2997 regarding "continuous improvement in environmental performance and for ensuring environmental compliance with environmental laws, regulations, and permit terms." ISO 14001 has not been applied uniformly to all facilities across the United States in regard to these critical areas due to company's and registrar's differing interpretations of the requirements of the ISO standards. Further, the use of a third-party auditor system which allowed certain types of auditors to be "grandfathered" into the ISO 14001 program has allowed for inconsistency in the qualifications of the third-party registrars used for certification. In addition to these factors, the compliance history language contained in HB 2912 requires the commission to consider compliance history in any participation in "innovative regulatory programs." Finally, the EPA has requested that the commission ensure that the site meets the requirements of the NEPT program in order to receive federal incentives. Certification to the ISO 14001 standard does not ensure compliance with NEPT. The commission has set up a mechanism in the rule to allow the use of an agency contractor or the company's third-party auditor in the EMS evaluation process, to help eliminate any redundant efforts on the part of the person requesting incentives. Guidance will be developed for the use of this option. Therefore, no change has been made in response to this comment.

Concerning §90.32, TCC commented that the EMS rule should be consistent with statutory language in HB 2997 and HB 2912 and that language not included in the legislation can change the meaning of the requirement and have significant effects, like removing flexibility. TIP commented that the commission should strive to ensure consistency between the regulations it enacts and the legislation that authorizes those regulations. TIP further stated that where the legislature uses clear and direct language, additional words and phrases not included in the underlying bill can have serious consequences and that where the legislature merely requires that a regulatory agency adopt rules, and provides limited guidance, the agency is free to incorporate language outside of that set forth in the legislation. However, TIP continued, where the legislature uses detailed language to describe a program, additional words and phrases added to the language can change legislative intent are clearly unauthorized.

The commission responds that every attempt was made to ensure that deviations from the exact statutory language did not change the basic requirements of the statutes. The commission has the authority to develop rule language that implements the statutes. The language the commission used in the rule provides specific detail on how the commission will implement the statutes. Therefore, no change has been made in response to this comment.

Concerning §90.32(1), TCC requested that the commission delete the words, "governing performance improvement and compliance assurance," from §90.32(1). TIP stated that, for example, proposed §90.32(1) provides that an EMS should include a "written environmental policy governing performance improvement and compliance assurance." TIP commented however, that the underlying legislation clearly states that the rules "must provide" that an EMS includes a "written environmental policy" and therefore the language regarding "performance improvement and compliance assurance" goes beyond the legislation, and is not authorized by the legislation. ICE and AECT recommended that the "environmental" be added to §90.32(1) between the words, "governing" and "performance" to make the language more consistent with the language in HB 2997 and HB 2912, §1.12.

The commission responds that the definition of "environmental management system" contained in HB 2997 states that "maintaining an environmental policy directed toward continuous improvement" is an essential element of an EMS. Although the definition does not contain the language "compliance assurance," it does imply the system will "address applicable environmental regulatory requirements." The commission has modified the language in §90.32(1) to more closely adhere to statutory language in the definition for EMS and the language is restated as "includes a written environmental policy directed towards continuous improvement." The commission has removed the reference to compliance assurance since it is clearly detailed in the minimum standards for the EMS that an EMS must ensure regulatory compliance to meet the requirements of this rule.

The commission responds that the language change recommended by ICE and AECT does not add meaning or clarification to the proposed rule language. Since these rules outline the requirements for an environmental management system, and not some other type of management system, all performance improvement documented in a site's EMS, should be related to environmental improvements. No change has been made in response to this comment.

Currently, both "identifies" and "prioritizes" are requirements listed in §90.32(2). The commission has separated these two requirements into two separate paragraphs and renumbered §90.32 to reflect the change. The commission made this change to clarify that a person's EMS must identify the environmental aspects of their site *and* that a person must prioritize the previously identified environmental aspects by the significance of the impacts of aspects at the site. (Emphasis added)

TCC requested that the word "prioritizes" be deleted from §90.32(2) and noted that an EMS does not necessarily prioritize aspects and impacts. AECT and ICE requested that the "and prioritizes" in §90.32(2) be deleted because the language is not supported by the legislation and it is not clear what "prioritize" means in the context of proposed §90.32(2). TIP commented on §90.32(2) that HB 2997 does not require that a person prioritize the environmental aspects and impacts of its activities.

The commission responds that the phrase "prioritizes" was added to the rule to emphasize the requirement in HB 2997, §5.127(c)(3), that a person "sets the priorities for continuous improvement in environmental performance and for ensuring compliance with applicable laws, regulations, and permit conditions" for a site. To set meaningful goals required in the statutory language, any person implementing one of the many accepted EMS standards would prioritize the aspects identified in HB 2997, §5.127(c)(2), by the significance of the impacts. Therefore, the commission responds that adding language to prioritize the aspects based on their impacts should not be an additional burden to a person implementing an EMS. Further, this is a necessary step to establish improvement goals and compliance priorities. The commission is developing guidance to provide a more detailed explanation of the requirements contained in the rule. The commission has modified the language in §90.32(2) and (3) to clarify that aspects should be prioritized by the significance of their impacts.

Concerning §90.32(3), LSS noted that §90.30(c) and §90.32(3) use the phrase, "continuous improvement" and that the phrase is also used in HB 2997. LSS stated that this phrase presents a conflict when an organization's EMS program is based on the ISO 14001 standard because ISO 14001 requires "continual improvement" which it defines as "the process of enhancing the environmental management system to achieve improvements in overall environmental performance in line with the organization's environmental policy." LSS continued that §4.2(c) of the ISO 14001 standard also states that the organizations environmental policy include "a commitment to continual improvement." LSS has been advised that some third-party ISO-14001 auditors will not accept the phrase "continuous improvement" in an organization's environmental policy. LSS requested that the commission address the conflict between the words "continuous" as stated in HB 2997 and "continual" as stated in the ISO 14001 standard.

The commission acknowledges that there may be wording differences between the proposed rules and the requirements of ISO; however, the commission derives its authority to write rules from the legislature. In this instance, the proposed rules are based on an express delegation of authority to promulgate rules through HB 2997 and HB 2912. House Bill 2997 expressly speaks in terms of "continuous improvement." While these rules use the language of HB 2997, the goal is the same whether one uses the word continuous or continual: that is EMS improvement over time. Therefore, a company has the flexibility and latitude on how it discusses or demonstrates "continuous improvement" in its environmental policy and associated EMS. The rule does not require that as EMS use the word "continuous" in its environmental policy to meet the requirements in §90.30(c) or §90.32(4). Further, the commission cannot address the inconsistencies in the ISO 14001 third-party auditor interpretation of "continuous" versus "continual." Therefore, no change has been made in response to this comment.

TCC requested that "EMS" be deleted from §90.32(5).

The commission responds that the proposed deletion of "EMS" does not change the meaning of the requirements. Therefore, the commission will modify §90.32(6) by deleting "EMS" and substituting the original language from HB 2997, §1, under the amended language to TWC, §5.127(c)(5) and add "procedures" instead of "EMS" from §90.32(6).

TCC requested that "written," "on a routine schedule," and "priorities" be deleted from §90.32(6). TCC also noted that routine schedules may make this rule more difficult to follow for small businesses and are not included in the statute.

An essential step in the continued improvement of an EMS "over time" is the evaluation of the EMS. This evaluation should occur at a regularly scheduled interval. In order to provide businesses that choose to seek a regulatory incentive under this rule maximum flexibility, the proposed rule language does not define what is "routine." This will allow businesses of any size, including small businesses, seeking regulatory flexibility under this rule to work within their own resource constraints. Additionally, while the word "routine" is not in HB 2997, this statute does require an evaluation and refinement "over time" to improve attainment of environmental goals and targets and the system itself. To refine the an EMS over time, a person would need to set evaluation periods against which to measure whether it is improving or not. Further, for a person to be accountable not only within its organization but also to the public, who has an interest in whether the EMS is working, it is essential that each site that uses an EMS document whether it is reaching its goals. Without written documentation about the progress a site is making in reaching its stated goals, it would be extremely difficult to note any progress made toward each goal over any period of time. Finally, while "priorities" is not included in the statutory language for this specific requirement, it is included in HB 2997, §1 under the amended language to TWC, §5.127(c)(3). Since priorities are what are used to evaluate and refine implementation, linking the three elements together is essential for a complete evaluation process. The intent of this legislation was to not only evaluate and refine goals and targets over time, but also to reevaluate priorities to ensure they are also still relevant, which is an essential element of goal and target refinement. No change has been made in response to this comment.

New §90.34, Regulatory Incentives, is adopted with changes to the proposed text. This adopted section will provide the range of regulatory incentives that could potentially be requested under the EMS regulatory incentive program. These incentives include, but are not limited to, on-site technical assistance, accelerated access to program information, modification of state or federal regulatory requirements that do not change emission or discharge limits, consideration of a site's implementing an EMS in scheduling and conducting compliance inspections, and inclusion of the use of an EMS in a site's compliance history and compliance summaries. While the basic language was taken from HB 2997, the adopted section was expanded to provide further clarification that state and federal regulatory incentives could be requested.

Concerning §90.34, ICE and AECT commented that the incentives in the current proposal are not adequate to motivate most companies that do not already have an EMS in place to develop and implement an EMS under the new rules. Accordingly, ICE recommended that the commission add to the proposal as many additional incentives as possible.

The language proposed in the rule has been crafted in a general fashion to allow for the offering of many types of incentives without excluding any specific incentives until further research is done in this area by the commission. The commission has also created a stakeholder group to support incentive development and is actively working with the EPA to create specific federal incentives for entities. The overwhelming response from entities requesting a variety of regulatory incentives indicates that

the proposed rule language is enough to motivate entities to develop an EMS to obtain regulatory incentives from the commission without having every incentive specifically stated in the rule. No change has been made in response to this comment.

Concerning §90.34, AECT and ICE commented that the commission is limited in terms of what incentives it can offer because of constraints imposed by federal laws or by EPA. AECT and ICE stated that unless some of these constraints are removed or loosened so that the commission can offer more incentives to encourage companies to develop and implement an EMS, they are skeptical that the incentives will be adequate to entice companies to develop and implement an EMS. Therefore, AECT and ICE encouraged the commission to continue, and, if possible, increase its efforts to convince EPA to remove or loosen federal constraints to the commission offering incentives that likely would entice companies to develop and implement an EMS. Additionally, TCC supported the implementation of regulatory incentives available to persons with an EMS. TCC further stated, however, due to existing federal statutes, the available incentives with real benefits are limited. TCC expressed opposition to including incentives in the EMS rule that cannot be implemented due to other federal requirements. TCC supported the inclusion of these types of incentives if the commission obtains the necessary waivers from EPA prior to rule publication. TIP commented that it is critical for the commission to obtain the necessary waivers from EPA so that the benefit of EMS can be effective with respect to federal regulations. TIP encouraged the commission to involve EPA at the highest levels. ExxonMobil commented that the regulatory incentives proposed by the commission are very limited. ExxonMobil supported and endorsed the suggestions submitted by TIP and strongly encouraged the commission to include these in the regulatory language.

The commission has commenced discussions with EPA on the NEPT program requirements. In order for the commission to grant federal incentives, EPA will require the EMS to meet the standards contained in the NEPT program. In addition EPA has submitted informal comments to the commission regarding how the EPA would like to form a partnership with the commission to facilitate the approval of federal incentives. Some suggestions from EPA include joint review of EMS to facilitate workload, the establishment of a joint panel of commission and EPA stakeholders to review incentives, the creation of a memorandum of understanding between the EPA and the commission to accomplish the goal of granting federal incentives, and the creation of a formal mechanism to allow the approval of federal incentive in support of our state program. No change has been made in response to these comments.

Concerning §90.34, TIP and Chevron commented that incentives for qualifying facilities should be reviewed on a case-by-case basis.

Until a formal incentives approval structure has been developed, the commission will review incentives requested on a case-by-case basis with specific review time periods so that a person can request incentives that may not be specifically detailed in the rulemaking and receive a response to their request in a timely fashion. No change has been made in response to this comment.

Concerning §90.34, BP commented that the commission should expand the proposed regulatory incentives.

The language proposed in the rule has been crafted in a general fashion to allow for the offering of many types of incentives without excluding any specific incentives until further research is done in this area by the commission. The commission has also created a stakeholder group to support incentive development and is actively working with EPA to create specific federal incentives for entities. No change has been made in response to this comment.

Concerning §90.34, Argent commented that it is not clear what "on-site technical assistance" and "accelerated access to program information incentives" are. Argent stated that if in fact they are related to the development, review, and approval of the EMS system, then they would need to be awarded before the program is fully developed and final approval is obtained. Argent suggested that these two incentives be allowed for a preliminary system that shows developmental progress and a commitment to timely implementation. Argent further stated that a tangible reward for program development would be a tax incentive, similar to that allowed for pollution abatement equipment.

In regard to the meanings of "on-site technical assistance" and "accelerated access to program information," the commission will prepare guidance that will provide further clarification on the statutory language included with this rule package as well as suggestions by regulated entities on what should be included in those incentive categories. On-site technical assistance includes any free assistance offered by the agency to entities participating in the EMS regulatory program that can include specific EMS program assistance or assistance with other regulatory programs in the agency. Accelerated access to program information means participants in the EMS incentives program may request additional mechanisms to obtain program information different from current agency practices in order to expedite their information needs from the agency. The Small Business and Environmental Assistance (SBEA) Division, which is the compliance assistance area of the commission, has trained staff on the evaluation and implementation of EMS. This assistance/incentive in a variety of forms will be available to all sizes of industry and local governments that wish to develop an EMS prior to the formal evaluation process. However, the commission is unable to offer tax incentives similar to those included with other existing programs for the development of an EMS without legislative authority. Therefore, since this option was not included in either HB 2997 or HB 2912, the commission cannot offer this specific incentive. No change has been made in response to this comment.

In addition to the general comments provided about §90.34, ExxonMobil, Chevron, TCC, TIP, ICE, Argent, AECT, and BP provided specific suggestions for the types of incentives the TNRCC should offer as part of the EMS rulemaking. ExxonMobil urged the commission to include as incentives guaranteed inclusion in the highest ranked category under the compliance history programs currently under development for all person's with approved EMS programs, and dispensation to submit emission inventories every other year rather than annually, noting that any variation noticed in the off- years could be reported during the reporting years. ICE suggested the following incentives: permit extensions; expedited permitting; permit flexibility, deletion, or consolidation of redundant requirements; consolidation of recordkeeping and reporting requirements; use of consolidated permits; fee waivers, fee reductions; announced compliance inspections (for companies that are not already receiving announced inspections), and policy incentives/non-rule procedures. BP suggested the following incentives: priority processing of permit applications, a reduction in emission and permit fees; a reduction in emission inventory reporting from

annually to every other year; consideration of case-by-case requests for incentives; adoption of a special notice of violation (NOV) dispensation procedure for facilities that have approved systems; defer penalty for violations corrected within a timely manner; allow pre-authorization of minor changes that result in insignificant emission increases; revision of the definition of "start of construction" to allow facilities begin some construction preparation activities; and grant a higher ranking for compliance history. Argent also suggested some regulatory incentives for final approval which could include, but are not limited to: tax benefits for the capital cost and training costs of program implementation; approval of EMS system forms and reports in place of agency forms and reports; and approval of on-line reporting systems in place of phone or fax reports. TCC suggested the following incentives: give higher priority to permit applications; authorize all emissions associated with any activity from a permitted point source as long as the emissions are below the emission rate in the maximum allowable emission rate table (MAERT); institute a preliminary NOV dispensation procedure; allow for the option of complying with state and/or federal regulatory leak detection and repair (LDAR) program rather than the new source review (NSR) permit LDAR programs; allow more flexibility in the use of predictive emissions monitoring systems (PEMS) by reducing qualification and follow-up procedures associated with PEMS; delete multiple references to federal requirements in permits issued under 30 TAC Chapter 116; invite companies that maintain approved EMS to participate in regulatory development groups that work with the TNRCC in developing regulations affecting industry; assign the same inspector to a given facility over time; eliminate duplicative monitoring requirements; periodically publish a list of incentives granted to participating facilities; replace specific recordkeeping requirements with more general recordkeeping requirements that allow flexibility while still demonstrating compliance with applicable emission rates; reduce reporting and monitoring requirements under the discharge monitoring report (DMR) provisions of the Clean Water Act (CWA); consider maintenance of an EMS as a good faith effort to comply with state and federal requirements; allow facilities that maintain electronic records additional retrieval time; limit conditions that sources must meet to be eligible for flexible permits (state) and plant-wide applicability limits (PALs) (federal); allow pre-authorization of minor changes that result in a de minimus emissions increase; allow longer averaging periods for determining compliance with emissions limits; allow facilities the flexibility to complete tie-ins prior to receiving construction approval on a new unit; provided that any emissions increase is de minimus; allow additional construction preparation activities to be undertaken before a company is deemed to have commenced "construction"; extend the applicability period for facilities that cannot begin construction within 18 months of their best available control technology (BACT) determination; allow waste to accumulate at sites for longer periods of time before off-site shipment; and reduce the frequency of maximum achievable control technology (MACT) reporting.

TIP requested the following incentives for having an EMS: maintenance of an EMS should show good faith effort under the penalty policy and should merit a 100% reduction in the penalty; certain standard permit conditions should be deleted or limited; the commission should look to only a two-year compliance history regarding decisions made in enforcement or permitting; a company's permit application or alternate method of control should be expedited such that it will be processed in no more than 50% of the maximum period; less frequent inspections; lower permit fees; and a single, specific point permitting contact. TIP also suggested the following incentives with a federal component: replace specific recordkeeping with general recordkeeping requirements that allow flexibility while still demonstrating compliance with applicable emission rates; reduce reporting and monitoring requirements under the DMR provisions of the CWA; consider maintenance of an EMS as a good faith effort to comply with state and federal requirements; allow facilities that maintain electronic records additional retrieval time; limit conditions that sources must meet to be eligible for flexible permit and plant-wide applicability limits; allow pre-authorization of minor changes that result in a de minimus emission increase; give high priority to permit applications by companies that maintain an EMS; allow longer averaging periods for determining compliance with emissions limits; allow facilities the flexibility to complete tie-ins prior to receiving construction approval on a new unit, provided that any emissions increase is de minimus; allow additional construction preparation activities to be undertaken before a company is deemed to have commenced "construction"; extend the applicability period for facilities that cannot begin construction within 18 months of the BACT determination; allow waste to accumulate at sites for longer periods of time before off-site shipment, without triggering resource conservation and recovery act (RCRA) permitting requirements; reduce the frequency of MACT reporting; require only recordation of final compliance results for continuous emission monitoring system (CEMS) and continuous monitoring system (CMS); institute a special NOV dispensation procedure for facilities with an approved EMS; allow facilities the option of complying with state and federal LDAR programs in place of NSR permit programs. TIP also requested the following state- based incentives: allow more flexibility in the use of predictive emissions monitoring by reducing qualifications and follow-up procedures associated with PEMS to make them more cost effective; delete multiple references to federal requirement in permits issued under Chapter 116; eliminate specific requirements to check for hydrogen sulfide (H_2S) leaks; invite companies that maintain an approved EMS to participate in regulatory development groups that work in the TNRCC in developing regulations affecting industry; assign the same inspector to a given facility over time; and eliminate duplicative monitoring requirements.

The commission has received numerous suggestions on regulatory incentives that the commission should offer to persons that implement EMS. The commission has collected the incentives requested under this formal comment period and is considering them. Due to the short time frame provided for adoption of this rulemaking, the commission is unable to adopt specific incentives by rule because many of the requested incentives require coordination at the federal as well as the state level and may require further rulemaking to implement. Further, the language proposed in the rule has been crafted in a general fashion, similar to the statutory language, to allow for the offering of many types of incentives without excluding any specific incentives until further research is done in this area by the commission. The commission has also created a stakeholder group to support incentive development and is actively working with EPA to create specific federal incentives for entities.

The commission will be handling the compliance history ranking and the use of an EMS in such ranking under a separate rulemaking specifically related to compliance history use. The

EMS rulemaking governing the voluntary EMS regulatory incentive program cannot include how EMS are included in compliance history as that is out of the scope of the this rulemaking and must be addressed under separate rulemaking. No change has been made in response to these comments.

ACT has commented that the language of §90.34(3) is so broad that it fails to provide the public with reasonable notice and opportunity to comment on the rule. ACT also commented that the language as proposed could arguably be interpreted to allow the commission to waive notice and hearing requirements. ACT also commented that §90.34(3) must be eliminated from the final rules.

The commission disagrees that the language of §90.34(3) is so broad that it fails to provide the public with reasonable notice and opportunity to comment on the rule. In addition, the commission disagrees that the rule language authorizes the commission to waive notice and hearing requirements without following the proper public participation requirements. This rule language does not change the existing mandatory procedures for authorizing significant amendments or changes to a permit which require notice. In addition, this rule language does not change existing procedures for granting modifications under the permitting or registration process. Therefore, the commission has not created any new authorization authority with this rulemaking than that which already exists at the commission.

Additionally, §90.34(3) must be read in conjunction with §90.38 which states: "Persons who request modifications of state or federal regulatory requirements which cannot be authorized by any other approval except a commission order must follow the requirements of Subchapter B of this chapter" because §90.34(3) provides the ability to request the incentive while §90.38 provides the mechanism for the executive director to approve the incentive. Section 90.16 specifically provides an opportunity for the public to receive reasonable notice, an opportunity to comment upon the modifications, and the ability to request a contested hearing.

Concerning §90.34, OPIC commented during the public hearing that where the commission lists regulatory incentives, the commission does not have the statutory authority to grant these incentives.

In written comments filed on October 8, 2001, OPIC withdrew and clarified this verbal comment made at the September 27, 2001 public hearing. The commission responds to that clarification in the following comment and response.

Concerning §90.34(3), OPIC commented that the commission should remove §90.34(3) because this incentive is not included in the EMS statute. The proposed §90.34(3) includes actions by the commission that the statute does not authorize. The commission is not granted statutory authority to alter the incentives included in the statute.

The commission disagrees with OPIC's comments that the proposed rules attempt to go beyond the types of incentives that the legislature authorized. Section 5.127(b) of HB 2997 states: "The incentives may include:...." While HB 2997 lists four different incentives, the commission believes that it is not limited to those four listed incentives. Specifically, Texas Government Code, §311.016(1) defines the term "may" in the Code Construction Act as creating discretionary authority or granting permission or a power. As such, the commission is vested with certain authority in expand the list of authorized incentives beyond the four listed in HB 2997.

ACT commented that §90.34(4) and (5) must be revised to more closely adhere to the statutory language. ACT stated that consistency with federal requirements may limit the ability of the commission to deviate from inspection schedules or to rely on announced inspection.

The commission responds that every attempt was made to ensure that deviations from the statutory language did not change the basic requirements of the statutes. The commission has the authority to develop rule language that implements the statutes. The language the commission used in the rule provides specific detail on how the commission will implement the statutes. Additionally, the commission notes that all of its functions must be carried out to be consistent with federal regulatory requirements. Based upon federally delegated or authorized programs the commission is bound to follow the rules and regulations unless EPA specifically authorizes a deviation from them. With regard to inspections, EPA only limits the commission's ability to schedule certain types of inspections but does not have requirements regarding announced or unannounced inspections. The new language in HB 2912, does have state requirements regarding the commission's ability to conduct announced inspections for poor performers which will be addressed in the compliance history rulemaking. Because there is no significant difference in the language proposed in §90.34(4) and the language in §1 of HB 2997 which amends TWC, §5.127(b)(3)(B), the commission will modify §90.34(4) to match the language in the statute.

ACT commented that proposed §90.34 should include the "consistent with federal requirements" language as well as the statutory words, "information regarding" the use of an EMS. ACT stated that "information regarding" an EMS is essential to determining the relevance of a site's adoption of an EMS in the context of compliance history.

The commission responds that its functions always must be carried out to be consistent with federal regulatory requirements. Based upon federally delegated or authorized programs the commission is bound to follow the rules and regulations unless EPA specifically authorizes a deviation from them. Therefore, since all such programs of the commission must be consistent with federal regulatory requirements, the addition of that language to this rule does not change or make more stringent the requirement that already governs the commission's functions as a whole in regard to any regulatory programs implemented that are based on federally delegated or authorized programs. The commission is already collecting information regarding an EMS as part of the evaluation process for approval of an EMS that will be considered in the context of compliance history. The addition of "information regarding" does not change the quality or quantity of information that will be collected for the commission's records under this rule and what types of information will be included in compliance history will be addressed in a separate rulemaking. No change has been made in response to these comments.

Concerning §90.34(5), TCC suggested that §90.34(5) should reflect that the EMS is a positive element of compliance history.

The commission responds that the actual use of an EMS as a positive component of compliance history is governed by a separate rulemaking package. The use of an EMS as a positive element will be included in that rule package. Therefore, no change has been made in response to this comment.

New §90.36, Evaluation of an Environmental Management System by the Executive Director, is adopted with changes to the

proposed text. This adopted section will provide details on how the executive director will evaluate whether the EMS meets the standards of this chapter and what documentation must be submitted. Upon receipt of a request to evaluate an EMS, the request will be reviewed and then an on-site evaluation will be scheduled with the person. After the on-site evaluation is complete, the executive director will provide the person information on whether the EMS meets the standards of the chapter or if it does not, how it can be improved to meet the standards. After all requirements of the chapter have been met, the person will be notified that the EMS meets the standards of the chapter and that they may qualify for incentives. In addition to the initial evaluation, the executive director or an approved third-party auditor will conduct a follow-up evaluation every three years from the date of the initial evaluation. Deficiencies noted during these follow-up evaluations must be corrected in a specified time frame or incentives could be terminated in accordance with the new §90.42 adopted in this rulemaking package. Additionally, the commission added new subsection (j) which includes the criteria the executive director must consider in the approval of a third-party auditor(s).

Concerning §90.36, AECT and ICE commented that where a company discovers noncompliance as a result of developing and implementing an EMS, the commission should use its enforcement discretion and not necessarily bring enforcement against a company. AECT and ICE also commented that bringing an enforcement action against a company when implementation of its EMS results in the company identifying and correcting noncompliance will only discourage other companies from participating in the EMS program.

The SBEA Division of the commission will be responsible for conducting the on-site evaluations. The personnel of this division are compliance assistance specialists and do not have the authority to issue NOVs for noncompliance. The intent of the on-site evaluation is not to identify areas of alleged noncompliance but to verify that the EMS has been implemented. If a noncompliance is witnessed, the function of the reviewer would be to determine how that noncompliance indicates a potential failure of the EMS and should be corrected. However, if the compliance assistance specialist witnesses a situation that is immediately dangerous to the environment, health, or safety of the surrounding community, the specialist is obligated to report the situation to the commission's regional office. A person who has implemented an EMS at a site should not have such a situation in existence, as the function of the EMS would be to identify, correct, and prevent the reoccurrence of such a situation. Therefore, it is not anticipated that an on-site evaluation would discourage any companies from participating in the EMS program because it is not an investigation. No change has been made in response to these comments.

Concerning §90.36(a), the commission added the word "written" before the word "documentation" to clarify that all documentation submitted to the executive director to request an on-site evaluation must be written. Additionally, the commission changed the word "their" to either "the person's" or "the site's" and added the language "for a specific site" in subsection (a) for clarity. Finally, the commission changed the word "should" to the word "must" to clarify that the items listed in §90.36(a)(1) - (11) are all a required part of the written documentation needed to request an on-site evaluation from the executive director.

Concerning §90.36(a), TIP commented that the commission must develop guidance outlining acceptable EMS. ACT commented that §90.36(a) should specify what type of documentation will be required. ACT stated that the documentation must include demonstration that the EMS is in fact, being implemented. TIP also commented that such guidance should set forth the documents a company must submit during the evaluation process, as well as the methods the commission will use to determine whether a company is improving compliance through the use of an EMS. In addition, TIP commented that commission should clarify through guidance how on-site evaluations will be carried out, if the commission maintains that requirement.

The commission responds that guidance will be developed outlining the elements of an EMS and outline how on-site evaluations will be carried out. The commission agrees that it would be helpful to outline documentation requirements to commence an evaluation and has added language to §90.36(a) that details what information must be submitted to commence the evaluation process. Language in §90.36(a)(1), (3), and (4) clarifies that the documentation required under these paragraphs is to verify the site has created the documentation required under the minimum standards in §90.32(1) - (4). The commission wanted a person submitting documentation under §90.36 to be clear that the person could submit the same documents and not have to create new ones to satisfy §90.36(a)(1), (3), and (4). Further, the commission does not agree with including documentation demonstrating that the EMS is being implemented in the initial request for evaluation because the on-site evaluation is the appropriate mechanism for verification that the system has been implemented. The executive director or approved third-party auditor will document the results of implementation after the evaluation is complete including any deficiencies noted and corrected.

In addition, the commission responds that the protocols used by the commission to review EMS will be publicly available as soon as they are developed. However, the commission will not prescriptively specify how a company should determine it is improving compliance since the commission notes that the same performance measurements cannot necessarily be applied to every site. The commission would also like to clarify that the legislation required "continuous improvement in environmental performance" and "ensuring compliance with environmental laws." Therefore, compliance improvement is only one measurement for continuous improvement. If a site already maintains a high level of compliance, measuring the improvement in compliance may not be the most appropriate measurement; whereas if a site has a poor compliance history, that may be the most important measurement. No change has been made in response to this comment.

Concerning §90.36, TIP commented that the TNRCC should have realistic expectations regarding the effectiveness of an EMS when conducting EMS conformance evaluations.

The commission acknowledges that a facility that is attempting its first EMS will have more action items in regard to conformance with the EMS standard for compliance assurance. Depending on the nature and magnitude of the non-conformance, the site may meet the standard but may not qualify for certain incentives initially. After demonstrating improvement in meeting specific compliance assurance goals, the person could request additional incentives as its system demonstrates improvement. The commission has added §90.40(b)(4) to clarify the incentive approval process in response to this comment.

Concerning §90.36, ICE and AECT commented that the rules should provide that EMS that are already certified under an existing recognized program (such as ISO 14001) should receive automatic approval under the EMS program, unless and until such certification lapses. BP commented that a person that is ISO 14001 certified should meet the minimum requirements for an EMS and be exempt from executive director evaluation under this section. TIP commented that the commission should allow companies that are currently certified through a recognized body to receive automatic approval and to maintain such approval as long as the facility's certification remains current. ExxonMobil commented that the commission should provide automatic certification under the Texas EMS program for persons who have obtained certification, endorsement, or attestation of a qualifying EMS under the terms and conditions of ISO 14001 (or similar type program). TCC commented that the requirement for on-site evaluation extends beyond the intent of the legislation and should be removed as a requirement for approval of the EMS and that on-site evaluation should be voluntary. TCC suggested that submittal of documentation to the executive director is required and this should be a sufficient method for evaluation of an EMS.

The commission responds that the ISO 14001 standard, although the most widely accepted standard for the development of an EMS, does not necessarily ensure compliance with the minimum standards of these rules for EMS. ISO 14001 is written in general terms to make it applicable to all sources internationally, and does not contain the very clear language of HB 2997 regarding "continuous improvement in environmental performance and for ensuring environmental compliance with environmental laws, regulations, and permit terms." Also, ISO 14001 has not been applied uniformly to all facilities across the United States in regard to these critical areas due to companies' and registrars' differing interpretations of the requirements of the ISO standards. In addition, the IOS does not have the delegated mission to ensure the protection of human health and the environment as the commission does. The ANSI-Registration and Accreditation Board (RAB) allowed certain ISO 9000 auditors to be "grandfathered" into the ISO 14001 program. This process has allowed for inconsistency in the qualifications of the third- party registrars used for certification and differing opinions on the scope of an EMS with regard to compliance assurance. Therefore, the commission will not be able to give blanket approval of any company with ISO 14001 certification. In addition, the compliance history legislation contained in HB 2912 also requires us to consider compliance history in the awarding of incentives. Therefore, automatic approval of an ISO 14001 system would not guarantee granting of a regulatory incentive if compliance history is unacceptable. Finally, EPA has requested that to receive federal incentives, the commission ensure that the site meets the requirements of the NEPT program. Certification to the ISO 14001 standard does not ensure compliance with NEPT. The commission also reiterates that this rule does not endorse one EMS standard over another. A company is free to choose which EMS standard they use to comply with the standards contained in this rule. The commission stresses that the rule allows for the use of an EMS on-site evaluation completed by a third-party auditor as long as the evaluation meets the same criteria as if the executive director completed the evaluation. Therefore, the commission is allowing for the company to make full use of work already completed on its EMS and is attempting to not add additional workload requirements to comply with this rule. The commission notes that it has not gone beyond the intent of the legislation by requiring on-site evaluations by noting that documentation is only one part of the minimum standards listed for an EMS. Other standards exist above and beyond the documentation that the executive director or an approved third-party auditor would need to verify through an on-site evaluation. No change has been made in response to these comments.

Concerning §90.36, ICE and AECT commented that proposed §90.36 should be revised by deleting the requirement for an on-site evaluations because EMS are by definition document-based systems, and in most cases, on-site evaluations should not be necessary or appropriate for EMSs. TIP also commented that the commission should not require mandatory on-site evaluations and that on- site evaluations should be voluntary. TIP suggested that facilities should have the option of submitting appropriate documentation, consistent with the requirements articulated by the legislature, in lieu of an on-site evaluation and that any evaluation of a facility's EMS should focus on evaluating the system for non-conformance. Finally, TIP, ICE, and AECT commented that the commission needs to clarify that when an on-site evaluation is necessary, the focus will be on evaluating documents associated with the proposed EMS and not on identifying possible areas of alleged noncompliance at the site.

In response to the request that evaluation of EMS should not include on-site evaluations or the on-site evaluation should be voluntary, the commission strongly disagrees with this statement. In all accepted standards for EMS, document control and records are only one part of the requirements for the establishment of an EMS. A system is not solely paper or documentation. Documentation is a tool to ensure consistency in the system. Without implementation of the system through behavioral change and management support, documentation can be meaningless. The commission has reviewed the protocols of the IOS, EPA's NEPT, Ecomangement and Audit Scheme (EMAS), Coalition for Environmental Responsible Economies (CERES), EPA Code of Environmental Management Principles for Federal Facilities (CEMP), and other EMS standard review and certification bodies in regard to EMS. All of the organizations and registrars contacted stated that on-site evaluation of the EMS was a critical step in verification that the EMS was not just a document-based system but in practice at the implementing facility. None of the organizations the commission contacted suggested that an EMS could be verified solely through review of documentation. The commission would not accept the evaluation of an EMS from any third-party certifying body that did not spend a majority of its time verifying that the EMS was implemented at the facility, not just on paper. It is also the intention of the commission to complete evaluations of the EMS and identify non-conformance of the systems, through the SBEA Division, not conduct compliance investigations. Inspection and enforcement functions are the responsibility of the commission's Office of Compliance and Enforcement (OCE). Therefore, no change has been made in response to this comment.

Concerning §90.36, TIP commented that the commission should make clear that an EMS does not necessarily have to meet the requirements of ISO 14001 to be approved, rather, ISO 14001 is merely an example of one type of EMS and that the commission will not discount other systems that meet program requirements.

The commission reiterates these rules do not endorse one EMS standard over another. A company is free to choose which EMS standard they use to comply with the standards contained in these rules. The commission has added additional language to the preamble to clarify this fact. Concerning §90.36, ACT requested that the commission address how it will avoid diverting

already too-scarce inspection and enforcement resources away from inspections and complaint response to EMS evaluations.

The commission responds that the primary responsibility for the EMS regulatory incentive program will reside with the SBEA Division with assistance from OCE regarding compliance history, site data, and related issues. As the SBEA Division has no responsibilities for inspection and enforcement only compliance assistance, the commission does not anticipate a significant resource diversion from OCE which conducts inspections, responds to complaints, and initiates enforcement actions. No change has been made in response to this comment.

Concerning §90.36, TIP suggested that where minor noncompliances are discovered during an evaluation, the commission should consider all the options available, including audit immunities, before proceeding against a company based on information discovered during an EMS evaluation.

The commission responds that a person at any time can notify the agency of their intent to conduct an audit under the Audit Privilege Act. Since an EMS will include auditing as part of its function, if the person has claimed immunity under the Audit Privilege Act and reported any violations discovered within the time frames for an audit provided by the Audit Privilege Act, any violations discovered by the person through the process of using an EMS auditing process could be protected under the Audit Privilege Act. It would be the person's responsibility to fully comply with all requirements of the Audit Privilege Act and to claim such immunity pursuant to the terms of the Audit Privilege Act. The intent of the EMS evaluation will be to identify non- conformances of the EMS, not complete a compliance inspection. Inspections are the separate function of OCE and will continue to be their function. No change has been made in response to this comment.

Concerning §90.36, TIP suggested that the commission create a negotiation process that allows approval steps during EMS development, as opposed to a single approval process after the EMS has been fully developed.

The existing rule language allows the company a negotiation process to correct any deficiencies noted in the EMS system because the commission will provide the person with a list of items to correct to meet the EMS standard. If the person corrects those items, the EMS can still be approved. The on-site evaluation is not the last step in the evaluation process. In addition, the commission will offer the assistance of the SBEA staff to entities requesting assistance on an EMS at any time during their development of an EMS. If there is an area of concern or question, a person can contact this division and receive clarification or assistance on a requirement prior to receiving a formal evaluation. No change has been made in response to this comment.

Concerning §90.36, ACT requested that the rule specifically provide that the results of either the executive director or third-party auditor on-site evaluation will be public information.

The commission responds that all documentation summarizing the results of the evaluation will be available for public review under the Public Information Act, Texas Government Code, Chapter 553. In addition, in order for a person to use a third-party auditor, the auditor will be required to submit the same types of verification information that the commission would have gathered if the executive director completed the evaluation. Therefore, no change has been made in response to this comment.

Concerning §90.36, Roehrig commented that a requirement to use only RAB certified ISO 14001 auditors, for example, would not be appropriate; the rule, although based extensively on ISO 14001, does not require or imply either certification or self-declaration of conformance to ISO 14001. Roehrig suggested that auditors having some formal training, e.g., American Society for Quality (ASQ) Certified Quality Auditors, who have appropriate environmental technical background and experience, including auditing experience, should be qualified. Further, Roehrig suggested that the commission provide prospective third-party auditors with appropriate program-specific training to ensure conformity and consistency with this commission program. Finally, Roehrig stated that since this is not an ISO 14001 program per se, it would probably not be appropriate to use ISO 14001 registrars as certifying bodies; the audit reports should be presented to the commission for review and program approval.

The commission will not require that the third-party auditor be an ISO-certified auditor; however the commission will set minimum qualifications and criteria which auditors with certain types of experience will already meet through other certifications such as ISO 14001. The commission has set up a mechanism in the rule to allow for the use of an agency contractor or the company's third-party auditor in the EMS evaluation process to help eliminate any redundant efforts on the part of the person requesting incentives. In addition to adding the criteria to new §90.36(j), the commission also will develop guidance on the required qualifications for third- party auditors and solicit comments from regulated entities and the public on what background and experience should be required in order to be approved. The commission also intends to provide training to entities on the evaluation and implementation of EMS through our Events Coordination and Education Section of the SBEA Division. If a registrar meets the appropriate requirements to be an approved third-party auditor, the commission does not see any issue with allowing them to evaluate EMS. It is anticipated that audit reports, in some form, will be submitted to the commission to verify the auditor followed the same standards the executive director would have used to complete the evaluation. No changes have been made in response to these comments.

Concerning §90.36, Chevron commented that an EMS will most likely contain certain data related to production rates and processes that would be considered business confidential. Further, Chevron stated that by allowing multiple contractors to perform the audits at various companies, information pertaining to innovative features and/or lessons learned in implementing the EMS could be shared in successive audits. At the very least, a contractor whose exclusive function is to conduct these evaluations or works exclusively for the commission should be used for the audits. Chevron also commented that a serious conflict could result if various consulting companies are used, and these companies are implementing and populating database systems for one company, while auditing the systems of other companies. Finally, Chevron commented that sharing of confidential business information could be addressed through confidentiality agreements, but the sharing of the structure of databases, and EMS methodologies, and corporate procedures remains a concern.

The commission notes that EMS documentation may be confidential. The Public Information Act, Texas Government Code, Chapter 553 governs the submittal of data that a company deems confidential. Therefore, it is the person's responsibility to note if any information provided to the agency is confidential at the time of the submission. That information would then not be shared with other entities based upon an evaluation by the

Texas Attorney General. If the commission hires a contractor to complete the evaluations on behalf of the commission, the contractor will be governed by the same constraints as a commission employee. If the person requesting the evaluation chooses to use its own auditor at its own expense, the person would control and manage its auditor. The commission would not have a role in determining the scope of control that a person gives to its contractor regarding confidential information. The commission states that the use of a third-party auditor instead of a review completed by the executive director is the decision of the person. Therefore, it is the person's responsibility to ensure that its third-party auditor does not disclose confidential business information to the agency unless it is appropriately marked. No changes have been made in response to these comments.

Concerning §90.36, TIP requested that the commission develop appropriate criteria for selection and use of third-party auditors. TIP stated that such auditors vary widely in their approaches and experience, therefore, it is appropriate for the commission to establish a list of approved third-party auditors. LSS commented that the commission needs to define the criteria necessary to be "an approved third-party auditor." LSS further commented that the commission also needs to state who will be responsible for the costs incurred for the on-site EMS evaluations performed either by the executive director or an approved third-party auditor. BP commented that the commission should develop criteria for registrars to petition for an "approval ranking" and that certifications by a TNRCC- approved ISO registrar should be accepted by the commission. BP continued that there is a need to establish a commission list of approved or ranked ISO 14001 registrars. Finally, BP commented that to differentiate registrars, the commission should consider: 1.) the experience of the auditor in environmental systems as well as practical industry experience, the certification status, the rate of turnover or tenure with specific registrar and contracted registrars versus permanently employed by the registrar; 2.) method of audit review (proportional time spent in manual, document, records review versus field observation and personnel interviews), and 3.) number of Texas or United States sites audited versus number recommended for certification.

The commission disagrees with the comment from TIP and BP regarding the establishment of a list of approved third-party EMS auditors. It would be inappropriate for this commission to create, monitor, and control such a list. The creation and maintenance of such a list would expose the commission to outside liability from those parties improperly excluded from the list to those parties improperly included on the list. Further, the commission may be exposed to liability to those persons seeking EMS who relied upon the list for damages occasioned by the use of an auditor from the list. The commission was not given the authority to assume such liabilities from the Texas Legislature in the enactment of the EMS statutes. The commission will be developing guidance on the qualifications and auditing protocols that will be required of any third-party auditor used as part of the evaluation process. This guidance will be coordinated through the EMS stakeholder group and will be available for review and comment prior to publication. The commission has added language to §90.36 that gives general criteria that will be used to approve third-party auditors but stresses that the application of the criteria will be detailed in guidance after the guidance has been reviewed and commented on by the regulated community and the public.

The commission will consider inclusion of the criteria suggested by BP in the development of the guidance document governing criteria for third-party auditors. The commission will not establish a list of approved third-party auditors because the EMS evaluation process will be completed on a site-specific not company-specific basis. The intent of approving a third-party auditor to complete the evaluation, was to recognize that a person may already be or have engaged the services of an auditor in the past that is reviewing or reviewed its EMS according to standards that meet or exceed the standards contained in these rules. This would allow the commission to recognize that review instead of starting a new evaluation process. The intent of this third-party approval option was not to give blanket authorization to any one company to complete these reviews on behalf of the commission for any site and have them accepted by the commission since the qualifications of auditors and entities can vary significantly from location to location. Therefore, no changes have been made in response to comments.

In response to who bears the costs incurred for the on-site EMS evaluation, the statutory language does not provide for any revenue or fee structure; therefore, the corresponding rule language also does not mention any fees required for an evaluation completed by the commission or the commission's authorized agent. If a person chooses to use their own third-party auditor, those costs would be borne by the person. No change has been made in response to these comments.

Concerning §90.36, Argent commented that they have invested significant effort to develop an on-line compliance system and would want to ensure the system meets commission requirements before investing in further development. Argent requested that a preliminary executive director review be allowed that is not subject to the 60-day timeline. Argent expressed concern that the rule is tailored to Clean Texas businesses that already have a program in place and does not reflect the processes of smaller companies. Argent suggested that the commission modify the rule language to allow for a preliminary review and a final review.

The commission responds that the intent of the EMS rule is that it will be implemented and evaluated on a site-specific basis. The commission will not have the resources to review and approve any type of on-line compliance system, software, or database as meeting the standards of this rule separate from actual implementation at a site. These items, as stand-alone products, cannot demonstrate implementation of an EMS at a site. They are tools that can be used at a facility implementing an EMS, but are only one part of the EMS. The SBEA Division of the commission is available at any time prior to requesting a final evaluation of the EMS to assist persons during their EMS development and implementation process if they have questions or concerns as to whether their EMS will meet the standards in this rule. An additional review process with no timeline would more than double the commitment time of commission resources in support of an evaluation procedure. That level of resources is not available. If after the on- site evaluation, the executive director identifies deficiencies in the EMS, the person will be given the opportunity to correct the areas where it might not meet the minimum standards under the current rule language. The commission disagrees that this rule has been tailored to Clean Texas businesses because the requirements of that program are more stringent than the standards contained in §90.34. No change has been made in response to these comments.

Concerning §90.36(b), the commission changed, throughout the paragraph, the word "their" to the word "the" for clarity.

AECT suggested the following changes for proposed §90.36(b): 1.) the term "Clean Texas Leader" needs to be defined; and 2.) the term "subsection" at the end of the last sentence should be changed to be "subchapter." BP commented that existing item §90.36(b), concerning Clean Texas Leaders, should be revised to require that the commission or other third-party auditor assess the equivalence of the Clean Texas Leader program with all ISO 14001 or other similar EMS programs. BP stated that as with Responsible CARE, there are significant overlaps for companies who are already doing things right. Further, BP commented that the definition of a sound EMS is best compared with ISO 14001 and that other programs often are collections of requirements that contain some positive attributes. Finally, BP commented that these positive attributes may not necessarily result in a cohesive EMS driving continual improvement.

The commission responds that Clean Texas Leader Program is an existing agency recognition program managed by the SBEA Division. Any interested person can obtain a copy of the Clean Texas Program requirements on the agency's web site at *www.cleantexas.org* or by contacting the SBEA Division at (512) 239-3100. Therefore, the commission will not add a definition for "Clean Texas Leader" to this rule.

Further, under §90.36(b), a Clean Texas Leader is only exempt from providing evaluation materials to the commission prior to requesting the on-site evaluation of its EMS. Section 90.36(b) does not exempt a Clean Texas Leader from receiving the actual on-site evaluation. The Clean Texas Leader program already requires a person to submit extensive information regarding their EMS program to the commission to be approved in this program. The purpose of this exemption is to reduce the paperwork burden on Clean Texas Leaders by not having them resubmit that same information already on file at the commission. Therefore, no change has been made in response to this comment.

Additionally, the commission responds that although ISO 14001 contains a definition for EMS, this rule is modeled after the definition contained in HB 2997. The commission acknowledges that all EMS standards are not equal, but as long as they meet the minimum standards of this rule the commission will not state that one system is better than another system for EMS development. If these other standards do not result in a cohesive EMS driving continual improvement, they would not meet the standards of this rule and would not be approved. Therefore, no change has been made in response to this comment.

Finally, the commission notes that the term "subsection" was used incorrectly and that the term should have been "subchapter." The commission has deleted the term "subsection" in §90.36(b) and replaced it with the term "subchapter."

Concerning §90.36(b), ACT questioned the rationale for exempting Clean Texas Leaders from providing the required documentation.

The commission responds that the Clean Texas Leader is exempt from submitting the EMS documentation because the Clean Texas Leader program already requires the Leader to submit the EMS documentation that will be required under this rule to the commission in order to be evaluated and approved for the Clean Texas Leader Program. The commission does not believe it is an effective use of a person's resources to resubmit documentation that is already on file with the commission. This existing information is available for public review at any time under the Public Information Act. No change has been made in response to this comment.

Concerning §90.36, the commission has added new subsection (c) to clarify that if a request for regulatory incentives is solely to request additional incentives under the EMS that has already been approved by the executive director, the person making the request is exempt from §90.36(a) and lists the alternative information a person must submit. Finally, the commission added a time frame in which the executive director must act regarding additional incentives requested under an EMS previously approved by the executive director. The commission added this subsection to more clearly outline the steps in regulatory incentive approval process.

Concerning 90.36(c) and (d), TCC commented the 30-day periods in §90.36(c) and (d) seem brief. TCC commented that these 30- and 60-day time frames are too strict for a voluntary program. TCC suggested that the commission should change the time periods in §90.36(c) and (d) to 60 days or longer. TIP also commented that strict, short time frames will only serve to dissuade companies from participating in this voluntary program. And that the commission should endeavor to make program requirements less burdensome. TIP commented that mandatory deadlines should be extended considerably, or eliminated entirely.

The commission recognizes that the time periods proposed may have been too short to allow an person to properly support the EMS evaluation procedure especially for a voluntary program which will require extensive resources to implement and maintain. Therefore, the commission will extend the 30-day requirements for the commission to respond back to the person in subsections (d) and (e) to 90 days. Proposed subsections (c) and (d) have been relettered to allow for the addition of new subsection (c). The commission would not extend this time period further because the person would be notified in a timely manner, whether its information was complete and also when it could expect the executive director to conduct an on-site evaluation.

Concerning §90.36(f), the commission replaced the word "their" with the word "the" for clarity.

Concerning §90.36(f), TCC commented that the timing in §90.36(f) is unclear. TCC noted that the proposal gives 30 days to respond, but no action is taken unless 60 days have passed. TCC suggested removing the 30-day time period identified in §90.36(f).

In response to the comment, the commission has rewritten subsection (f) and relettered to subsection (g), to delete the requirement to respond within 30 days to a request for information. Subsection (g) will state that if no response is received within 90 days, the commission will place the EMS evaluation request in an "inactive" status and may require the person to submit additional information to demonstrate compliance with this subchapter.

Concerning §90.36(g), BP commented that the commission should recognize that under the ISO 14001 standard, minimum surveillance is an annual visit by the registrar. Therefore, the commission should document in the preamble that ISO 14001 facilities exceed the three-year follow-up requirement in §90.36(g). BP stated that the annual registrar attestation of surveillance should be deemed adequate for ISO certified facilities. Finally, BP encouraged the commission to reconsider the appropriateness of allowing a non-ISO 14001 certified site to receive incentives with no review for three years. LSS requested that the commission state that it will accept proof of third-party recertification by a qualified third-party auditor of an

organization's ISO 14001 EMS program, rather than requiring the executive director to conduct additional follow-up evaluation. LSS stated that typically, an organization that has third-party certification of its EMS has semi-annual follow-up audits by the third-party certifying body. Finally, LSS commented that an additional commission evaluation every three years is not necessary for those parties with third-party certification.

In response to recognizing ISO 14001 as an equivalent surveillance to a commission review every three years, the commission notes that the purpose of an ISO 14001 surveillance is not the same as the ultimate mission of the commission, which is to ensure the protection of human health and the environment. The ISO 14001 level of surveillance is dependent on the registrar providing the surveillance and can vary in scope and depth and may not include all of the compliance or performance improvement goals of this rule. The commission asserts that all entities should have a review of their EMS by the executive director or an approved third-party auditor to ensure that the site is still operating to the intent of this standard and meeting their obligations. The rule language allows for a process where a person could use its third-party auditor to complete such reviews in lieu of a commission employee or contractor. Since certain incentives granted may already reduce or eliminate the normal inspection process for that site, the review proposed in this rule package is necessary to ensure that the person has abided by their commitments for its' EMS and continues to operate in an environmentally responsible manner. This review serves to verify that the EMS in place is providing compliance assurance and continuous improvement in environmental performance which are stressed strongly in the statutory language. The commission will be preparing guidance on what the three-year review will entail and anticipates that it will be an abbreviated version of the initial evaluation process and focus on achievement of environmental improvement while maintaining compliance assurance. The results of the each evaluation will be documented and submitted to the commission either by commission personnel or the approved third-party auditor (which could be the same auditor providing the ISO 14001 surveillance) to verify on the public record that the EMS still meets the requirements of this rule. The commission disagrees that only an ISO 14001 site should receive regulatory incentives since the requirements of these rules do not specify ISO 14001 as the only standard that can meet the requirements to qualify for regulatory incentives. The commission will ensure that any site approved under this rule will be required to have a routine schedule for evaluation and refinement of its EMS. In addition, the intent of the statutes was not to specify that ISO 14001 is the only means to meet the requirements of these rules and receive regulatory incentives, rather, that a site's EMS must meet the standards contained in these rules. No other changes have been made to the rule language.

Concerning §90.36(g), TIP commented that this subsection requires a follow-up evaluation at least every three years, however, no description of the process for such an evaluation is provided and that it is unclear whether the executive director will schedule such evaluation, or whether individual facilities are responsible for scheduling. The commission should clarify that it bears the responsibility for scheduling such evaluations. ExxonMobil commented the commission propose that any person who receives regulatory incentives must have a follow-up on-site evaluation every three years with the possibility of using a third-party auditor.

The commission will prepare guidance on what the three-year review will entail and anticipates that it will be an abbreviated version of the initial evaluation process and also allow the use of a third-party auditor to complete this function. The results of each evaluation will be documented and submitted to the commission either by commission personnel or the approved third-party auditor to verify on the public record that the EMS still meets the requirements of this rule and any deficiencies noted and corrected. In response to these comments, the commission has clarified in proposed §90.36(g), now relettered to §90.36(h), that it is the commission's responsibility to schedule the follow-up review and also that the EMS incentives granted will remain in place until such review is completed by the executive director and will not be rescinded without following the procedures for termination of incentives contained in this rule.

Concerning §90.36, ExxonMobil asked if the commission will provide a list of approved third-party auditors and if approved will ISO 14001 auditors be included in that group. ExxonMobil suggested that the commission include language providing for both of these suggestions in the final rulemaking.

The commission disagrees with this comment. It would be inappropriate for the commission to create, monitor, and control such a list. The creation and maintenance of such a list would expose the commission to outside liability from those parties alleging they were improperly excluded from the list to those parties alleging they were improperly included on the list. Further, the commission may be exposed to liability to those persons seeking EMS who relied upon the list, for damages occasioned by the use of an auditor from the list. The commission was not given the authority to assume such liabilities from the Texas Legislature in the enactment of the EMS statutes. No change has been made in response to this comment.

Concerning §90.36, TCC commented that the wording in the proposed rule states that the executive director or a third- party auditor will conduct a follow-up evaluation on a three-year period. TCC questioned the need for a three-year follow-up audit if the evaluation is required to be completed on-site. TCC stated that the steps that must be taken by a facility after a follow-up evaluation are unclear. TCC asked that if completed by a third party, must the results be submitted to the commission. Furthermore, TCC commented that the proposed language does not specify the status of the EMS if the executive director fails to complete the follow-up evaluation in a timely manner. TCC suggested that the three-year evaluation be based on document submittal with the option to complete an on-site audit of the EMS. TCC also commented that the language in the rule should indicate that the EMS approval is extended until the executive director completes the evaluation.

The commission responds that one of the regulatory incentives potentially available to a person under this program is reduced inspection frequency. In order to ensure that the person is meeting its compliance obligations despite a reduction or elimination of inspections, the executive director will want to verify on site that the person is still meeting all of its obligations. In addition, the executive director is required to measure the success of the EMS regulatory incentive program and a review of progress on site will help achieve this requirement.

The commission will prepare guidance on what the three-year review will entail and anticipates that it will be an abbreviated version of the initial evaluation process and also allow the use of a third-party auditor to complete this function. The results of the

evaluation will require some type of documentation and be submitted to the commission either by commission personnel or the approved third-party auditor to verify on the public record that the EMS still meets the requirements of this rule and any deficiencies are noted and corrected. In response to these comments, the commission has clarified in proposed §90.36(g), now relettered to §90.36(h), that it is the executive director's responsibility to schedule the follow-up review and also that the EMS incentives granted will remain in place until such review is completed by the executive director.

New §90.38, Request for Modification of State or Federal Regulatory Requirements, is adopted with changes to the proposed text. This adopted section will address the fact that certain types of incentives may only be legally approved through the use of a commission order and in some cases, the involvement of the EPA. In addition, language has been added to clarify that to qualify for federal incentives, the EMS must meet the standards of the EPA NEPT Program. Therefore, this section provides that if a person submits a request for incentives that cannot be approved through any other process but an order, that the executive director will notify the person that he/she must follow the requirements of Subchapter B.

ACT commented that §90.34(3) and §90.38 must be eliminated from the final rules. OPIC commented that the commission goes beyond the regulatory incentives which it is statutorily authorized to implement.

The commission disagrees with these comments that the proposed rules attempt to go beyond the types of incentives that the legislature authorized. Section 5.127(b) of HB 2997 states: "The incentives may include:...." While HB 2997 proceeds to list four different incentives, the commission believes that it is not limited to those four listed incentives. Specifically, Texas Government Code, §311.016(1) defines the term "may" in the Code Construction Act as creating discretionary authority or granting permission or a power. As such, the commission is vested with certain authority to expand the list of authorized incentives beyond the four listed in HB 2997.

New §90.40, Executive Director Action on Request for Regulatory Incentives through the Use of an Environmental Management System, is adopted with changes to the proposed text as published in the September 7, 2001 issue of the *Texas Register* (26 TexReg 6845). This adopted section will provide persons information on when the executive director would approve regulatory incentives depending on the type of incentive requested. Regulatory incentives specifically authorized by rule may be implemented as soon as the person is notified that the person's EMS meets the requirements of the chapter. Regulatory incentives that do not require an order or are not adopted by rule, will be approved within 60 days of notification that the person's EMS meets the standards of the chapter. In addition, this section details that the executive director shall consider in the decision to allow certain regulatory incentives, the person's compliance history, the efforts made to involve internal and external stakeholders, the person's participation in voluntary programs for environmental improvement, and the steps the person has taken to develop an EMS that exceeds the minimum requirements of this chapter. Finally, the commission added new §90.40(b)(4) to clarify that if the request for regulatory incentives is specifically for additional incentives after the evaluation of the EMS has been completed and the EMS approved, or for reconsideration of granting an incentive that was previously denied, the progress made at the site toward the environmental improvement goals and compliance assurance targets listed in the site's EMS will be considered in granting further regulatory incentives.

Concerning §90.40, Roehrig commented that ISO 14001 requires communication with both internal and external parties about an organization's EMS and environmental activities. However, Roehrig commented that the development of the EMS should be the organization's responsibility, including the decision regarding the extent of involvement of external parties in the development of the EMS. Further, Roehrig continued, once the EMS has been developed, it is appropriate to share the EMS information, as well as the environmental aspect and impact information and other environmental information with external interested parties. Finally, Roehrig commented that the "quality control" mechanism to ensure adequate communication with external interested parties should be the commission's review and approval of the EMS and that it will be important to an organization for the commission to provide information regarding its minimum requirements in this area.

The commission acknowledges that ISO 14001 has communication aspects in the standard. The commission agrees that the development of an EMS is an organization's responsibility, including the extent of involvement with external parties. However, in order to receive federal incentives, the EMS must meet the stakeholder involvement and reporting requirements of the EPA's NEPT. Federal incentives requested under this program must have EPA approval. The commission acknowledges it is appropriate to share EMS information with external parties and that most entities completing EMS have some type of program in place to do so. The commission notes that it will not establish minimum requirements in the area of stakeholder involvement because the degree of external involvement required of the EMS will be determined by the type of incentives requested by the person (state or federal) and the site's past compliance history, as well as operational constraints. Sufficiency of the program will be determined on a case-by-case basis with consideration given to the size, resources, compliance history, environmental impact, and other operational factors specific to the site.

Concerning §90.40(b), the commission added "where approval by the executive director is required under this subchapter" and deleted "when considering approval of regulatory incentives" to clarify which types of incentives are being referred to in subsection (b).

Concerning §90.40, ACT commented that the proposed rule language should be clarified because it does not clearly state what incentives will be offered nor does it specify what incentives are included in the proposed rule language. ACT also commented that §90.40(b) lists several "considerations" in the executive director's "approval" of regulatory incentives, but fails to provide any standards for evaluating those factors. ACT stated that the standards should be spelled out in the final rule to prevent arbitrary decisions. Finally, ACT commented that proposed §90.40(b)(2) is particularly vague, unworkable, and meaningless and that without clarification, the proposed rule fails to provide the public with reasonable notice and opportunity to comment on the rules.

The commission responds that incentives that will be offered are discussed in §90.34 of this rule, and it is not necessary to repeat those incentives in this section. This section of the rule only covers the executive director action on a requested incentive. The commission notes that for §90.4(b)(1), the standard for evaluating compliance history will be the most currently adopted regulatory standard or policy in place for evaluating compliance history.

In regard to stakeholder involvement, §90.4(b)(2) rule language has been modified, and it is noted that it will rely on standards already provided by the EPA under the NEPT and other published standards for external stakeholder involvement, compliance history (as noted previously), consideration of the size, resources, environmental impact and other operational factors of the site. Section 90.38 has been expanded to provide further clarification that for federal incentives, the site must meet the requirements of the EPA's NEPT program for stakeholder involvement. In addition, a new §90.40(b)(4) has been inserted which notes that when a person is requesting additional incentives after the initial evaluation has been completed or is requesting reconsideration of granting a specific incentive that was specifically denied, the executive director will consider the person's demonstration of attainment of environmental goals and targets under the EMS. The commission disagrees that the language in §90.40(b)(2) is "vague, unworkable, and meaningless" with the clarifications to the rule language and discussed previously.

Concerning §90.40, ExxonMobil commented that it is unclear to many in the regulated community how the commission intends to provide regulatory incentives under proscriptive mandates of the many state and federal rules and regulations under which we operate.

The commission notes that approval authority for regulatory incentives will depend on the type of incentive requested. Incentives will be approved by several mechanisms, including: 1.) by the executive director for incentives that are not legally required to be adopted by rule, permit amendment, or order; 2.) by rulemaking; 3.) by permit amendment; 4.) by order; 5.) through federal program approval criteria (NEPT, Environmental Council of States (ECOS)/EPA agreements, etc.). Other approval mechanisms may also exist that are not specifically listed in this response to comments. No change has been made to the rule in response to this comment.

Concerning §90.40, TCC commented that the proposed rule states that the executive director will consider steps taken to exceed the minimum EMS requirements. However, the minimum requirements for an EMS in §90.32 are so broad that it is unclear if or how a person could exceed these minimum requirements.

The commission responds that §90.38 has been modified per previous comment discussion to clearly state that for federal regulatory incentives, the EMS must meet the additional requirements of EPA's NEPT program which exceeds the minimum standards of HB 2997. In addition, the commission will publish guidance that reviews the minimum standards for EMS as well as components which would indicate an exceedence of the minimum standards to ensure a person can evaluate the sufficiency of its EMS. In addition, the SBEA Division of the commission will be available for direct contact at (512) 239-3100 to provide guidance on this subject.

Concerning §90.40(d), the commission modified the first sentence to clarify that the types of incentives referred to in subsection (d) are those that require approval by the executive director under this subchapter. Additionally, for clarity, the commission changed the word "their" to the word "the." Further, the commission added a sentence to provide that if a person requests regulatory incentives under §90.36(c), the executive director must act on that request within a certain time frame of the submission of the request. The addition of a time frame will allow requestors to know a date certain by which they can expect executive director action on the request. Finally, the commission added "or a rule change" to clarify that rule changes may take longer than 60 days.

New §90.42, Termination of Regulatory Incentives under an Environmental Management System, is adopted with changes to the proposed text. This adopted section will provide a mechanism for the executive director to terminate regulatory incentives if a person does not maintain their EMS to the standards of the chapter. In addition, it provides a mechanism for a person to terminate incentives if they no longer wish to participate in the EMS regulatory incentive program. In addition, the executive director may specify an appropriate and reasonable transition period to allow the person to come into full compliance with all existing commission requirements, including time to apply for any necessary permits or authorizations. The person can terminate the EMS regulatory incentives by sending notice through certified mail and shall reference the order number, if applicable. The person must be in compliance with all permits, existing statutes, or commission rules at the time of termination.

Concerning §90.42, ACT commented that the language should be modified to allow an affected person, as defined by commission rules, to petition for termination of a regulatory incentive that has been granted in return for use of an EMS.

The commission responds to the request to expand the petition for termination to include an affected person by noting that existing commission complaint procedures already allow for an affected person to file a complaint against a site with the regional office of the commission. If the complaint is substantiated or the person provides direct evidence to substantiate the claim, the regional office will initiate an investigation and possible enforcement action against the site. If the regional office identifies that the violation also indicates a failure of the EMS, then under this rulemaking, the person will be notified and given the opportunity to correct the deficiency of the EMS. If the deficiency is not corrected as required by the commission, then the commission can revoke the regulatory incentives. The commission does not believe an additional process for revoking regulatory incentives under the EMS program is necessary. Therefore, no change has been made in response to this comment.

Concerning §90.42, TCC supported a transition time after termination of regulatory incentives to come into full compliance as specified in subsection (b)(4). The transition time should also be reflected in §90.42(a)(2) by adding, "except as otherwise provided in this section."

The commission recognizes that the intent of the section is to provide a transition time for a site to come into full compliance. Therefore, the commission will add the clarifying language to §90.42(a)(2) to conform with §90.42(b)(4).

Concerning §90.42(b)(4), the commission added "under this section" after the word "terminated" for clarity.

New §90.44, Motion to Overturn, is adopted without changes to the proposed text as published in the September 7, 2001 issue of the *Texas Register* (26 TexReg 6845). This section will allow any person who has requested approval of an EMS and whose EMS was denied approval; any person who has been notified by the executive director that the approval for the person's system has been terminated; any person who has been denied regulatory incentives under §90.40; or any person who has been notified by the executive director that a regulatory incentive has been terminated to file a motion to overturn the executive director's decision with the Office of the Chief Clerk. Additionally, this section requires the motion to be filed within 23 days after the date

the commission mails notice of the executive director's decision to the person. Finally, this section notes that motions that are filed in a timely fashion are subject to 30 TAC §50.139(e) - (g).

Concerning §90.44, the commission changed the word "their" to "the person's" for clarity.

SUBCHAPTER A. PURPOSE, APPLICABILITY, AND ELIGIBILITY

30 TAC §90.1, §90.2

STATUTORY AUTHORITY

The amended sections are adopted under TWC, §5.103 and §5.105, which provide the commission with authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state. Specific statutory authorization is derived from HB 2997, 79th Legislature, 2001 and HB 2912, §1.12, 79th Legislature, 2001, which amended TWC by adding §5.127, which requires the commission to promulgate rules that establish a regulatory process that encourages the use of an EMS by regulated entities and TWC, §5.122, which delegates to the executive director the commission's authority to act on an application or other request to issue, renew, reopen, transfer, amend, extend, withdraw, revoke, terminate, or modify a permit, license, certificate, registration, or other authorization, or approval. The adopted rules also relate to the incentives the commission will use to encourage the use of an EMS by those same regulated entities.

§90.2. Applicability and Eligibility.

(a) Subchapter B of this chapter applies to any statute or commission rule regarding the control or abatement of pollution, except that it does not apply to requirements for storing, handling, processing, or disposing of low-level radioactive materials.

(b) Subchapter C of this chapter applies to any site that has an environmental management system (EMS) that meets the minimum standards in §90.32 of this title (relating to Minimum Standards for Environmental Management Systems).

(c) Except as provided in subsection (e) or (f) of this section, a person whose EMS for a specific site meets the minimum standards of §90.32 of this title may be eligible to receive regulatory incentives under this chapter.

(d) Except as provided in subsection (g) or (h) of this section, any person subject to any statute or commission rule regarding the control or abatement of pollution may be eligible to receive a regulatory flexibility order (RFO).

(e) A person who has been referred to the Texas or United States attorney general and has incurred a judgment against the site for which the person is requesting regulatory incentives, is ineligible to receive regulatory incentives at that site for using an EMS for a period of three years from the date the judgment was final.

(f) A person who has been convicted of willfully or knowingly committing an environmental crime regarding the site for which the person is requesting regulatory incentives is ineligible to receive regulatory incentives for using an EMS for a period of three years from the date of the conviction.

(g) A person who has been referred to the Texas or United States attorney general, and has incurred a judgment, is ineligible to receive an RFO for a period of three years from the date the judgment was final.

(h) A person who has been convicted of willfully or knowingly committing an environmental crime in this state, or any other state, is ineligible to receive an RFO for a period of three years from the date of the conviction.

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 November 26, 2001.

TRD-200107218
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: December 16, 2001
Proposal publication date: September 7, 2001
For further information, please call: (512) 239-4712

♦ ♦ ♦

SUBCHAPTER C. REGULATORY INCENTIVES FOR USING ENVIRONMENTAL MANAGEMENT SYSTEMS

30 TAC §§90.30, 90.32, 90.34, 90.36, 90.38, 90.40, 90.42, 90.44

STATUTORY AUTHORITY

The new sections are adopted under TWC, §5.103 and §5.105, which provide the commission with authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state. Specific statutory authorization is derived from HB 2997, 79th Legislature, 2001 and HB 2912, §1.12, 79th Legislature, 2001, which amended TWC by adding §5.127, which requires the commission to promulgate rules that establish a regulatory process that encourages the use of an EMS by regulated entities and TWC, §5.122, which delegates to the executive director the commission's authority to act on an application or other request to issue, renew, reopen, transfer, amend, extend, withdraw, revoke, terminate, or modify a permit, license, certificate, registration, or other authorization, or approval. The adopted rules also relate to the incentives the commission will use to encourage the use of an EMS by those same regulated entities.

§90.30. Definitions.

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

(1) Environmental aspect--Element of a person's activities, products, or services that can interact with the environment.

(2) Environmental impact--Any change to the environment, whether adverse or beneficial, wholly or partially resulting from a person's activities, products, or services regarding a specific site.

(3) Environmental management system--A documented management system to address applicable environmental regulatory requirements that includes organizational structure, planning activities, responsibilities, practices, procedures, processes, and resources for developing, implementing, achieving, reviewing, and maintaining an environmental policy directed toward continuous improvement.

(4) Site--For purposes of this subchapter, any individual location or contiguous location of a person.

§90.32. Minimum Standards for Environmental Management Systems.

A person may be eligible to receive regulatory incentives under this chapter if the site's environmental management system (EMS), at a minimum:

(1) includes a written environmental policy directed toward continuous improvement;

(2) identifies the environmental aspects at the site;

(3) prioritizes these environmental aspects by the significance of the impacts at the site;

(4) sets the priorities, goals, and targets for continuous improvement in environmental performance and for ensuring compliance with applicable environmental laws, regulations, and permit conditions;

(5) assigns clear responsibility for implementation, training, monitoring, and taking corrective action and for ensuring compliance with applicable environmental laws, regulations, and permit conditions;

(6) requires written documentation of the implementation procedures and the results of so doing; and

(7) requires a written evaluation, on a routine schedule, of the refinement to the EMS to demonstrate how attainment of the priorities, goals, and targets of the system has improved.

§90.34. Regulatory Incentives.

Regulatory incentives may include, but are not limited to:

(1) on-site technical assistance;

(2) accelerated access to program information;

(3) modification of state or federal regulatory requirements that do not change emission or discharge limits;

(4) consideration of a person's implementation of an EMS regarding a specific site in scheduling and conducting compliance inspections; and

(5) inclusion of the use on an EMS in a site's compliance history and compliance summaries.

§90.36. Evaluation of an Environmental Management System by the Executive Director.

(a) A person must submit written documentation of the person's environmental management system (EMS) for a specific site as part of a written request for an on-site evaluation of that site's EMS to the executive director to be eligible to receive regulatory incentives under this subchapter except as described in subsection (b) of this section. The documentation must include:

(1) the environmental policy statement as required in §90.32(1) of this title (relating to Minimum Standards for Environmental Management Systems);

(2) scope of the EMS (programmatic, geographic area, sites, facilities, or units included in the EMS);

(3) the prioritized environmental aspects for the site as required in §90.32(2) and (3) of this title;

(4) environmental improvement goals and targets for continuous improvement in environmental performance as required in §90.32(4) of this title;

(5) environmental performance indicators that the person measures to demonstrate the effectiveness of the EMS at the site including continuous improvement goals and audit functions;

(6) list of any independent or third-party reviews or certifications that have been completed on the EMS;

(7) main point of contact on the EMS;

(8) date when the requestor would be ready to have the executive director conduct a formal on-site evaluation of the EMS or whether the person will be requesting approval of the person's third-party auditor(s);

(9) a description of the regulatory incentives of interest to the person regarding that site;

(10) any other information requested by the executive director during the evaluation period;

(11) signature of the requestor or the duly authorized agent, that certifies that all information is true, accurate, and complete to the best of that person's knowledge.

(b) A person who qualifies as a Clean Texas Leader is exempt from providing documentation for the EMS regarding the specific site to the executive director if the information the person submitted to qualify to become a Clean Texas Leader is still current. Clean Texas Leaders must still submit a written request to the executive director for an on-site evaluation of the EMS to be eligible for regulatory incentives under this subchapter .

(c) If the request for regulatory incentives is solely to request additional incentives under the EMS regulatory incentive program for an EMS that has already been approved by the executive director, the person is exempt from the submittal requirements of subsection (a) of this section. The executive director will act on the request in accordance with the time frames in §90.40(d) of this title (relating to Executive Director Action on Request for Regulatory Incentives through the Use of an Environmental Management System). The person must instead submit the following information:

(1) a description of the additional regulatory incentives requested for the site;

(2) main point of contact for the EMS; and

(3) any additional information requested by the executive director to evaluate the regulatory incentive request including demonstration of attainment of environmental performance improvement goals or targets.

(d) Within 90 days of submission of the request for evaluation of an EMS, the executive director shall notify the requestor in writing of whether the information provided is complete or whether additional information must be submitted to the executive director.

(e) Within 90 days of submission of the request for an on-site evaluation of an EMS, the executive director will schedule with the requestor an on-site evaluation to be performed by the executive director or allow the use of the results from an approved third-party auditor that satisfies the evaluation criteria in subsection (j) of this section.

(f) The executive director will notify the person who submitted the request for evaluation of whether the EMS qualifies for regulatory incentives under this subchapter. If the EMS does not qualify for regulatory incentives under this subchapter, the executive director will send the person who requested an evaluation of the EMS a notice detailing where the EMS does not meet the standards in §90.32 of this title.

(g) If the person makes no formal response within 90 days to the executive director's request regarding areas where the EMS does

not meet the standard in §90.32 of this title, the EMS evaluation will be placed on inactive status and the person may be required to submit additional information to demonstrate compliance with this subchapter.

(h) If a person receives regulatory incentives under this subchapter for a specific site, the executive director will schedule a follow-up on-site evaluation by the executive director or authorize the use of an approved third-party auditor to conduct a follow-up on-site evaluation of the EMS at least every three years from the date of the initial evaluation. Regulatory incentives granted prior to the three-year evaluation will remain in effect until such time as the executive director terminates them under §90.42 of this title (relating to Termination of Regulatory Incentives under an Environmental Management System).

(i) Any areas in which the executive director or an approved third-party auditor finds the EMS does not meet the standards in §90.32 of this title during the follow-up evaluation shall be corrected in accordance with the schedule required by the executive director. If the deficiencies are not corrected within the time frame allowed or are of such a nature to indicate the EMS no longer meets the standards of this subchapter, the regulatory incentives may be terminated under §90.42 of this title.

(j) In order for the executive director to approve the use of a third-party auditor(s) to complete the on- site evaluation of the EMS or to recognize the results of past evaluations completed on an EMS as equivalent to the executive director's review process, the following criteria shall be considered by the executive director:

(1) ability of the auditor's EMS review protocols to meet the same requirements as the executive director's audit protocols;

(2) ability of the auditor's documentation of the EMS evaluation process to provide comparable information to the commission that the executive director would collect if completing the same evaluation;

(3) independence of the third-party auditor completing the evaluation;

(4) demonstrated experience of the auditor in EMS programs and environmental regulatory programs and auditing;

(5) method of audit review--time allotted for review of documentation versus field observation and personnel interviews to confirm performance of EMS;

(6) educational background of auditor;

(7) certifications already granted to the auditor by other audit/standards bodies for EMS or auditing methodologies; and

(8) any other information the executive director deems necessary to verify the capability of the auditor to complete the evaluation process as the executive director would have if he completed the evaluation.

§90.38. Requests for Modification of State or Federal Regulatory Requirements.

(a) Persons who request modifications of state or federal regulatory requirements which cannot be authorized by any other approval method except a commission order must follow the requirements of Subchapter B of this chapter.

(b) Persons who request modification of federal regulatory requirements under this subchapter must also meet the standards for the EPA's National Environmental Performance Track (NEPT) Program in order to receive federal regulatory incentives.

§90.40. Executive Director Action on Request for Regulatory Incentives through the Use of an Environmental Management System.

(a) Executive director action on regulatory incentives authorized by rule is not required. Regulatory incentives authorized by rule may be implemented as soon as the person is notified that its environmental management system (EMS) meets the requirements of §90.32 of this title (relating to Minimum Standards for Environmental Management Systems).

(b) Where approval by the executive director is required under this subchapter, the executive director shall consider, among other factors:

(1) the compliance history of the person who submitted the EMS; and

(2) the efforts made by the person to include stakeholder involvement and environmental reporting of the person's EMS internal and external to the site with consideration of the size, resources, compliance history, environmental impact, and other operational factors of the specific site;

(3) the person's participation in voluntary programs for environmental improvement; and

(4) if the request is specifically for additional incentives after the evaluation of the EMS has been completed and approved, or for reconsideration of granting an incentive that was previously denied, the progress made at a site toward the environmental improvement goals and compliance assurance targets listed in the site's EMS will be considered in granting further regulatory incentives.

(c) When considering regulatory incentives which modify state or federal requirements, the executive director shall consider the steps the person has taken at the site to develop an EMS that exceeds the minimum requirements in §90.32 of this title.

(d) Where approval by the executive director is required under this subchapter, the executive director shall act within 60 days of notifying the person that the EMS meets the standards outlined in this subchapter. If a request for additional regulatory incentives is submitted under §90.36(c) of this title (relating to Evaluation of an Environmental Management System by the Executive Director), the executive director shall act on the request within 60 days of its submission. These time frames may be extended at the request of the person or the executive director to allow additional approval time for incentives that require approval by the EPA for implementation or adoption by rule.

§90.42. Termination of Regulatory Incentives under an Environmental Management System.

(a) Termination by the recipient.

(1) A person who receives regulatory incentives for a site through the use of an environmental management system (EMS) that meets the standards in this subchapter may terminate the regulatory incentives at any time by sending a notice of termination to the executive director by certified mail.

(2) Once a regulatory incentive is terminated, the site for which a person has requested incentives must be in compliance with all permits, existing statutes, or commission rules affected by the regulatory incentives granted at the time of termination except as otherwise provided in this section.

(3) If the regulatory incentives approved involve the use of an order, the person who received the regulatory incentives shall comply with the applicable provisions of §90.20 of this title (relating to Termination).

(b) Termination by the executive director.

(1) Noncompliance with the terms and conditions of the regulatory incentives, Texas Water Code, §5.127 or §5.131, or this chapter, may result in the regulatory incentives being terminated.

(2) If a person who is approved to use regulatory incentives for a specific site under this subchapter is found by the executive director or an approved third-party auditor to no longer meet the requirements of this subchapter, the executive director shall notify the person in writing of the deficiencies found.

(3) Any areas in which the executive director or an approved third-party auditor finds the EMS does not meet the standards in §90.32 of this title (relating to Minimum Standards for Environmental Management Systems) during the follow-up evaluation shall be corrected in accordance with the schedule required by the executive director. If the deficiencies are not corrected within the time frame allowed or are of such a nature to indicate the EMS no longer meets the standards of this subchapter, the regulatory incentives will be terminated under this section.

(4) In the event regulatory incentives are terminated under this section, the executive director may specify an appropriate and reasonable transition period to allow the site previously operating under regulatory incentives to come into full compliance with all existing commission requirements, including time to apply for any necessary permits or other authorizations.

§90.44. Motion to Overturn.

Any person who has requested approval of an environmental management system (EMS) and whose EMS was denied approval, any person who has been notified by the executive director that the approval for the person's system has been terminated, any person who has been denied regulatory incentives that the executive director is authorized to approve under §90.40 of this title (relating to Executive Director Action on Request for Regulatory Incentives through the Use of an Environmental Management System), or who has been notified by the executive director that a regulatory incentive has been terminated, may file with the chief clerk a motion to overturn the executive director's decision. A motion must be filed within 23 days after the date the commission mails notice of the executive director's decision to the person. Timely motions are subject to §50.139(e) - (g) of this title (relating to Motion to Overturn).

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 November 26, 2001.

TRD-200107219
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: December 16, 2001
Proposal publication date: September 7, 2001
For further information, please call: (512) 239-4712

♦ ♦ ♦

CHAPTER 281. APPLICATION PROCESSING

SUBCHAPTER A. APPLICATION PROCESSING

30 TAC §281.21

The Texas Natural Resource Conservation Commission (commission) adopts an amendment to §281.21, Draft Permit, Technical Summary, Fact Sheet, and Compliance Summary. Section 281.21 is adopted *without change* to the proposed text as published in the August 24, 2001 issue of the *Texas Register* (26 TexReg 6259) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The adopted rule implements certain requirements of Senate Bill (SB) 324, 77th Legislature, 2001. Senate Bill 324 became effective on May 26, 2001.

In accordance with SECTION 18.05(f) and (g) of House Bill (HB) 2912 ("Sunset"), 77th Legislature, 2001, former law relating to compliance history is continued in effect for underground injection control (UIC) applications for permit issuance, amendment, or renewal submitted before September 1, 2002. Because SB 324 became effective on May 26, 2001, it is former law and applies to any UIC applications for permit issuance, amendment, or renewal pending on or submitted on or after May 26, 2001, and before September 1, 2002. For those UIC permit applications submitted on or after September 1, 2002, the compliance history requirements of HB 2912 will apply.

The purpose of the adopted rule is to implement certain requirements of SB 324. Senate Bill 324 amends Texas Water Code (TWC), §27.051(e), by requiring the commission to establish a procedure for the preparation of comprehensive summaries of an applicant's compliance history, including the compliance history of any corporation or business entity managed, owned, or otherwise closely related to the applicant.

The commission currently has procedures for preparation of compliance summaries for UIC permit applications, and these procedures are specified in existing §281.21(d). These current procedures specify that a compliance summary shall cover at least the two-year period preceding the date on which the technical review is completed and shall include: the date(s) and descriptions of any citizen complaints received; the date(s) of all agency inspections, and for each inspection, whether a condition of noncompliance was alleged by the inspector and a brief description of the resulting environmental impact; the date(s) of any agency enforcement action and the applicant's response to such action; the date(s) and description of any incident the applicant reported to the agency which required implementation of the facility contingency plan, if applicable; and the name and telephone number of a person to contact for additional compliance history. In addition to these requirements listed in the rule, compliance summary procedures specified by the commission include a current assessment of compliance and a statement indicating if a current inspection with alleged noncompliances has been resolved, a statement of whether the company is current with facility and generator fees, the date(s) and description of any pending or prior enforcement actions against the facility and the facility's response, as well as any pending or prior enforcement actions against facilities that are owned or operated by the current applicant.

Adopted §281.21(d)(7) implements SB 324 by specifying additional information for comprehensive compliance summaries prepared for injection well applications. Adopted §281.21(d)(7) specifies that the comprehensive compliance summary shall include the components in existing §281.21(d)(1) - (6) and provides information on the applicant and any entities closely related to the applicant for all media regulated by the commission

including, but not limited to, underground injection, solid waste, water, and air.

In the past, compliance summaries for injection well permits included only information relative to the site which is the subject of the current application, as well as other UIC and other solid waste facilities at other sites owned or operated by the applicant whether permitted or not. Compliance summaries for facilities with injection wells have traditionally included only inspections and reports of noncompliances related to solid waste or UIC. Adopted §281.21(d)(7) which is intended to implement the amendments to TWC, §27.051(e), significantly broadens the required elements of a compliance summary for an injection well permit application to include all compliance issues relating to a regulated entity. Specifically, a comprehensive compliance summary would include all compliance issues for all media regulated by the commission including, but not limited to, underground injection, solid waste, water, and air.

Senate Bill 324 amendments to TWC, §27.051(e) also require the commission to prepare comprehensive summaries not only of the applicant's compliance history, but also the compliance history of any corporation or business entity managed, owned, or otherwise closely related to the applicant. To implement this change, adopted §281.21(d)(7) requires that a compliance summary for a regulated entity applying for an injection well permit be broadened to include the compliance history of any corporation or business entity managed, owned, or otherwise closely related to the applicant. Closely related entities include business entities that share common partnership members, association members, or corporate officers with the applicant; or business entities in which the applicant has an ownership interest of at least 20%. Perhaps the most applicable accounting standard and business practice that can be applied to the statutory reference to "closely related" is how the accounting profession determines the accounting treatment for an investment. When an investor corporation owns more than 50% of another entity it possesses a controlling interest. An investor corporation may hold an interest of less than 50% and therefore not possess legal control; however, its investment in voting stock gives it the ability to exercise significant influence over operating and financial policies of an entity. Consequently, the accounting profession established a guide for accounting for investors when 50% or less of common voting stock is held. This guide, Accounting Principles Board Opinion No. 18 (APB 18), also provides an operational definition of significant influence. To achieve a reasonable degree of uniformity in the application of "significant influence" criterion, APB 18 concludes that an investment (direct or indirect) of 20% or more of the voting stock of an entity should lead to a presumption that an investor has the ability to exercise significant influence over the entity. The commission proposes to use 20% ownership as the standard for determining whether an entity is closely related. Using 20% as the standard would establish a bright line for the commission and for an applicant in determining what entities will be included in a compliance summary. This change would result in a significant increase in the numbers and types of facilities that are reviewed during the preparation of a compliance summary for a UIC permit application.

SECTION BY SECTION DISCUSSION

Adopted §281.21(d)(7), Draft Permit, Technical Summary, Fact Sheet, and Compliance Summary, implements the changes to TWC, §27.051(e), relating to the commission's consideration of the compliance history of the applicant and related entities prior to the issuance of an injection well permit.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute.

Although the intent of the rule is to protect the environment or reduce risks to human health from environmental exposure, it is not a major environmental rule because it does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The rule will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the rule merely requires the commission to prepare a more comprehensive compliance history for UIC applications, and requires the commission to deny permits to applicants with unacceptable compliance histories. Certain provisions of TWC, Chapter 27, were amended by SB 324 during the 77th Legislature, 2001. These amendments became effective on May 26, 2001. The adopted rule is intended to implement certain provisions of SB 324. Senate Bill 324 amends TWC, §27.051(d), and broadens its applicability. Senate Bill 324 further amends TWC, §27.051(e), by directing the commission to deny the permit in cases where the commission finds that the compliance history is unacceptable. The rule will implement these statutory changes. Furthermore, the rulemaking does not meet any of the four applicability requirements listed in §2001.0225(a). The adopted rule does not exceed a standard set by federal law, because there is no comparable federal law. The adopted rule does not exceed an express requirement of state law, because it is consistent with the express requirements of SB 324. The adopted rule does not exceed a requirement of a delegation agreement, because there is no applicable delegation agreement. The adopted rule has not been adopted solely under the general powers of the agency, but has been adopted under the express requirements of SB 324.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this adopted rule in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. Texas Government Code, §2007.003(b)(4), provides that Chapter 2007 does not apply to this adopted rule because it is reasonably taken to fulfill an obligation mandated by state law. The specific purpose of this adopted rule is to incorporate the new requirements relating to the preparation of compliance summaries by the executive director and the consideration of applications by the commission, which are contained in TWC, §27.051(d) and (e). Promulgation and enforcement of this adopted rule will not affect private real property which is the subject of the rule because the rule language merely incorporates the new requirements relating to the preparation of compliance summaries by the executive director and the consideration of applications by the commission, which are contained in TWC, §27.051(d) and (e). There is no burden on private real property because the adopted standards are not considered to be more stringent than existing standards. The subject adopted regulations do not affect a landowner's rights in private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this adopted rulemaking for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council, and determined that the rulemaking will not have direct or significant adverse effect on any Coastal Natural Resource Areas, nor will the rulemaking have a substantive effect on commission actions subject to the CMP.

HEARING AND COMMENTERS

A public hearing on the proposed rulemaking was held in Austin on September 13, 2001, at 2:00 p.m. in Building F, Room 2210 at the Texas Natural Resource Conservation Commission complex, located at 12100 Park 35 Circle. No individuals presented oral statements during the public hearing. The comment period closed on September 24, 2001.

A total of seven commenters provided both general and specific comments on the proposed rulemaking that included Chapter 281, Application Processing; Chapter 305, Consolidated Permits; and Chapter 331, Underground Injection Control. The amendments to Chapters 305 and 331 are being adopted concurrently in this issue of the *Texas Register*. The following commented on the proposal: Baker Botts, L.L.P (Baker Botts); Dupont; United States Environmental Protection Agency (EPA); Fritz, Byrne & Head, L.L.P (FBH); Hance, Scarborough, Wright, Ginsberg & Brusilow (HSWGB); Jenkins & Gilchrist (J&G) on behalf of Huntsman Petrochemical Corporation; and Texas Chemical Council (TCC).

RESPONSE TO COMMENTS

Baker Botts commented that the proposed rules extend the reach of compliance history, but go beyond the statute in doing so. The statute states the compliance history must include "any corporation or business entity managed, owned, or otherwise closely related to the applicant." Baker Botts stated that the proposed rules construe the "closely related" language extremely broadly to include "business entities that share common partnership members, association members, or corporate officers with the applicant; or business entities in which the applicant has an ownership interest of at least 20%."

The commission disagrees with this comment. The commission believes that the proposed definition of "closely related" is consistent with, not broader than, the statute (SB 324). The statute does not use terms of limitation when referring to related entities. Specifically, TWC, §27.051(d) states that "the commission, in determining if the use or installation of an injection well is in the public interest under Subsection (a)(1) of the section, shall consider, *but shall not be limited to the consideration of*: 1) compliance history of the applicant and related entities in accordance with Subsection (e) of this section ..." (emphasis added). The statute requires the preparation of comprehensive summaries of the applicant's compliance history, including the compliance history of any corporation or business entity *managed, owned, or otherwise closely related* to the applicant (emphasis added) (TWC, §27.051(e)).

The proposed rules provide a clear standard which is consistent with the statutory language. The proposed rules would define as "closely related entities" any "business entities that share common partnership members, association members, or corporate officers with the applicant; or business entities in which the applicant has an ownership interest of at least 20%." Thus, entities could be closely related in one of two ways, either: 1) the applicant and the other entity share at least one person who is a partner, officer, or member in both entities; or 2) the applicant has an ownership interest of at least 20% in the entity. The commission has made no changes in response to this comment.

Baker Botts commented that the agency bases the 20% figure in the proposed rule on the 1971 guidance document by the APB 18, entitled *The Equity Method of Accounting for Investments in Common Stock*. Baker Botts commented that the applicability of the standards put forth in APB 18 to this situation is questionable. Baker Botts read the APB 18 to state that the ability to influence operating and financial policies may be indicated in many ways: board representation; participation in policy making processes or material transactions; interchange of management; or technological dependency. Baker Botts stated that, after these primary indicia, percent of ownership is described as "another important consideration" with the opinion noting that "determining the ability of an investor to exercise significant influence is not always clear and applying judgement is necessary to assess the status of each investment." Baker Botts stated that APB 18 cautions the use of the 20% "rule" as a litmus test for determining control.

Dupont commented that by using the proposed 20% standard, one assumes that an investor has the ability to exercise significant influence, which would mean they would be technologically and managerially in control.

TCC commended the commission for looking to formal accounting principles to develop what percentage ownership constitutes the ability of an entity to control or influence the actions of a corporate affiliate. TCC commented, however, that a close reading of the APB 18 reveals that the 20% level chosen by the commission is not a "bright line" used to determine level of control, but rather is simply an indicator of possible control.

The commission partially agrees with these comments. The commission agrees that APB 18 provides indicators for determining whether investors may be able to exert significant influence over operating and financial policies of an investee. Accounting Principles Board Opinion No. 18 states that the ability to exercise significant influence may be indicated in several ways: representation on the board of directors; participation in policy making processes; material intercompany transactions; interchange of managerial personnel; or technological dependency. In APB 18, the Board also mentions as another important consideration the extent of ownership by an investor in relation to the concentration of other shareholdings. The Board then points out that substantial or majority ownership of the voting stock of an investee by one investor does not necessarily preclude the ability to exercise significant influence by another investor. The Board concludes that "{i}n order to achieve a reasonable degree of uniformity in application, . . . an investment (direct or indirect) of 20% or more of the voting stock of an investee should lead to a presumption in the absence of evidence to the contrary an investor has the ability to exercise significant influence over an investee. Conversely, an investment of less than 20% of the voting stock of an investee should lead to a presumption that an investor does not have the ability to exercise significant influence unless such ability can be demonstrated."

The proposed rule language is consistent with APB 18. The proposed rules would define as "closely related entities" any "business entities that share common partnership members, association members, or corporate officers with the applicant; or business entities in which the applicant has an ownership interest of at least 20%." This proposed rule is based upon APB 18 indicia

such as "representation on the board of directors"; "participation in policy making processes"; and "interchange of managerial personnel"; as well as the 20% (direct or indirect) ownership standard.

The commission believes that a broad standard is appropriate because the purpose of SB 324 is to require the preparation of comprehensive compliance summaries which would include information related to the applicant and "the compliance history of any corporation or business entity managed, owned, or otherwise closely related to the applicant." The reality of business relationships is that a "majority ownership" relationship is too narrow to capture all business relationships where two entities could be closely related. For example, two limited liability partnerships could be managed by the same general partner who may only own 1% of each of the limited liability partnerships. Thus, the general partner would be able to exert a significant influence over both companies without having a majority ownership or even a 20% ownership in either.

The commission notes that other Texas statutes provide broad criteria for considering whether an entity has the ability to influence another entity. The Texas Business and Commerce Code provides definitions for "affiliate" and "insider," which are similar to the "closely related" definition provided in this rulemaking. The Texas Business and Commerce Code, §24.002(1) defines an "affiliate" to include: "A) a person who directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding securities of the debtor. . . ; B) a corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned controlled or held with power to vote, by the debtor or a person who directly or indirectly owns, controls, or holds, with power to vote, 20 percent or more of the outstanding voting securities of the debtor . . ." The Texas Business and Commerce Code, §24.002(7) defines an "insider" to include: "a relative of the debtor or general partner of the debtor"; "a director of the debtor . . . an officer of the debtor . . . or . . . a person in control of the debtor . . . or a relative of a general partner, director, officer, or person in control of the debtor"; "an affiliate, or insider of an affiliate as if the affiliate were the debtor"; and "a managing agent of the debtor."

The Texas Government Code contains conflict of interest provisions applicable to state officers and state employees. Under Texas Government Code, §572.005, a person may have a "substantial interest" in a business entity if the person has greater than 10% of the voting interest, owns more than $25,000 fair market value of the entity, or has a direct or indirect participating interest by shares, stock in the profits, proceeds, or capital gains of the business entity.

These statutes may lend further support for defining "closely related" broadly, by using a standard broader than a 50% majority ownership standard. The commission has made no changes in response to this comment.

Baker Botts commented that the language "common partnership members, association members, or corporate officers" is too vague and fails to provide meaningful guidance or a "bright line" test to determine which entities are included. Baker Botts commented that the rules do not specify whether one common partner, member, or officer is sufficient to bring in the compliance history of other business entities, nor do they establish any de minimis threshold. Baker Botts recommended that the rules require a majority of such individuals be present or individuals representing a majority interest and that the rules make clear that passive investors, such as limited partners, are not relevant to the analysis.

J&G commented that the meaning of the term "association members" in proposed 30 TAC §331.120(c) is unclear and needs to be clarified.

The commission partially agrees with these comments. By the term "association members," the commission intended to include any members of an entity who could exert a significant influence over that entity. For corporations, this would include corporate officers. For partnerships, this would include partners. For other entities, this would include, but not be limited to, general partners of limited partnerships, or limited partners who participate in the control of the business; managers of limited liability companies; or sole proprietors. The term "association member" is intended to include anyone in this latter category.

With the clarification provided earlier in this preamble, the commission believes that the language "common partnership members, association members, or corporate officers" is not vague and provides meaningful guidance or a "bright line" test to determine which entities are included. The proposed language would include as "closely related" the applicant and any other entity with which the applicant has at least one person who is an officer, partner, or member in both the applicant and the other entity.

The commission disagrees with Baker Botts' comment that passive investors, such as limited partners, are not relevant to the analysis. In some cases, limited partners can participate in the management, operation, or control of the business. To the extent that they participate, the commission believes that limited partners and other passive investors are relevant to the analysis. The commission has made no change in response to this comment.

Baker Botts, DuPont, and TCC recommended that the commission adopt a 50% or greater ownership standard for determining when two entities are "closely related."

Baker Botts suggested that the existence of a majority ownership interest is more appropriate "bright line" standard for concluding that two entities are "closely related." Baker Botts also commented that the ownership interest threshold of 20% is too low and that instead, majority ownership should be the "bright-line test used by the agency." In many cases, a 20% ownership interest will not give rise to an ability to control or influence the actions of a corporate affiliate.

Dupont also 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.

TCC commented that a simple "majority ownership" (i.e., 50%) is a better indicator in that this is a level of control that is not in doubt and cannot be challenged.

The commission disagrees with these comments. While it is true that majority ownership would convey a controlling interest, the statutory provisions in TWC, §27.051(e), relating to "closely related" business entities are significantly broader in scope than that required by a simple majority ownership. Senate Bill 324 does not limit closely related entities to those entities in which the applicant has a 50% ownership interest. Senate Bill 324 includes not only those entities "owned" by the applicant but also those "managed" or "otherwise closely related to" the applicant. The commission believes that APB 18 provides a more accurate and meaningful approach to establishing significant influence,

a standard more appropriate for judging when business entities are closely related as required by SB 324. The commission has made no changes in response to this comment.

Baker Botts commented that, at the very least, there should be an opportunity to rebut any presumption on a case-by-case basis that a 20% ownership interest gives rise to an ability to control the affiliate such that the two are "closely related."

The commission disagrees with this comment. Senate Bill 324 requires the preparation of comprehensive summaries which are to include the compliance history of any corporation or business entity managed, owned, or otherwise closely related to the applicant. The commission believes that the proposed definition of "closely related" will provide a "bright line" standard by which comprehensive compliance summaries can be prepared. Although APB 18 recommends that a presumption of significant influence in cases of 20% or more (direct or indirect) ownership and a presumption of no significant influence in cases of less than 20% (direct or indirect) ownership, for the purposes of preparing comprehensive compliance summaries, the commission believes that a "bright line" standard rather than a presumption would be more appropriate. The compliance summaries are intended to provide the commission with comprehensive information to assist them in determining whether the applicant's compliance history is unacceptable. The commission will decide whether the compliance history is unacceptable on a case-by-case basis, considering the factors enumerated in new §331.120. In making a determination of whether a compliance history is unacceptable and whether an application must be denied, the commission would have the discretion to consider applicant's arguments relating to the specifics of the relationships between the applicant and the entities with which the applicant is closely related. The commission has made no changes in response to this comment.

Baker Botts commented that proposed new §331.120(d) provides that the commission shall deny a permit application if the agency finds the applicant's compliance history unacceptable. The decision whether an applicant's compliance history is unacceptable will be made on a "case-by-case basis" after considering the "nature, duration, repetition, and potential impact of violations for all media." Baker Botts agreed that a case-by-case approach is the most appropriate way to handle determinations of "unacceptable" compliance history under SB 324, even though it provides little guidance to the permit applicant, given the interim nature of these rules. However, in taking a case-by- case approach Baker Botts commented that there is no reason nor is there statutory support for specifying "failure to permit" violations as having greater significance than other types of significant noncompliances. Baker Botts expressed the belief that the proposed regulatory considerations of "nature, duration, repetition, and potential impact" will provide the pertinent factors under which prior noncompliances may be properly weighted.

The commission disagrees with this comment. Failure to obtain a required permit is considered a particularly egregious violation of commission rules. Obtaining appropriate authorization from the commission is a fundamental requirement. Entities who engage in activities without appropriate authorization from the commission deprive the commission of the opportunity to review the entities' proposed activities and to evaluate the entities' activities against the commission requirements. Commission requirements can include facility and equipment design; processing, storage, management, and disposal techniques; monitoring; maintenance; facility closure; and emergency response. Commission evaluation is necessary to ensure that the proposed activities are protective of human health and the environment. An entities' failure or repeated failure to obtain appropriate authorization from the commission hinders the commission in its responsibility of ensuring the conservation of natural resources and the protection of human health and the environment. The commission has made no change in response to this comment.

Dupont commented that UIC compliance summaries should be prepared using EPA's *UICP Guidance Document No. 81*, which redefines significant noncompliance for Class I UIC wells.

The commission disagrees with this comment. The term "significant noncompliance (SNC)" is a term used by the EPA for its compliance rules and may not be germane to regulatory policies of the commission in all cases. However, the UIC SNC criteria do have an effect on compliance histories, although they may not be as direct an effect as the commenter suggests. Significant noncompliance criteria is used in determining when to initiate an enforcement action; this affects compliance summaries because enforcement actions are components of compliance history. However, the SNC criteria is not a limiting factor; in other words, enforcement actions may be initiated for violations which do not meet SNC criteria, and these actions would also be considered in compliance history determinations. Furthermore, although these adopted rule changes are specific to UIC applications, UIC-related compliance histories encompass all media and programs; the SNC criteria referenced by the commenter only applies to UIC and would not apply to any other programs or media. Therefore, the commission has made no change in response to this comment.

Dupont commented that more stringent Texas requirements (i.e., positive annulus pressure) should be noted in any compliance history since the federal EPA requirements are protective. DuPont stated that there are several cases where the commission regulations are more stringent than federal requirements. For example, the federal requirement is that the annulus pressure during operation must be positive, whereas, the commission has a requirement of 100 pounds per square inch (psi) annulus differential. Dupont commented that these different requirements should be noted for the record on any compliance history because the EPA requirements are protective of human health and the environment.

The commission disagrees with this comment. The commission agrees that EPA requirements are protective of human health and the environment; however, the commission has been authorized by the EPA to conduct certain aspects of the UIC program in the State of Texas. To maintain primacy, state rules must be *at least* as stringent as federal rules. There are cases where state rules are *more stringent* than federal rules, but only where it is appropriate or necessary to do so. The commission believes that it would not be appropriate for the compliance summaries to reflect when the alleged violation is a violation of state but not federal requirements because UIC permittees in Texas are required to comply with applicable federal *and* state requirements. The commission has made no change in response to this comment.

Dupont commented that SB 324 does not require UIC applicants to have a compliance history for all media.

TCC commented that SB 324 requires "Evidence of compliance or noncompliance by an applicant for an injection well permit with environmental statutes...." This implies to TCC that SB 324

was intended to deal with those environmental statutes affecting the UIC program but not all environmental statutes. While other statutes enacted by the 77th Legislature, 2001, might specifically state that an applicant's compliance history should cover all environmental statutes, TCC commented that SB 324 did not so state this. TCC recommended that the rule changes implementing SB 324 should only address UIC activities, not other media.

The commission disagrees with this comment. The commission believes that the statutory changes made by SB 324 broaden TWC, §27.051(e), so that compliance summaries for UIC applicants are required to cover all media regulated by the commission. Prior to the SB 324 changes, TWC, §27.051(e) required the commission "to establish a procedure . . . for preparation of compliance summaries relating to the history of compliance . . . with rules adopted or orders or permits issued by the commission *under this chapter*" (emphasis added). Senate Bill 324 amended TWC, §27.051(e), by deleting the phrase "under this chapter." Texas Water Code, §27.051(e) now requires the preparation of "comprehensive summaries." In addition, prior to the SB 324 changes, evidence of compliance by an applicant with "rules adopted or orders or permits issued by the commission under this chapter" could be offered at a contested case hearing on the applicant's application. Senate Bill 324 amended TWC, §27.051(e), deleted the phrase "under this chapter," and now allows evidence of compliance by an applicant with "environmental statutes and rules adopted or orders or permits issued by the commission" to be offered at a contested case hearing on the applicant's application. These SB 324 changes significantly broaden the applicability of the statute. The commission believes that the SB 324 changes now require UIC applicants' compliance histories to include all media regulated by the commission. The commission has made no change in response to this comment.

EPA commented that the removal of the term "for the disposal of hazardous wastes" in §331.121(b), expands the following elements for the commission's consideration to all injection well classes and is an increase in stringency.

The commission agrees with this comment. Senate Bill 324 amended TWC, §27.014(d) to require that use or installation of an injection well is in the public interest. By deleting the words "for the disposal of hazardous waste," the public interest determination now applies to both hazardous and nonhazardous injection wells. This broader statutory requirement and its implementation in §331.121(b) does result in an increase in stringency of state rules. The commission has made no change in response to this comment.

FBH commented that proposed §331.120 is nonspecific as to the scope of consideration of compliance history. FBH stated that the investigation into an applicant's compliance history, including the compliance history of any corporation or business entity managed, owned, or otherwise closely related to the applicant, should be restricted to facilities located in Texas. A nationwide and/or worldwide investigation into compliance histories, conducted by agency staff would be extremely burdensome and perhaps infeasible. Moreover, any attempt at a nationwide and or worldwide investigation of an applicant's compliance history would significantly delay the processing and commission consideration of a permit application. FBH proposed that §331.21 {sic} be clarified so that an applicant's compliance history be limited to facilities in Texas. According to FBH, such a restriction would be consistent with 30 TAC §205.1, relating to compliance history for general permits, in that the commission will not allege violations of other states' laws as part of compliance histories.

The commission partially agrees with this comment. As a practical matter, the commission intends to include in comprehensive compliance summaries compliance data on the applicant's facilities and any related business entities in Texas. The commission intends to include in the summaries any compliance data available at the commission and any compliance data from the EPA to the extent that the data is readily available to the commission.

However, FBH's comment addresses the "scope of consideration of compliance history." The commission disagrees with FBH to the extent that the comment suggests that the commission would be limited to considering the Texas compliance history of an applicant in deciding whether to issue, amend, extend, or renew a permit. Although the proposed rules would limit compliance summary information to facilities in Texas, SB 324 provides the commission with the discretion to consider compliance history information for facilities outside of Texas. Specifically, TWC, §27.051(d) states that "the commission, in determining if the use or installation of an injection well is in the public interest under Subsection (a)(1) of the section, shall consider, *but shall not be limited to the consideration of*: 1) compliance history of the applicant and related entities in accordance with Subsection (e) of this section . . ." (emphasis added). Moreover, TWC, §27.051(e) allows any party at hearing on the application to offer "evidence of compliance or noncompliance by an applicant . . . with environmental statutes and the rules adopted or orders or permits issued by the commission." The commission has made no change in response to this comment.

FBH commented that any consideration of compliance history under proposed §331.120 should not take into account TWC, §7.070 no-findings orders entered into by an applicant, inasmuch as the orders on their face typically state that this order shall not be considered as part of an applicant's compliance history. FBH stated that respondents negotiating §7.070 orders are entitled to rely upon the language of the order that it is not to be considered in its compliance history. Otherwise, FBH argued, an entity who agrees to settle a case under a §7.070 no-findings order might otherwise have contested the alleged violations. Moreover, FBH expressed the belief that a rule requiring consideration of §7.070 orders, where it is stated that the order is not intended to become part of a facility's compliance history, would be unconstitutional retroactive rulemaking destroying or impairing a vested right. FBH suggested that the proposed rule specifically state that §7.070 orders are not to be included in compliance summaries for purposes of §281.21(d)(7). FBH stated that this proposed modification is consistent with the definition of the term "compliance history" set forth in recently adopted §205.1(1), where it is specifically stated that compliance history "shall not include any order that is precluded by its term or by law from being part of the applicant's compliance history."

HSWGB commented that the proposed rules are silent as to the issue of whether agreed orders and notices of violations that led to agreed orders containing provisions authorized by TWC, §7.070, should be included in the compliance summaries. Senate Bill 1660 Agreed Orders (1660 orders) do not have findings of violations and contain text indicating: 1) that the entry of the agreed order is not an admission of a violation; 2) that the occurrence of a violation is in dispute; and 3) the order is not intended to become part of the compliance history. Senate Bill 324 does not amend any provision of TWC, Chapter 7 and does not change the applicability of any agreed orders containing text authorized by TWC, §7.070. Entities who have agreed to such an order have done so in reliance on the language that the order would not become part of their compliance history. Many

entities have relied on this provision of the TWC in order to expeditiously resolve disputed enforcement matters rather than engage in a protracted contested case hearing. It would be unfair to retroactively repeal the provisions that entities have relied on in making the decision to settle an enforcement matter rather than dispute it. Such entities should be able to continue to rely on that language. HSWGB suggested that the proposed rules should specify that agreed orders containing the provisions authorized by TWC, §7.070 should not be included in compliance summaries for purposes of proposed §331.121. Similarly, the proposed rules should clarify that notices of alleged violations that have been resolved with 1660 orders will not be included in compliance summaries. Such clarity will assist participants in the regulatory process in understanding exactly what will be considered in these type of permitting decisions.

The commission partially agrees with this comment. In September of 1995, the commission began to use orders crafted under the provisions of TWC, §7.070, (generally referred to as "1660 orders"). The pertinent language in TWC, §7.070(1) - (3) states that, "An agreed administrative order *may* include a reservation that: 1) the order is not an admission of a violation of a statute within the commission's jurisdiction or of a rule adopted or an order or a permit issued under such a statute; 2) the occurrence of a violation is in dispute; *or* 3) the order is not intended to become a part of a party's or a facility's compliance history" (emphasis added). In September of 1995, when the commission began to use orders crafted under the provisions of TWC, §7.070, language was included stating that the occurrence of any violation is in dispute and the entry of the agreed order shall not constitute an admission by the respondent of any violation alleged in the order, nor of any statute or rule, and further that the *order* is not intended to become a part of the respondent's compliance history.

However, the commission also continued to utilize other orders which were not crafted under §7.070, (generally referred to as "findings orders"). These orders contain findings of fact and conclusions of law, and do not contain the provision stating that they will not become a part of the respondent's compliance history. Findings orders are used in some enforcement matters, based on specific criteria.

Recently, the commission modified the language in 1660 orders being offered to respondents for settlement of applicable enforcement matters. The 1660 orders now state that if the order becomes effective prior to February 1, 2002, the order is not intended to become a part of the respondent's compliance history. The language further specifies that the order will become a part of the respondent's compliance history if it becomes effective on or after February 1, 2002. So, any 1660 orders which become effective on or after February 1, 2002, along with any findings orders regardless of effective date, will be considered part of a person's compliance history. The commission does not agree that there is a need to modify the rule to specify this.

The commission does not currently consider 1660 orders as a component of compliance history if the language included and the associated understanding between the parties is that they will not be considered for purposes of compliance history. The commission agrees with the commenter that these 1660 orders themselves cannot be included as part of the applicant's compliance history because the terms of these orders would preclude this. The commission disagrees, however, that the rule language should explicitly state when 1660 orders will be considered as part of the applicant's compliance history and believes that this issue has been adequately addressed in this preamble. Furthermore, the components of compliance history that have to do with enforcement actions, found in existing §281.21(d)(4) have not been modified through this rulemaking. Therefore, the commission has determined that no change to the rule is warranted.

HSWGB also raised an issue regarding notices of violations (NOVs) issued and subsequently resolved by the issuance of a 1660 order containing the language stating the order is not to become part of the respondent's compliance history. The commission does not agree that NOVs ultimately resolved in this manner should not be included in compliance history reviews. As specified earlier, the applicable language in the 1660 orders only states that the *order* will not become part of the respondent's compliance history. This is consistent with the language in TWC, §7.070(3) as well. Neither the order language nor the statute states that any preceding NOV will not become part of the respondent's compliance history. Notices of violations are currently included in compliance history considerations, and the components of compliance history that have to do with NOVs, found in existing §281.21(d)(3) have not been modified through this rulemaking. The commission does not agree that any change is warranted, and no change to the rule has been made in response to this comment.

J&G commented that once the proposed revision to §331.121(b)(3) is adopted, the language in §331.121(b)(3) will be contrary to TWC, §27.051(d)(3), as it was revised by SB 324. Texas Water Code, §27.051(d)(3) was revised by SB 324 so that it will continue to apply to hazardous waste injection wells only. Because of the proposed revision to §331.121(b) to delete the words "for the disposal of hazardous waste," once the proposed rules are adopted, §331.121(b)(3) will apply to nonhazardous waste injection wells, which would be contrary to TWC, §27.051(d)(3). To address this problem, §331.121(b)(3) needs to be revised, adding the clause "if the injection well will be used for the disposal of hazardous waste," to make it consistent with SB 324.

The commission agrees with this comment and will add the clause, "if the injection well will be used for the disposal of hazardous waste," to §331.121(b)(3).

J&G commented that §331.121(b)(4) requires that the owner or operator of a hazardous waste injection well must certify that there is a program in place to reduce the volume or quantity of toxicity of the waste to be injected to the degree that is economically practicable and that the injection of the waste is the practicable method of disposal currently available that minimizes the present and future threat to human health and the environment. Once the proposed revision to §331.121(b) is adopted, §331.121(b)(4) will begin to apply to nonhazardous waste injection wells, as well as to hazardous waste injection wells. Section 331.121(b)(4) should continue to apply only to hazardous waste injection wells because there is nothing in SB 324 that specifies or even indicates that the requirement in §331.121(b)(4) should be expanded to cover nonhazardous waste injection wells, in addition to hazardous waste injection wells. Section 331.121(b)(4) should be revised to read: "that any permit issued for a Class I injection well for disposal of hazardous wastes generated on-site requires a certification...."

The commission agrees with this comment and will add the word "hazardous" to §331.121(b)(3).

TCC commented that a review of an applicant's compliance for the two years prior to the completion of the permit technical review is appropriate.

The commission disagrees with this comment. Senate Bill 324 does not limit the time period to be covered by a comprehensive compliance summary. Current commission rules in §281.21(d) state that the summary shall cover *at least* the two-year period preceding the date on which technical review is completed (emphasis added). The adopted rule does not propose any changes to the current requirement of "at least two years." The commission has the discretion to consider, and the executive director has the authority to prepare, comprehensive compliance summaries which cover periods of more than two years. The commission has made no change in response to this comment.

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and TWC, §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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

TRD-200107220
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: December 16, 2001
Proposal publication date: August 24, 2001
For further information, please call: (512) 239-4712

♦ ♦ ♦

CHAPTER 305. CONSOLIDATED PERMITS
SUBCHAPTER C. APPLICATION FOR PERMIT

30 TAC §305.42, §305.53

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §305.42, Application Required and §305.53, Application Fee. Sections 305.42 and 305.53 are adopted *without changes* to the proposed text as published in the August 24, 2001 issue of the *Texas Register* (26 TexReg 6262) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of the adopted rules is to implement certain requirements of Senate Bill (SB) 324, 77th Legislature, 2001. Senate Bill 324 amends Texas Water Code (TWC), §27.012, by providing that applications for hazardous and nonhazardous disposal well permits shall be processed in accordance with this chapter for the benefit of the state and the preservation of its natural resources. Senate Bill 324 also amends TWC, §27.014, by increasing the permit application fee for disposal wells which inject nonhazardous waste from $25 to $100. Senate Bill 324 became effective on May 26, 2001.

SECTION BY SECTION DISCUSSION

Adopted §305.42(e), Application Required, implements the changes to TWC, §27.012, by providing that applications for hazardous and nonhazardous disposal well permits shall be processed in accordance with this chapter for the benefit of the state and the preservation of its natural resources.

The adopted amendment to §305.53(a)(1), Application Fee, implements the changes to TWC, §27.014, by increasing the permit application fee for disposal wells which inject nonhazardous waste from $25 to $100.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute.

Although the intent of the rules is to protect the environment or reduce risks 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. The rules will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because they merely increase the application fee for permits to dispose of nonhazardous waste into waste disposal wells from $25 to $100. Certain provisions of TWC, Chapter 27, were amended by SB 324 during the 77th Legislature, 2001. These amendments became effective on May 26, 2001. The adopted rules are intended to implement certain provisions of SB 324. Specifically, the application fee for permits to dispose of nonhazardous waste into waste disposal wells will increase, as required by SB 324, from $25 to $100. Furthermore, the rulemaking does not meet any of the four applicability requirements listed in §2001.0225(a). The adopted rules do not exceed a standard set by federal law, because there is no comparable federal law. The adopted rules do not exceed an express requirement of state law, because they are consistent with the express requirements of SB 324. The adopted rules do not exceed a requirement of a delegation agreement, because there is no applicable delegation agreement. The rules have not been adopted solely under the general powers of the agency, but have been adopted under the express requirements of SB 324.

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. Texas Government Code, §2007.003(b)(4), provides that Chapter 2007 does not apply to these adopted rules because they are reasonably taken to fulfill an obligation mandated by state law. The specific purpose of these adopted rules is to incorporate the new application fee for a nonhazardous waste injection well, which is contained in TWC, §27.014. Promulgation and enforcement of these adopted rules would not affect private real property which is the subject of the rules

because the adopted rule language merely incorporates the new application fee for a nonhazardous waste injection well, which is contained in TWC, §27.014. The adopted rules do not affect a landowner's rights in private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this adopted rulemaking for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council, and determined that the rulemaking will not have direct or significant adverse effect on any Coastal Natural Resource Areas, nor will the rulemaking have a substantive effect on commission actions subject to the CMP.

HEARING AND COMMENTERS

A public hearing on the proposed rules was held in Austin on September 13, 2001, at 2:00 p.m. in Building F, Room 2210 at the Texas Natural Resource Conservation Commission complex, located at 12100 Park 35 Circle. No individuals presented oral statements during the public hearing. The comment period closed on September 24, 2001.

A total of seven commenters provided both general and specific comments on the proposed rulemaking that included Chapter 281, Application Processing; Chapter 305, Consolidated Permits; and Chapter 331, Underground Injection Control. The amendments to Chapters 281 and 331 are being concurrently adopted in this issue of the *Texas Register*. The following commented on the proposal: Baker Botts, L.L.P (Baker Botts); Dupont; United States Environmental Protection Agency (EPA); Fritz, Byrne & Head, L.L.P (FB&H); Hance, Scarborough, Wright, Ginsberg & Brusilow (HSWG&B); Jenkins & Gilchrist (J&G) on behalf of Huntsman Petrochemical Corporation; and Texas Chemical Council (TCC). Only the EPA commented on the proposed amendments to Chapter 305.

RESPONSE TO COMMENTS

EPA commented that §305.42(e) is a new paragraph that requires applications for Class I wells be processed with focus on the benefit to the State. EPA stated that this provision could possibly provide additional argument on behalf of the State for contentious applications at a hearing.

The commission agrees with this comment. Senate Bill 324 amended TWC, §27.012(b), to require that "applications for hazardous and nonhazardous disposal well permits shall be processed in accordance with this chapter for the benefit of the state and the preservation of its natural resources." While the commission agrees that it may be an issue in hearing whether a permit application is processed in accordance with TWC, Chapter 27, "for the benefit of the state and the preservation of its natural resources," the commission believes that these changes do not reflect a change in requirements as much as a formal incorporation into TWC, §27.102(b) of other statutory provisions already existing in TWC, Chapters 5 and 27. Under TWC, §5.011, the commission's purpose is to provide efficient and effective administration of the conservation of natural resources and the protection of the environment in this state. Under TWC, §27.051(a)(1), the commission is given the discretion to grant an application for a underground injection control (UIC) permit if, among other things, the use or installation of the injection well is in the public interest. New §305.42(e), which tracks the SB 324 changes verbatim, formally incorporates these already existing statutory considerations applicable to commission determinations on UIC applications. The commission has made no change in response to this comment.

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and TWC, §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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

TRD-200107221
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: December 16, 2001
Proposal publication date: August 24, 2001
For further information, please call: (512) 239-4712

♦ ♦ ♦

CHAPTER 331. UNDERGROUND INJECTION CONTROL

SUBCHAPTER G. CONSIDERATION PRIOR TO PERMIT ISSUANCE

30 TAC §331.120, §331.121

The Texas Natural Resource Conservation Commission (commission) adopts new §331.120, Compliance History; Denial of Permit, and an amendment to §331.121, Class I Wells. Sections 331.120 and 331.121 are adopted *with changes* to the proposed text as published in the August 24, 2001 issue of the *Texas Register* (26 TexReg 6266).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The adopted rules implement certain requirements of Senate Bill (SB) 324, 77th Legislature, 2001. Senate Bill 324 became effective on May 26, 2001.

In accordance with SECTION 18.05(f) and (g) of House Bill (HB) 2912 ("Sunset"), 77th Legislature, 2001, former law relating to compliance history is continued in effect for underground injection control (UIC) applications for permit issuance, amendment, or renewal submitted before September 1, 2002. Because SB 324 became effective on May 26, 2001, it is former law and applies to any UIC applications for permit issuance, amendment, or renewal pending on or submitted on or after May 26, 2001, and before September 1, 2002. For those UIC permit applications submitted on or after September 1, 2002, the compliance history requirements of HB 2912 will apply.

The adopted rules implement certain requirements of SB 324. Senate Bill 324 adds Texas Water Code (TWC), §27.012(b), Application for Permit; and amends §27.014, Applicable Fee; and §27.051(d) and (e), Issuance of Permit. Texas Water Code, §27.051(a)(1), specifies that the commission may issue a permit for an injection well if it finds that the use or installation of the injection well is in the public interest. Prior to SB 324, TWC, §27.051(d), required the commission, in determining if the use or installation of an injection well for the disposal of hazardous waste is in the public interest, to consider a number of factors including the compliance history of the applicant. Senate Bill 324 amends TWC, §27.051(d), and broadens its applicability. Whereas before the commission was required to consider these factors for hazardous waste disposal applications, SB 324 now requires the commission to consider the factors set out in TWC, §27.051(d), prior to the issuance of all injection well applications, not just those relating to the disposal of hazardous waste. Therefore, TWC, §27.051(d), now applies to all injection well applications, including those for the disposal of hazardous waste and nonhazardous waste and those for uranium mining. The adopted amendment to §331.121(b) deletes the specific reference to disposal of hazardous waste in order to implement this statutory requirement. In addition, SB 324 amends TWC, §27.051(d), by requiring the commission to consider the compliance history not only of the applicant but of entities "related" to the applicant. Adopted §331.120, Compliance History; Denial of Permit, implements the changes to TWC, §27.051(d), relating to the commission's consideration of the compliance history of the applicant and related entities prior to the issuance of an injection well permit. Adopted §331.120(a) specifies that this section applies to applications for UIC permits submitted or pending on or after May 26, 2001, and before September 1, 2002.

Senate Bill 324 also amends TWC, §27.051(e), by requiring the commission to establish a procedure for the preparation of comprehensive summaries of an applicant's compliance history, including the compliance history of any corporation or business entity managed, owned, or otherwise closely related to the applicant.

The commission currently has procedures for preparation of compliance summaries for UIC permit applications, and these procedures are specified in existing 30 TAC §281.21(d). These current procedures specify that a compliance summary shall cover at least the two-year period preceding the date on which the technical review is completed and shall include: the date(s) and descriptions of any citizen complaints received; the date(s) of all agency inspections, and for each inspection, whether a condition of noncompliance was alleged by the inspector and a brief description of the resulting environmental impact; the date(s) of any agency enforcement action and the applicant's response to such action; the date(s) and description of any incident the applicant reported to the agency which required implementation of the facility contingency plan, if applicable; and the name and telephone number of a person to contact for additional compliance history. In addition to these requirements listed in the rules, compliance summary procedures specified by the commission include a current assessment of compliance and a statement indicating if a current inspection with alleged noncompliances has been resolved, a statement of whether the company is current with facility and generator fees, the date(s) and description of any pending or prior enforcement actions against the facility and the facility's response, as well as any pending or prior enforcement actions against facilities that are owned or operated by the current applicant.

In the past, compliance summaries for injection well permits included only information relative to the site which is the subject of the current application, as well as other UIC and other solid waste facilities at other sites owned or operated by the applicant whether permitted or not. Compliance summaries for facilities with injection wells have traditionally included only inspections and reports of noncompliances related to solid waste or UIC. To implement the requirements of SB 324, a comprehensive compliance summary would include all compliance issues for all media regulated by the commission including, but not limited to, UIC, solid waste, water, and air. New §331.120(b) requires the commission to prepare comprehensive compliance summaries for applications pertaining to UIC permits. This new subsection will implement the new requirements specified in TWC, §27.051(e), and will significantly broaden the required elements of a compliance summary for an injection well permit application to include all compliance issues relating to a regulated entity.

Senate Bill 324 amendments to TWC, §27.051(e) require the commission to prepare comprehensive summaries not only of the applicant's compliance history, but also the compliance history of any corporation or business entity managed, owned, or otherwise closely related to the applicant. To implement this change, new §331.120(c) will require UIC compliance histories for a regulated entity applying for an injection well permit be broadened to include any corporation or business entity managed, owned, or otherwise closely related to the applicant. Closely related entities include business entities that share common partnership members, association members, or corporate officers with the applicant; or business entities in which the applicant has an ownership interest of at least 20%. Perhaps the most applicable accounting standard and business practice that can be applied to the statutory reference to "closely related" is how the accounting profession determines the accounting treatment for an investment. When an investor corporation owns more than 50% of another entity it possesses a controlling interest. An investor corporation may hold an interest of less than 50% and, therefore, not possess legal control; however, its investment in voting stock gives it the ability to exercise significant influence over operating and financial policies of an entity. Consequently, the accounting profession established a guide for accounting for investors when 50% or less of common voting stock is held. This guide, Accounting Principles Board Opinion No. 18 (APB 18), also provides an operational definition of significant influence. To achieve a reasonable degree of uniformity in the application of "significant influence" criterion, APB 18 concludes that an investment (direct or indirect) of 20% or more of the voting stock of an entity should lead to a presumption that an investor has the ability to exercise significant influence over the entity. The commission will use 20% ownership as the standard for determining whether an entity is closely related. Using 20% as the standard will establish a bright line for the commission and for an applicant in determining what entities will be included in a compliance summary. This change will result in a significant increase in the numbers and types of facilities that are reviewed during the preparation of a compliance summary for a UIC permit application. New §331.120(c) also requires that the applicant shall provide, as part of the UIC application, all required information relating to business entities.

Senate Bill 324 further amends TWC, §27.051(e), by directing the commission to deny the permit in cases where the commission finds that the compliance history is unacceptable. New

§331.120(d) sets out criteria to be used in classifying UIC compliance history. New §331.120(d) will require the commission to deny the permit application in cases where the commission concludes that the applicant's compliance history is unacceptable. This determination will be made by the commission on a case-by-case basis after consideration of the nature, duration, repetition, and potential impact of violations, for all media. The commission will give special weight to violations involving the failure of the applicant to obtain a permit and other violations which indicate the applicant's tendency to engage in activities without seeking appropriate authorization from the commission. Authority for the commission to deny a permit in whole or in part is provided for in 30 TAC §50.17, relating to Commission Actions. Injection control permit applicants may appeal the commission's decision to deny a permit based on an unacceptable compliance history in accordance with the provisions of §50.19, relating to Notice of Commission Action, Motion for Rehearing.

SECTION BY SECTION DISCUSSION

Adopted §331.120, Compliance History; Denial of Permit, implements the changes to TWC, §27.051(d), relating to the commission's consideration of the compliance history of the applicant and related entities prior to the issuance of an injection well permit and will also implement changes to TWC, §27.051(e), relating to preparation of comprehensive summaries of an applicant's compliance history.

Adopted §331.120(a) specifies that this section applies to applications for UIC permits submitted or pending on or after May 26, 2001, and before September 1, 2002.

Adopted §331.120(b) requires the commission to prepare comprehensive compliance summaries for applications pertaining to UIC permits. This new subsection will implement the new requirements specified in TWC, §27.051(e).

Adopted §331.120(c) requires UIC compliance histories for applications for permit issuance, amendment, or renewal pending on or submitted on or after May 26, 2001, and before September 1, 2002, to include any corporation or business entity managed, owned, or otherwise closely related to the applicant. Closely related entities include business entities that share common partnership members, association members, or corporate officers with the applicant; or business entities in which the applicant has an ownership interest of at least 20%. New §331.120(c) also requires that the applicant shall provide, as part of the UIC application, all required information relating to business entities.

Adopted §331.120(d) requires the commission, for applications for permit issuance, amendment, or renewal pending on or submitted on or after May 26, 2001, and before September 1, 2002, to deny the permit application in cases where the commission concludes that the applicant's compliance history is unacceptable. Whether a compliance history is unacceptable will be determined by the commission on a case-by-case basis. In making this determination, the commission will consider the nature, duration, repetition, and potential impact of violations, for all media. The commission will give special weight to violations involving the failure of the applicant to obtain a permit and other violations which indicate the applicant's tendency to engage in activities without seeking appropriate authorization from the commission.

Adopted §331.121(b) deletes the specific reference to disposal of hazardous waste. Senate Bill 324 now requires the commission to consider the factors set out in TWC, §27.051(d), prior to the issuance of all injection well applications, not just those relating to the disposal of hazardous waste.

Other adopted amendments change word usage to conform to the definitions in 30 TAC Chapter 3, word usage in this chapter generally, and to correct references.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute.

Although the intent of the rules is to protect the environment or reduce risks 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. The rules will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the rules merely require the commission to prepare a more comprehensive compliance history for UIC applications, and require the commission to deny permits to applicants with unacceptable compliance histories. Certain provisions of TWC, Chapter 27, were amended by SB 324 during the 77th Legislature, 2001. These amendments became effective on May 26, 2001. The adopted rules are intended to implement certain provisions of SB 324. Senate Bill 324 amends TWC, §27.051(d), and broadens its applicability. Senate Bill 324 further amends TWC, §27.051(e), by directing the commission to deny the permit in cases where the commission finds that the compliance history is unacceptable. The rules will implement these statutory changes. Furthermore, the adopted rulemaking does not meet any of the four applicability requirements listed in §2001.0225(a). The adopted rules do not exceed a standard set by federal law, because there is no comparable federal law. The adopted rules do not exceed an express requirement of state law, because they are consistent with the express requirements of SB 324. The adopted rules do not exceed a requirement of a delegation agreement, because there is no applicable delegation agreement. The adopted rules have not been adopted solely under the general powers of the agency, but have been adopted under the express requirements of SB 324.

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. Texas Government Code, §2007.003(b)(4), provides that Chapter 2007 does not apply to these adopted rules because they are reasonably taken to fulfill an obligation mandated by state law. The specific purpose of these adopted rules is to incorporate the new requirements relating to the preparation of compliance summaries by the executive director and the consideration of applications by the commission, which are contained in TWC, §27.051(d) and (e). Promulgation and enforcement of these adopted rules will not affect private real property which is the subject of the rules because the rule language merely incorporates the new requirements relating to the preparation of compliance summaries by the executive director and the consideration of applications by the commission, which are contained in TWC, §27.051(d) and (e). There is no burden on private real property because the adopted standards are not considered to be more stringent than existing standards. The

subject adopted regulations do not affect a landowner's rights in private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this adopted rulemaking for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council, and determined that the rulemaking will not have direct or significant adverse effect on any Coastal Natural Resource Areas, nor will the rulemaking have a substantive effect on commission actions subject to the CMP.

HEARING AND COMMENTERS

A public hearing on the proposed rules was held in Austin on September 13, 2001, at 2:00 p.m. in Building F, Room 2210 at the Texas Natural Resource Conservation Commission complex, located at 12100 Park 35 Circle. No individuals presented oral statements during the public hearing. The comment period closed on September 24, 2001.

A total of seven commenters provided both general and specific comments on the proposed rulemaking that included Chapter 281, Application Processing; Chapter 305 Consolidated Permits; and Chapter 331, Underground Injection Control. The amendments to Chapters 281 and 305 are being adopted concurrently in this issue of the *Texas Register*. The following commented on the proposal: Baker Botts, L.L.P (Baker Botts); Dupont; United States Environmental Protection Agency (EPA); Fritz, Byrne & Head, L.L.P (FBH); Hance, Scarborough, Wright, Ginsberg & Brusilow (HSWGB); Jenkins & Gilchrist (J&G) on behalf of Huntsman Petrochemical Corporation; and Texas Chemical Council (TCC).

RESPONSE TO COMMENTS

Baker Botts commented that the proposed rules extend the reach of compliance history, but go beyond the statute in doing so. The statute states the compliance history must include "any corporation or business entity managed, owned, or otherwise closely related to the applicant." Baker Botts stated that the proposed rules construe the "closely related" language extremely broadly to include "business entities that share common partnership members, association members, or corporate officers with the applicant; or business entities in which the applicant has an ownership interest of at least 20%."

The commission disagrees with this comment. The commission believes that the proposed definition of "closely related" is consistent with, not broader than, the statute (SB 324). The statute does not use terms of limitation when referring to related entities. Specifically, TWC §27.051(d), states that "the commission, in determining if the use or installation of an injection well is in the public interest under Subsection (a)(1) of the section, shall consider, but shall not be limited to the consideration of: 1) compliance history of the applicant and related entities in accordance with Subsection (e) of this section . . ." (emphasis added). The statute requires the preparation of comprehensive summaries of the applicant's compliance history, including the compliance history of any corporation or business entity *managed, owned, or otherwise closely related* to the applicant (emphasis added) (TWC, §27.051(e)).

The proposed rules provide a clear standard which is consistent with the statutory language. The proposed rules would define as "closely related entities" any "business entities that share common partnership members, association members, or corporate officers with the applicant; or business entities in which the applicant has an ownership interest of at least 20%." Thus, entities could be closely related in one of two ways, either: 1) the applicant and the other entity share at least one person who is a partner, officer, or member in both entities; or 2) the applicant has an ownership interest of at least 20% in the entity. The commission has made no changes in response to this comment.

Baker Botts commented that the agency bases the 20% figure in the proposed rule on the 1971 guidance document by the APB 18, entitled *The Equity Method of Accounting for Investments in Common Stock*. Baker Botts commented that the applicability of the standards put forth in APB 18 to this situation is questionable. Baker Botts read the APB 18 to state that the ability to influence operating and financial policies may be indicated in many ways: board representation; participation in policy making processes or material transactions; interchange of management; or technological dependency. Baker Botts stated that, after these primary indicia, percent of ownership is described as "another important consideration" with the opinion noting that "determining the ability of an investor to exercise significant influence is not always clear and applying judgement is necessary to assess the status of each investment." Baker Botts stated that the APB 18 cautions the use of the 20% "rule" as a litmus test for determining control.

Dupont commented that by using the proposed 20% standard, one assumes that an investor has the ability to exercise significant influence, which would mean they would be technologically and managerially in control.

TCC commended the commission for looking to formal accounting principles to develop what percentage ownership constitutes the ability of an entity to control or influence the actions of a corporate affiliate. TCC commented, however, that a close reading of the APB 18 reveals that the 20% level chosen by the commission is not a "bright line" used to determine level of control, but rather is simply an indicator of possible control.

The commission partially agrees with these comments. The commission agrees that APB 18 provides indicators for determining whether investors may be able to exert significant influence over operating and financial policies of an investee. Accounting Principles Board Opinion No. 18 states that the ability to exercise significant influence may be indicated in several ways: representation on the board of directors; participation in policy making processes; material intercompany transactions; interchange of managerial personnel; or technological dependency. In APB 18, the Board also mentions as another important consideration the extent of ownership by an investor in relation to the concentration of other shareholdings. The Board then points out that substantial or majority ownership of the voting stock of an investee by one investor does not necessarily preclude the ability to exercise significant influence by another investor. The Board concludes that "{i}n order to achieve a reasonable degree of uniformity in application... an investment (direct or indirect) of 20% or more of the voting stock of an investee should lead to a presumption in the absence of evidence to the contrary an investor has the ability to exercise significant influence over an investee. Conversely, an investment of less than 20% of the voting stock of an investee should lead to a presumption that an investor does not have the ability to exercise significant influence unless such ability can be demonstrated."

The proposed rule language is consistent with APB 18. The proposed rules would define as "closely related entities" any "business entities that share common partnership members, association members, or corporate officers with the applicant; or business entities in which the applicant has an ownership interest of at least 20%." This proposed rule is based upon APB Opinion No. 18 indicia such as "representation on the board of directors"; "participation in policy making processes"; and "interchange of managerial personnel"; as well as the 20% (direct or indirect) ownership standard.

The commission believes that a broad standard is appropriate because the purpose of SB 324 is to require the preparation of comprehensive compliance summaries which would include information related to the applicant and "the compliance history of any corporation or business entity managed, owned, or otherwise closely related to the applicant." The reality of business relationships is that a "majority ownership" relationship is too narrow to capture all business relationships where two entities could be closely related. For example, two limited liability partnerships could be managed by the same general partner who may only own 1% of each of the limited liability partnerships. Thus, the general partner would be able to exert a significant influence over both companies without having a majority ownership or even a 20% ownership in either.

The commission notes that other Texas statutes provide broad criteria for considering whether an entity has the ability to influence another entity. The Texas Business and Commerce Code provides definitions for "affiliate" and "insider," which are similar to the "closely related" definition provided in this rulemaking. The Texas Business and Commerce Code, §24.002(1) defines an "affiliate" to include: "A) a person who directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding securities of the debtor. . . ; B) a corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned controlled or held with power to vote, by the debtor or a person who directly or indirectly owns, controls, or holds, with power to vote, 20 percent or more of the outstanding voting securities of the debtor . . ." The Texas Business and Commerce Code, §24.002(7) defines an "insider" to include: "a relative of the debtor or general partner of the debtor"; "a director of the debtor . . . an officer of the debtor . . . or . . . a person in control of the debtor . . . or a relative of a general partner, director, officer, or person in control of the debtor"; "an affiliate, or insider of an affiliate as if the affiliate were the debtor"; and "a managing agent of the debtor."

The Texas Government Code contains conflict of interest provisions applicable to state officers and state employees. Under Texas Government Code, §572.005, a person may have a "substantial interest" in a business entity if the person has greater than 10% of the voting interest, owns more than $25,000 fair market value of the entity, or has a direct or indirect participating interest by shares, stock in the profits, proceeds, or capital gains of the business entity.

These statutes may lend further support for defining "closely related" broadly, by using a standard broader than a 50% majority ownership standard. The commission has made no changes in response to these comments.

Baker Botts commented that the language "common partnership members, association members, or corporate officers" is too vague and fails to provide meaningful guidance or a "bright line" test to determine which entities are included. Baker Botts commented that the rules do not specify whether one common partner, member, or officer is sufficient to bring in the compliance history of other business entities, nor do they establish any de minimis threshold. Baker Botts recommended that the rules require a majority of such individuals be present or individuals representing a majority interest and that the rules make clear that passive investors, such as limited partners, are not relevant to the analysis.

J&G commented that the meaning of the term "association members" in proposed §331.120(c) is unclear and needs to be clarified.

The commission partially agrees with these comments. By the term "association members," the commission intended to include any members of an entity who could exert a significant influence over that entity. For corporations, this would include corporate officers. For partnerships, this would include partners. For other entities, this would include, but not be limited to, general partners of limited partnerships, or limited partners who participate in the control of the business; managers of limited liability companies; or sole proprietors. The term "association member" is intended to include anyone in the other entity category.

With the clarification provided earlier in this preamble, the commission believes that the language "common partnership members, association members, or corporate officers" is not vague and provides meaningful guidance or a "bright line" test to determine which entities are included. The proposed language would include as "closely related" the applicant and any other entity with which the applicant has at least one person who is an officer, partner, or member in both the applicant and the other entity.

The commission disagrees with Baker Botts' comment that passive investors, such as limited partners, are not relevant to the analysis. In some cases, limited partners can participate in the management, operation, or control of the business. To the extent that they participate, the commission believes that limited partners and other passive investors are relevant to the analysis. The commission has made no change in response to these comments.

Baker Botts, DuPont, and TCC recommended that the commission adopt a 50% or greater ownership standard for determining when two entities are "closely related."

Baker Botts suggested that the existence of a majority ownership interest is more appropriate "bright line" standard for concluding that two entities are "closely related." Baker Botts also commented that the ownership interest threshold of 20% is too low and that instead, majority ownership should be the "bright-line test used by the agency." In many cases, a 20% ownership interest will not give rise to an ability to control or influence the actions of a corporate affiliate.

Dupont also 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.

TCC commented that a simple "majority ownership" (i.e., 50%) is a better indicator in that this is a level of control that is not in doubt and cannot be challenged.

The commission disagrees with these comments. While it is true that majority ownership would convey a controlling interest, the statutory provisions in TWC, §27.051(e), relating to "closely related" business entities are significantly broader in scope than that required by a simple majority ownership. Senate Bill 324 does not limit closely related entities to those entities in which

the applicant has a 50% ownership interest. Senate Bill 324 includes not only those entities "owned" by the applicant but also those "managed" or "otherwise closely related to" the applicant. The commission believes that APB 18 provides a more accurate and meaningful approach to establishing significant influence, a standard more appropriate for judging when business entities are closely related as required by SB 324. The commission has made no changes in response to these comments.

Baker Botts commented that, at the very least, there should be an opportunity to rebut any presumption on a case-by-case basis that a 20% ownership interest gives rise to an ability to control the affiliate such that the two are "closely related."

The commission disagrees with this comment. Senate Bill 324 requires the preparation of comprehensive summaries which are to include the compliance history of any corporation or business entity managed, owned, or otherwise closely related to the applicant. The commission believes that the proposed definition of "closely related" will provide a "bright line" standard by which comprehensive compliance summaries can be prepared. Although APB 18 recommends a presumption of significant influence in cases of 20% or more (direct or indirect) ownership and a presumption of no significant influence in cases of less than 20% (direct or indirect) ownership, for the purposes of preparing comprehensive compliance summaries, the commission believes that a "bright line" standard rather than a presumption would be more appropriate. The compliance summaries are intended to provide the commission with comprehensive information to assist the commission in determining whether the applicant's compliance history is unacceptable. The commission will decide whether the compliance history is unacceptable on a case-by-case basis, considering the factors enumerated in new §331.120. In making a determination of whether a compliance history is unacceptable and whether an application must be denied, the commission would have the discretion to consider applicant's arguments relating to the specifics of the relationships between the applicant and the entities with which the applicant is closely related. The commission has made no changes in response to this comment.

Baker Botts commented that proposed new §331.120(d) provides that the commission shall deny a permit application if the agency finds the applicant's compliance history unacceptable. The decision whether an applicant's compliance history is unacceptable will be made on a "case-by-case basis" after considering the "nature, duration, repetition, and potential impact of violations for all media." Baker Botts agreed that a case-by-case approach is the most appropriate way to handle determinations of "unacceptable" compliance history under SB 324, even though it provides little guidance to the permit applicant, given the interim nature of these rules. However, in taking a case-by- case approach Baker Botts commented that there is no reason nor is there statutory support for specifying "failure to permit" violations as having greater significance than other types of significant noncompliances. Baker Botts expressed the belief that the proposed regulatory considerations of "nature, duration, repetition, and potential impact" will provide the pertinent factors under which prior noncompliances may be properly weighted.

The commission disagrees with this comment. Failure to obtain a required permit is considered a particularly egregious violation of commission rules. Obtaining appropriate authorization from the commission is a fundamental requirement. Entities who engage in activities without appropriate authorization from the commission deprive the commission of the opportunity to review the entities' proposed activities and to evaluate the entities' activities against the commission requirements. Commission requirements can include facility and equipment design; processing, storage, management, and disposal techniques; monitoring; maintenance; facility closure; and emergency response. Commission evaluation is necessary to ensure that the proposed activities are protective of human health and the environment. An entities' failure or repeated failure to obtain appropriate authorization from the commission hinders the commission in its responsibility of ensuring the conservation of natural resources and the protection of human health and the environment. The commission has made no change in response to this comment.

Dupont commented that UIC compliance summaries should be prepared using EPA's *UICP Guidance Document No. 81*, which redefines significant noncompliance for Class I UIC wells.

The commission disagrees with this comment. The term "significant noncompliance (SNC)" is a term used by the EPA for its compliance rules and may not be germane to regulatory policies of the commission in all cases. However, the UIC SNC criteria do have an effect on compliance histories, although it may not be as direct an effect as the commenter suggests. Significant noncompliance criteria is used in determining when to initiate an enforcement action; this affects compliance summaries because enforcement actions are components of compliance history. However, SNC criteria is not a limiting factor; in other words, enforcement actions may be initiated for violations which do not meet SNC criteria, and these actions would also be considered in compliance history determinations. Furthermore, although these adopted rule changes are specific to UIC applications, UIC-related compliance histories encompass all media and programs; the SNC criteria referenced by the commenter only apply to UIC and would not apply to any other programs or media. Therefore, the commission has made no change in response to this comment.

Dupont commented that more stringent Texas requirements (i.e., positive annulus pressure) should be noted in any compliance history since the federal EPA requirements are protective. DuPont stated that there are several cases where the commission regulations are more stringent than federal requirements. For example, the federal requirement is that the annulus pressure during operation must be positive, whereas, the commission has a requirement of 100 pounds per square inch (psi) annulus differential. Dupont commented that these different requirements should be noted for the record on any compliance history because the EPA requirements are protective of human health and the environment.

The commission disagrees with this comment. The commission agrees that EPA requirements are protective of human health and the environment; however, the commission has been authorized by the EPA to conduct certain aspects of the UIC program in the State of Texas. To maintain primacy, state rules must be *at least* as stringent as federal rules. There are cases where state rules are *more stringent* than federal rules, but only where it is appropriate or necessary to do so. The commission believes that it would not be appropriate for the compliance summaries to reflect when the alleged violation is a violation of state but not federal requirements because UIC permittees in Texas are required to comply with applicable federal *and* state requirements. The commission has made no change in response to this comment.

Dupont commented that SB 324 does not require UIC applicants to have a compliance history for all media.

TCC commented that SB 324 requires "Evidence of compliance or noncompliance by an applicant for an injection well permit with environmental statutes...." This implies to TCC that SB 324 was intended to deal with those environmental statutes affecting the UIC program but not all environmental statutes. While other statutes enacted by the 77th Legislature, 2001, might specifically state that an applicant's compliance history should cover all environmental statutes, TCC commented that SB 324 did not so state this. TCC recommended that the rule changes implementing SB 324 should only address UIC activities, not other media.

The commission disagrees with this comment. The commission believes that the statutory changes made by SB 324, TWC, broaden §27.051(e), so that compliance summaries for UIC applicants are required to cover all media regulated by the commission. Prior to the SB 324 changes, TWC, §27.051(e), required the commission "to establish a procedure... for preparation of compliance summaries relating to the history of compliance . . . with rules adopted or orders or permits issued by the commission *under this chapter*" (emphasis added). Senate Bill 324 amended TWC, §27.051(e), by deleting the phrase "under this chapter." Texas Water Code, §27.051(e) now requires the preparation of "comprehensive summaries." In addition, prior to the SB 324 changes, evidence of compliance by an applicant with "rules adopted or orders or permits issued by the commission under this chapter" could be offered at a contested case hearing on the applicant's application. Senate Bill 324 amended TWC, §27.051(e), deleted the phrase "under this chapter," and now allows evidence of compliance by an applicant with "environmental statutes and rules adopted or orders or permits issued by the commission" to be offered at a contested case hearing on the applicant's application. These SB 324 changes significantly broaden the applicability of the statute. The commission believes that the SB 324 changes now require UIC applicants' compliance summaries to include all media regulated by the commission. The commission has made no change in response to this comment.

EPA commented that the removal of the term "for the disposal of hazardous wastes" in §331.121(b), expands the following elements for the commission's consideration to all injection well classes and is an increase in stringency.

The commission agrees with this comment. Senate Bill 324 amended TWC, §27.014(d) to require that use or installation of an injection well is in the public interest. By deleting the words "for the disposal of hazardous waste," the public interest determination now applies to both hazardous and nonhazardous injection wells. This broader statutory requirement and its implementation in §331.121(b) does result in an increase in stringency of state rules. The commission has made no change in response to this comment.

FBH commented that proposed §331.120 is nonspecific as to the scope of consideration of compliance history. FBH stated that the investigation into an applicant's compliance history, including the compliance history of any corporation or business entity managed, owned, or otherwise closely related to the applicant, should be restricted to facilities located in Texas. A nationwide and/or worldwide investigation into compliance histories, conducted by agency staff would be extremely burdensome and perhaps infeasible. Moreover, any attempt at a nationwide and or worldwide investigation of an applicant's compliance history would significantly delay the processing and commission consideration of a permit application. FBH proposed that §331.21 {sic} be clarified so that an applicant's compliance history be limited to facilities in Texas. According to FBH, such a restriction would be consistent with 30 TAC §205.1, relating to compliance history for general permits, in that the commission will not allege violations of other states' laws as part of compliance histories.

The commission partially agrees with this comment. As a practical matter, the commission intends to include in comprehensive compliance summaries compliance data on the applicant's facilities and any related business entities in Texas. The commission intends to include in the summaries any compliance data available at the commission and any compliance data from the EPA to the extent that the data is readily available to the commission.

However, FBH's comment addressed the "scope of consideration of compliance history." The commission disagrees with FBH to the extent that the comment suggested that the commission would be limited to considering the Texas compliance history of an applicant in deciding whether to issue, amend, extend, or renew a permit. Although the proposed rules would limit compliance summary information to facilities in Texas, SB 324 provides the commission with the discretion to consider compliance history information for facilities outside of Texas. Specifically, TWC, §27.051(d) states that "the commission, in determining if the use or installation of an injection well is in the public interest under Subsection (a)(1) of the section, shall consider, *but shall not be limited to the consideration of*: 1) compliance history of the applicant and related entities in accordance with Subsection (e) of this section . . ." (emphasis added). Moreover, TWC, §27.051(e) allows any party at hearing on the application to offer "evidence of compliance or noncompliance by {an} applicant . . . with environmental statutes and the rules adopted or orders or permits issued by the commission." The commission has made no change in response to this comment.

FBH commented that any consideration of compliance history under proposed §331.120 should not take into account TWC, §7.070 no-findings orders entered into by an applicant, inasmuch as the orders on their face typically state that this order shall not be considered as part of an applicant's compliance history. FBH stated that respondents negotiating §7.070 orders are entitled to rely upon the language of the order that it is not to be considered in its compliance history. Otherwise, FBH argued, an entity who agrees to settle a case under a §7.070 no-findings order might otherwise have contested the alleged violations. Moreover, FBH expressed the belief that a rule requiring consideration of §7.070 orders, where it is stated that the order is not intended to become part of a facility's compliance history, would be unconstitutional retroactive rulemaking destroying or impairing a vested right. FBH suggested that the proposed rule specifically state that §7.070 orders are not to be included in compliance summaries for the purposes of §281.219(d)(7). FBH stated that this proposed modification is consistent with the definition of the term "compliance history" set forth in recently adopted §205.1(1), where it is specifically stated that compliance history "shall not include any order that is precluded by its terms or by law from being part of the applicant's compliance history."

HSWGB commented that the proposed rules are silent as to the issue of whether agreed orders and notices of violations that led to agreed orders containing provisions authorized by TWC, §7.070 should be included in the compliance summaries. Senate Bill 1660 Agreed Orders (1660 orders) do not have findings of violations and contain text indicating: 1.) that the entry of

the agreed order is not an admission of a violation; 2.) that the occurrence of a violation is in dispute; and 3.) the order is not intended to become part of the compliance history. Senate Bill 324 does not amend any provision of TWC, Chapter 7 and does not change the applicability of any agreed orders containing text authorized by TWC, §7.070. Entities who have agreed to such an order have done so in reliance on the language that the order would not become part of their compliance history. Many entities have relied on this provision of the TWC in order to expeditiously resolve disputed enforcement matters rather than engage in a protracted contested case hearing. It would be unfair to retroactively repeal the provisions that entities have relied on in making the decision to settle an enforcement matter rather than dispute it. Such entities should be able to continue to rely on that language. HSWGB suggested that the proposed rules should specify that agreed orders containing the provisions authorized by TWC, §7.070 should not be included in compliance summaries for purposes of proposed §331.121. Similarly, the proposed rules should clarify that notices of alleged violations that have been resolved with 1660 orders will not be included in compliance summaries. Such clarity will assist participants in the regulatory process in understanding exactly what will be considered in these type of permitting decisions.

The commission partially agrees with this comment. In September of 1995, the commission began to use orders crafted under the provisions of TWC, §7.070, (generally referred to as "1660 orders"). The pertinent language in TWC, §7.070(1) - (3) states that, "An agreed administrative order *may* include a reservation that: 1) the order is not an admission of a violation of a statute within the commission's jurisdiction or of a rule adopted or an order or a permit issued under such a statute; 2) the occurrence of a violation is in dispute; *or* 3) the order is not intended to become a part of a party's or a facility's compliance history" (emphasis added). In September of 1995, when the commission began to use orders crafted under the provisions of TWC, §7.070, language was included stating that the occurrence of any violation is in dispute and the entry of the agreed order shall not constitute an admission by the respondent of any violation alleged in the order, nor of any statute or rule, and further that the *order* is not intended to become a part of the respondent's compliance history.

However, the commission also continued to utilize other orders which were not crafted under §7.070, (generally referred to as "findings orders"). These orders contain findings of fact and conclusions of law, and do not contain the provision stating that they will not become a part of the respondent's compliance history. Findings orders are used in some enforcement matters, based on specific criteria.

Recently, the commission modified the language in 1660 orders being offered to respondents for settlement of applicable enforcement matters. The 1660 orders now state that if the order becomes effective prior to February 1, 2002, the order is not intended to become a part of the respondent's compliance history. The language further specifies that the order will become a part of the respondent's compliance history if it becomes effective on or after February 1, 2002. So, any 1660 orders which become effective on or after February 1, 2002, along with any findings orders regardless of effective date, will be considered part of a person's compliance history. The commission does not agree that there is a need to modify the rule to specify this.

The commission does not currently consider 1660 orders as a component of compliance history if the language included and the associated understanding between the parties is that they will not be considered for purposes of compliance history. The commission agrees with the commenter that these 1660 orders themselves cannot be included as part of the applicant's compliance history because the terms of these orders would preclude this. The commission disagrees, however, that the rule language should explicitly state when 1660 orders will be considered as part of the applicant's compliance history and believes that this issue has been adequately addressed in this preamble. Furthermore, the components of compliance history that have to do with enforcement actions, found in existing 30 TAC §281.21(d)(4) have not been modified through this rulemaking. Therefore, the commission has determined that no change to the rule is warranted.

HSWGB also raised an issue regarding notices of violations (NOVs) issued and subsequently resolved by the issuance of a 1660 order containing the language stating the order is not to become part of the respondent's compliance history. The commission does not agree that NOVs ultimately resolved in this manner should not be included in compliance history reviews. As specified earlier, the applicable language in the 1660 orders only states that the *order* will not become part of the respondent's compliance history. This is consistent with the language in TWC, §7.070(3) as well. Neither the order language nor the statute states that any preceding NOV will not become part of the respondent's compliance history. Notices of violations are currently included in compliance history considerations, and the components of compliance history that have to do with NOVs, found in existing §281.21(d)(3) have not been modified through this rulemaking. The commission does not agree that any change is warranted, and no change to the rule has been made in response to this comment.

J&G commented that once the proposed amendment to §331.121(b)(3) is adopted, the language in §331.121(b)(3) will be contrary to TWC, §27.051(d)(3) as it was revised by SB 324. Texas Water Code, §27.051(d)(3) was revised by SB 324 so that it will continue to apply to hazardous waste injection wells only. Because of the proposed amendment to §331.121(b) to delete the words "for the disposal of hazardous waste," once the proposed rules are adopted, §331.121(b)(3) will apply to nonhazardous waste injection wells, which would be contrary to TWC, §27.051(d)(3). To address this problem, §331.121(b)(3) needs to be revised, adding the clause "if the injection well will be used for the disposal of hazardous waste," to make it consistent with SB 324.

The commission agrees with this comment and will add the clause, "if the injection well will be used for the disposal of hazardous waste," to §331.121(b)(3).

J&G commented that §331.121(b)(4) requires that the owner or operator of a hazardous waste injection well must certify that there is a program in place to reduce the volume or quantity of toxicity of the waste to be injected to the degree that is economically practicable and that the injection of the waste is the practicable method of disposal currently available that minimizes the present and future threat to human health and the environment. Once the proposed amendment to §331.121(b) is adopted, §335.121(b)(4) will begin to apply to nonhazardous waste injection wells, as well as to hazardous waste injection wells. Section 331.121(b)(4) should continue to apply only to hazardous waste injection wells because there is nothing in SB 324 that specifies or even indicates that the requirement in §331.121(b)(4) should be expanded to cover nonhazardous

waste injection wells, in addition to hazardous waste injection wells. Section 331.121(b)(4) should be revised to read: "that any permit issued for a Class I injection well for disposal of hazardous wastes generated on-site requires a certification...."

The commission agrees with this comment and will add the word "hazardous" to §331.121(b)(3).

TCC commented that a review of an applicant's compliance for the two years prior to the completion of the permit technical review is appropriate.

The commission disagrees with this comment. Senate Bill does not limit the time period to be covered by a comprehensive compliance summary. Current commission rules in §281.21(d) state that the summary shall cover *at least* the two-year period preceding the date on which technical review is completed (emphasis added). The commission has the discretion to consider, and the executive director has the authority to prepare, comprehensive compliance summaries which cover periods of more than two years. The commission has made no change in response to this comment.

STATUTORY AUTHORITY

The new and amended sections are adopted under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and TWC, §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells.

§331.120. Compliance History; Denial of Permit.

(a) This section applies to applications for underground injection control (UIC) permits submitted or pending on or after May 26, 2001, and before September 1, 2002.

(b) The executive director shall prepare a comprehensive compliance summary for applications for UIC permits in accordance with Texas Water Code, §27.051(e).

(c) The summary shall include the applicant's compliance history, including the compliance history of any corporation or business entity managed, owned, or otherwise closely related to the applicant. Closely related entities include business entities that share common partnership members, association members, or corporate officers with the applicant; or business entities in which the applicant has an ownership interest of at least 20%. The applicant shall provide, as part of the UIC application, all required information relating to business entities.

(d) The commission shall deny the permit application in cases where the commission concludes that the applicant's compliance history is unacceptable. Whether a compliance history is unacceptable will be determined by the commission on a case-by-case basis. In making this determination, the commission will consider the nature, duration, repetition, and potential impact of violations for all media. The commission will give special weight to violations involving the failure of the applicant to obtain a permit and other violations which indicate the applicant's tendency to engage in activities without seeking appropriate authorization from the commission.

§331.121. Class I Wells.

(a) The commission shall consider the following before issuing a Class I Injection Well Permit:

(1) all information in the completed application for permit;

(2) all information in the Technical Report submitted with the application for permit in accordance with §305.45(a)(8) of this title (relating to Contents of Application for Permit) including, but not limited to:

(A) a map showing the location of the injection well for which a permit is sought and the applicable area of review. Within the area of review, the map must show the number, or name, and location of all producing wells, injection wells, abandoned wells, dry holes, surface bodies of water, springs, mines (surface and subsurface), quarries, water wells, and other pertinent surface features, including residences and roads. The map should also show faults, if known or suspected. Only information of public record is required to be included on this map;

(B) a tabulation of all wells within the area of review which penetrate the injection zone or confining zone, and for salt cavern disposal wells, the salt cavern injection zone, salt cavern confining zone and caprock. Such data shall include a description of each well's type, construction, date drilled, location, depth, record of plugging and/or completion, and any additional information the executive director may require;

(C) the protocol followed to identify, locate, and ascertain the condition of abandoned wells within the area of review which penetrate the injection or the confining zones;

(D) maps and cross-sections indicating the general vertical and lateral limits of underground sources of drinking water (USDWs) and freshwater aquifers, their positions relative to the injection formation and the direction of water movement, where known, in each USDW or freshwater aquifer which may be affected by the proposed injection;

(E) maps, cross-sections, and description of the geologic structure of the local area;

(F) maps, cross-sections, and description of the regional geologic setting;

(G) proposed operating data:

(i) average and maximum daily injection rate and volume of the fluid or waste to be injected over the anticipated life of the injection well;

(ii) average and maximum injection pressure;

(iii) source of the waste streams;

(iv) an analysis of the chemical and physical characteristics of the waste streams;

(v) for salt cavern waste disposal, the bulk waste density, permeability, porosity, and compaction rate, as well as the individual physical characteristics of the wastes and transporting media;

(vi) for salt cavern waste disposal, the results of tests performed on the waste to demonstrate that the waste will remain solid under cavern conditions; and

(vii) any additional analyses which the executive director may reasonably require;

(H) proposed formation testing program to obtain an analysis of the chemical, physical, and radiological characteristics of formation fluids, and other information on the injection zone and confining zone;

(I) proposed stimulation program, if needed;

(J) proposed operation and injection procedures;

(K) engineering drawings of the surface and subsurface construction details of the system;

(L) contingency plans, based on a reasonable worst case scenario, to cope with all shut-ins; loss of cavern integrity, or well failures so as to prevent migration of fluid into any USDW;

(M) plans (including maps) for meeting the monitoring requirements of this chapter, such plans shall include all parameters, test methods, sample methods, and quality assurance procedures necessary and used to meet these requirements;

(N) for wells within the area of review which penetrate the injection zone or confining zone but are not adequately constructed, completed, or plugged, the corrective action proposed to be taken;

(O) construction procedures including a cementing and casing program, contingency cementing plan for managing lost circulation zones and other adverse subsurface conditions, well materials specifications and their life expectancy, logging procedures, deviation checks, and a drilling, testing, and coring program;

(P) delineation of all faults within the area of review, together with a demonstration, unless previously demonstrated to the commission or to the United States Environmental Protection Agency, that the fault is not sufficiently transmissive or vertically extensive to allow migration of hazardous constituents out of the injection zone;

(3) whether the applicant will assure, in accordance with Chapter 37, Subchapter Q of this title (relating to Financial Assurance for Underground Injection Control Wells), the resources necessary to close, plug, abandon, and if applicable, provide post-closure care for the well and/or waste disposal cavern as required;

(4) the closure plan, corrective action plan, and post-closure plan submitted in the technical report accompanying the permit application;

(5) any additional information required by the executive director for the evaluation of the proposed injection well.

(b) In determining whether the use or installation of an injection well is in the public interest under Texas Water Code, §27.051(a)(1), the commission shall also consider:

(1) the compliance history of the applicant in accordance with Texas Water Code, §27.051(e) and §281.21(d) of this title (relating to Draft Permit, Technical Summary, Fact Sheet, and Compliance Summary);

(2) whether there is a practical, economic and feasible alternative to an injection well reasonably available to manage the types and classes of hazardous waste;

(3) if the injection well will be used for the disposal of hazardous waste, whether the applicant will maintain liability coverage for bodily injury and property damage to third parties that is caused by sudden and nonsudden accidents in accordance with Chapter 37 of this title (relating to Financial Assurance); and

(4) that any permit issued for a Class I injection well for disposal of hazardous wastes generated on site requires a certification by the owner or operator that:

(A) the generator of the waste has a program to reduce the volume or quantity and toxicity of such waste to the degree determined by the generator to economically practicable; and

(B) injection of the waste is that practicable method of disposal currently available to the generator which minimizes the present and future threat to human health and the environment.

(c) The commission shall consider the following minimum criteria for siting before issuing a Class I injection well permit.

(1) All Class I injection wells shall be sited such that they inject into a formation that is beneath the lowermost formation containing, within 1/4 mile of the wellbore, a USDW or freshwater aquifer.

(2) The siting of Class I injection wells shall be limited to areas that are geologically suitable. The executive director shall determine geologic suitability based upon:

(A) an analysis of the structural and stratigraphic geology, the hydrogeology, and the seismicity of the region;

(B) an analysis of the local geology and hydrogeology of the well site, including, at a minimum, detailed information regarding stratigraphy, structure, and rock properties, aquifer hydrodynamics, and mineral resources; and

(C) a determination that the geology of the area can be described confidently and that limits of waste fate and transport can be accurately predicted through the use of analytical and numerical models.

(3) Class I injection wells shall be sited such that:

(A) the injection zone has sufficient permeability, porosity, thickness, and areal extent to prevent migration of fluids into USDWs or freshwater aquifers;

(B) the confining zone:

(i) is laterally continuous and free of transecting, transmissive faults or fractures over an area sufficient to prevent the movement of fluids into a USDW or freshwater aquifer; and

(ii) contains at least one formation of sufficient thickness and with lithologic and stress characteristics capable of preventing initiation and/or propagation of fractures.

(4) The owner or operator shall demonstrate to the satisfaction of the executive director that:

(A) the confining zone is separated from the base of the lowermost USDW or freshwater aquifer by at least one sequence of permeable and less permeable strata that will provide an added layer of protection for the USDW or freshwater aquifer in the event of fluid movement in an unlocated borehole or transmissive fault; or

(B) within the area of review, the piezometric surface of the fluid in the injection zone is less than the piezometric surface of the lowermost USDW or freshwater aquifer, considering density effects, injection pressures, and any significant pumping in the overlying USDW or freshwater aquifer; or

(C) there is no USDW or freshwater aquifer present;

(D) the commission may approve a site which does not meet the requirements in subparagraphs (A), (B), or (C) of this paragraph if the owner or operator can demonstrate to the commission that because of the geology, nature of the waste, or other considerations, that abandoned boreholes or other conduits would not cause endangerment of USDWs, and fresh or surface water.

(d) The commission shall also consider the following additional criteria, which must be addressed in the technical report of the application, before issuing a salt cavern Class I injection well permit:

(1) geologic suitability of the location:

(A) a thorough geologic characterization of the salt dome, including the geometry of the salt stock and its calculated movement and calculated salt loss rate. Data submitted must be

sufficient to image underneath all overhangs, to delineate the edge of the salt stock, to define any other caverns or co-uses of the salt stock, and to address any conditions that may result in potential adverse impact on the salt stock. Well logs, seismic reflection surveys, gravity surveys, and any other appropriate geophysical methods necessary to characterize the salt dome are to be utilized. Seismic reflection data submitted must include a surface recorded three-dimensional seismic grid survey sufficient to image underneath all suspected overhangs and to delineate the edge of the stock;

(B) any unusual features, such as depressions or lineations observable at the land surface or within or detectable within the subsurface, which may be indicative of underlying anomalies in the caprock or salt stock, which might affect construction, operation, or closure of the cavern;

(C) the petrology of the caprock, salt stock, and deformed strata; and

(D) for strata surrounding the salt stock, information on their nature, structure, hydrodynamic properties, and relationships to USDWs, including a demonstration that the proposed salt cavern injection zone will not be in or above a formation which within 1/4 mile of the salt cavern injection zone contains a USDW;

(2) establishment of a pre-development baseline for subsidence and groundwater monitoring, over the area of review;

(3) characterization of the predicted impact of the proposed operations on the salt stock, specifically the extent of the disturbed zone;

(4) demonstration of adequate separation between the outer limits of the injection zone and any other activities in the domal area. The thickness of the disturbed zone, as well as any additional safety factors will be taken into consideration; and

(5) the commission will consider the presence of salt cavern storage activities, sulfur mining, salt mining, brine production, oil and gas activity, and any other activity which may adversely affect or be affected by waste disposal in a salt cavern.

(e) Information requirements for Class I hazardous waste injection well permits.

(1) The following information is required for each active Class I hazardous waste injection well at a facility seeking a underground injection control permit:

(A) dates well was operated; and

(B) specification of all wastes that have been injected in the well, if available.

(2) The owner or operator of any facility containing one or more active hazardous waste injection wells must submit all available information pertaining to any release of hazardous waste or constituents from any active hazardous waste injection well at the facility.

(3) The owner or operator of any facility containing one or more active Class I hazardous waste injection wells must conduct such preliminary site investigations as are necessary to determine whether a release is occurring, has occurred, or is likely to have occurred.

(f) Interim Status under the RCRA for Class I hazardous waste injection wells. The minimum state standards which define acceptable injection of hazardous waste during the period of interim status are set out in this chapter. The issuance of an underground injection well permit does not automatically terminate RCRA interim status. A Class I well's interim status does, however, automatically terminate upon issuance of a RCRA permit for that well, or upon the well's receiving a RCRA permit-by-rule under §335.47 of this title (relating to Special Requirements for Persons Eligible for a Federal Permit by Rule). Thus, until a Class I well injecting hazardous waste receives a RCRA permit or RCRA permit-by-rule, the well's interim status requirements are the applicable requirements imposed under this chapter, including any requirements imposed in the UIC permit.

(g) Before issuing a permit for a hazardous waste injection well in a solution-mined salt dome cavern, the commission by order must find that there is an urgent public necessity for the hazardous waste injection well. The commission, in determining whether an urgent public necessity exists for the permitting of the hazardous waste injection well in a solution-mined salt dome cavern, must find that:

(1) the injection well will be designed, constructed, and operated in a manner that provides at least the same degree of safety as required of other currently operating hazardous waste disposal technologies;

(2) consistent with the need and desire to manage the state hazardous wastes generated in the state, there is a substantial or obvious public need for additional hazardous waste disposal capacity and the hazardous waste injection well will contribute additional capacity toward servicing that need;

(3) that the injection well will be constructed and operated in a manner so as to safeguard public health and welfare and protect physical property and the environment;

(4) the applicant has demonstrated that groundwater and surface waters, including public water supplies, will be protected from the release of hazardous waste from the salt dome waste containment cavern; and

(5) any other criteria required by the commission to satisfy that the test of urgency has been met.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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

TRD-200107222
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: December 16, 2001
Proposal publication date: August 24, 2001
For further information, please call: (512) 239-4712

♦ ♦ ♦

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 11. TEXAS JUVENILE PROBATION COMMISSION

CHAPTER 346. CASE MANAGEMENT STANDARDS

SUBCHAPTER A. CASE PLANNING AND SUPERVISION

37 TAC §§346.1 - 346.5

The Texas Juvenile Probation Commission adopts the repeal of Chapter 346, §§346.1 - 346.5, relating to case management standards without changes as published in the September 28, 2001, issue of the *Texas Register* (26 TexReg 7515) and will not be republished.

TJPC repeals this chapter in an effort not to overlap with adopted new standards which provide structural and substantive changes from the current standards that were effective September 1, 2001.

No public comment was received regarding the repeals.

This repeal is adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to modify or delete obsolete rules which provide minimum standards for the juvenile probation commission.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 20, 2001.

TRD-200107164
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: December 10, 2001
Proposal publication date: September 28, 2001
For further information, please call: (512) 424-6710

♦ ♦ ♦

CHAPTER 352. DATA COLLECTION AND REPORTING
SUBCHAPTER A. CASEWORKER SYSTEMS

37 TAC §§352.101 - 352.106

The Texas Juvenile Probation Commission adopts the repeal of Chapter 352, §§352.101 - 352.106, relating to data collection and reporting standards without changes as published in the September 28, 2001, issue of the *Texas Register* (26 TexReg 7515) and will not be republished.

TJPC repeals this chapter in an effort not to overlap with adopted new standards which provide structural and substantive changes from the current standards that were effective September 1, 2001.

No public comment was received regarding the repeals.

This repeal is adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to modify or delete obsolete rules which provide minimum standards for the juvenile probation commission.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 20, 2001.

TRD-200107165
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: December 10, 2001
Proposal publication date: September 28, 2001
For further information, please call: (512) 424-6710

♦ ♦ ♦

CHAPTER 352. DATA COLLECTION AND REPORTING
SUBCHAPTER B. NON-CASEWORKER SYSTEMS

37 TAC §§352.201 - 352.206

The Texas Juvenile Probation Commission adopts the repeal of Chapter 352, §§352.201 - 352.206, relating to data collection and reporting standards without changes as published in the September 28, 2001 issue of the *Texas Register*(26 TexReg 7516) and will not be republished.

TJPC repeals this chapter in an effort not to overlap with adopted new standards which provide structural and substantive changes from the current standards that were effective September 1, 2001.

No public comment was received regarding the repeals.

This repeal is adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to modify or delete obsolete rules which provide minimum standards for the juvenile probation commission.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 20, 2001.

TRD-200107166
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: December 10, 2001
Proposal publication date: September 28, 2001
For further information, please call: (512) 424-6710

♦ ♦ ♦

TEXAS DEPARTMENT OF INSURANCE

Notification Pursuant to the Insurance Code, Chapter 5, Subchapter L

As required by the Insurance Code, Article 5.96 and 5.97, the ***Texas Register*** publishes notice of proposed actions by the Texas Board of Insurance. Notice of action proposed under Article 5.96 must be published in the ***Texas Register*** not later than the 30th day before the board adopts the proposal. Notice of action proposed under Article 5.97 must be published in the ***Texas Register*** not later than the 10th day before the Board of Insurance adopts the proposal. The Administrative Procedure Act, the Government Code, Chapters 2001 and 2002, does not apply to board action under Articles 5.96 and 5.97.

The complete text of the proposal summarized here may be examined in the offices of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78714-9104.)

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Administrative Procedure Act.

Texas Department of Insurance

Final Action

The Commissioner of Insurance adopts: (1) new amendatory mandatory endorsements to certain residential property insurance policies; (2) new mandatory offer endorsements to certain residential property insurance policies; (3) amendments to the policy writing rules of the Homeowners and Dwelling Sections of the Texas Personal Lines Manual (Manual); and (4) amendments to the Texas Statistical Plan for Residential Risks (Residential Statistical Plan), with changes to the endorsements, Manual rules, and amendments to the Residential Statistical Plan as proposed by Texas Department of Insurance (Department) staff in a petition filed September 19, 2001, and a conforming amendment to Endorsement No. HO-170. Notice of the proposal (Reference No. P-0901-13-I), which was designed to modify current coverage for mold and other fungi losses that are ensuing losses resulting from covered water losses in Texas homeowners and dwelling policies, was published for comment in the September 28, 2001 issue of the *Texas Register* (26 TexReg 7579). Comments on and alternatives to the proposed endorsements, Manual rules, and amendments to the Residential Statistical Plan were solicited through the notice, and a public hearing under Docket No. 2498 was held October 16, 2001, at 9:00 a.m., in the LBJ Library Auditorium, 2313 Red River, Austin, Texas.

Upon consideration of the staff petition and all comments received, and for the reasons detailed herein, the Commissioner adopts, with changes to the proposal as noticed in the Texas Register, nine amendatory mandatory endorsements, nine mandatory offer endorsements, and amendments to the policy writing manual rules. The Commissioner declines to adopt the two policy rating manual rules and attendant rating examples that were proposed in the petition. Additionally, the Commissioner adopts an amendment to Endorsement No. HO-170 which conforms the water damage coverage in this endorsement to the changes made to the Texas Homeowners Form-A (HO-A) by one of the adopted amendatory mandatory endorsements. The Commissioner also adopts conforming amendments to the Residential Statistical Plan with changes to the proposal as noticed in the Texas Register. These conforming amendments remove the fields that were responsive to staff's petition as noticed in the Texas Register and add new fields to capture the use of nine mandatory offer endorsements adopted by this order as well as other mold endorsements that may be approved on an individual insurer basis. Prior to the next benchmark rate proceeding in which charges and credits for the adopted endorsements will be established, rate regulated insurers may file charges and credits for approval through individual insurer filings under the provisions of Section 4, Article 5.101 of the Texas Insurance Code.

Texas Insurance Code Articles 5.35, 5.96, and 5.98 authorize the action taken by the Commissioner. Article 5.35 authorizes the Commissioner to adopt policy forms and endorsements for certain lines of insurance, including residential property insurance. Article 5.96 allows the Commissioner to, among other things, promulgate, adopt, or amend standard and uniform manual rules, rating plans, statistical plans, and policy and endorsement forms for fire and allied lines (which includes residential property insurance) pursuant to the procedures specified under that article; Article 5.96 also provides that the Administrative Procedure Act (Texas Government Code Chapter 2001) does not apply to action taken under that article. Article 5.98 allows the agency to adopt reasonable rules appropriate to accomplish the purposes of Texas Insurance Code Chapter 5.

This order is adopted without prejudice to individual insurers' ability to file with the Department individual policies or endorsements, as authorized by Article 5.35.

I. Background

The current action had its genesis in a relatively sudden, large and unprecedented proliferation of mold claims against Texas homeowners policies over the past two years. Exacerbating the problem is the fact that the most commonly purchased Texas policy, Texas Homeowners Form-B (HO-B), which is presently a promulgated and standardized form, that provides the most expansive coverage, of all the states, for water damage and any ensuing mold and fungi losses. Texas also leads the nation as the most costly venue for homeowners insurance. This currently is due to the Texas standard policies' generous coverage for water damage losses as well as extreme weather-related losses.

Following recent substantial increases in the frequency and severity of water damage claims with an ensuing mold loss component, the Department received insurance company filings for approval to use homeowners and dwelling endorsements which would either totally or partially exclude coverage for mold as an ensuing loss without an option to buy back the excluded or limited coverage. These filings were made pursuant to Article 5.35(d), which allows the Commissioner to approve endorsements filed by insurers. To date, no such endorsements have

been approved by the Commissioner, although several filings have been made and are under review, and one individual company filing was disapproved on October 3, 2001 (Order No. 01-0941). In addition, national insurers and national organizations of insurance companies have filed policy forms and endorsements which would, in part, place limitations on the coverage for mold. No such policies have yet been approved by the Commissioner.

In response to extreme levels of concern from both policyholders and insurance companies regarding increasing mold-related claims and losses, the Department undertook several careful, comprehensive, and deliberate efforts to gather information and address relevant issues related to mold coverage. Beginning on June 26, 2001, the Commissioner convened a series of informational hearings in Austin, Corpus Christi, and Houston on mold coverage in general. As part of this information gathering process, the Commissioner obtained information, comments and data from a wide variety of sources, including individual insureds; consumer and citizens' groups such as the Office of Public Insurance Counsel, Consumers Union, Texas Watch, and Homeowners for Better Building; governmental agencies including the Texas Department of Health, the U.S. Environmental Protection Agency, and the National Flood Insurance Program; individual insurance companies and insurance trade associations; the scientific community; mold and water remediators; and the mortgage lending, real estate, and building industries.

In addition, on July 30, 2001, the Department's Property and Casualty Actuarial Division issued a data call to the five largest insurance groups that collectively write about three fourths of the residential property insurance in Texas, requesting statistical data on mold losses by August 31, 2001. The data allowed the Department to gauge, in part, the magnitude of mold losses in the state, including the frequency and severity of claims and how rapidly the class of mold claims was increasing.

While all five company groups responded to the data call, only three groups were able to provide all the data requested in time for the actuarial division to complete its studies. Nevertheless, the data analyzed, which represented approximately 65% of the homeowners insurance market in Texas, clearly demonstrated that the number and dollar amount of ensuing mold claims had risen exponentially over the 18 months ending on June 30, 2001. The data showed that in the course of a year and a half, claim frequency (i.e. the number of claims per thousand policies insured) had grown more than sixfold, from 1.6 to 10.8. Furthermore, the cost of the average mold claim was found to be approximately $18,000, which is 4.7 times the cost of an average homeowner's claim and 5.6 times the cost of an average non-mold related water damage claim. The frequency and severity of these mold claims point to the likelihood of sizeable increases in homeowners insurance rates if the current coverage is not modified.

Pursuant to Article 5.101, benchmark rates for homeowners insurance have been set annually through a ratemaking proceeding. The most recent benchmark rate order was issued on August 30, 2001 (Order No. 01-0828). However, because these rates were based on loss experience for the years 1994-1999, the current rates reflect few, if any, of the increased mold-related losses identified in the Department's data call and, most particularly, do not reflect the substantial increase in these claims in 2000 and 2001. The benchmark rates only apply to companies that by law are rate regulated. Over the past 20 or more years the Texas homeowners insurance market has increasingly moved to companies that are not rate regulated, to the point where currently approximately 95% of the homeowners business is written by non-rate regulated companies. Since it is unclear when or if the number and severity of mold claims will level off, consumers could face double digit rate increases for the next several years if mold coverage is left unchanged with no opportunity for insurers and consumers to limit mold coverage. As previously noted, Texas already has the highest premiums for homeowners insurance in the nation. Continued, significant increases in premiums for the next several years could make homeowners insurance unaffordable or effectively unavailable for many Texans.

Potentially making the rate affordability problem especially acute for some Texans is the fact that an analysis of mold claims by rating territory indicates that there are significant regional differences in claim frequencies and costs. For example, mold-related claim frequencies (the numbers of claims per 1,000 policies) ranged from .06 in Territory 7, El Paso County, to 13.2 in Territory 9, Nueces County. Sharp differences also exist between neighboring territories. For example, the average cost per policy for mold claims of $5,000 or more was $520 in Territory 9, Nueces County, while it was roughly one third of that, $165, in adjoining Territories 10 and 11. Therefore, while the state as a whole might possibly face an increase of 40 percent or more if no change were made to existing mold coverage, as some commenters and the staff petition suggested, certain specific regions could conceivably see two or three times that increase.

Another issue that appears to be unique to mold claims is the unusually high number of multiple claims (i.e., from multiple individual water leaks or discharges) alleged to be associated with a single mold infestation under a policy and which has led insurers to pay more than the stated policy limits for a dwelling damage claim (a situation which is commonly referred to as "stacking"). If a fire or a tornado were to destroy a home, an insured would be entitled to recover no more than the policy limits. While the possibility exists that there could be multiple fire losses within a policy period, with the combined amount of loss exceeding policy limits, it is extremely unlikely. It is the nature of mold-related losses that creates the stacking problem by which some claimants have recovered claim amounts far in excess of policy limits, increasing the losses attributable to mold. While this obviously creates a rate problem, it also raises an issue of equity.

Another factor unique to mold involves the process and costs related to mold testing, containment, and remediation. Currently, there are no federal or state licensing or certification standards for mold testers or remediators, nor are there officially adopted protocols or guidelines for assessment and remediation. This fact, coupled with the lack of federal or state health or environmental standards establishing acceptable background or tolerance levels for various types of mold, makes remediation procedures diverse and, often, costly. Indeed, many consumers and industry representatives have cited a wide variety of costs associated with testing, containment, and remediation of mold, separate from the costs required to repair or replace property physically damaged by water and ensuing mold. In addition, many initial attempts at remediation are unsuccessful, which also contributes to costs.

The industry has estimated additional statewide rate increases of 40 percent or more if the current ensuing mold damage coverage is not changed which, as noted above, could be greater in certain areas of the state. Consumers have also recognized that mold coverage is costly. Many have told the Department that they are willing to pay increased premium for some mold coverage in the basic homeowners policy. Others have said that they do not want to pay for mold coverage and want an option to exclude mold coverage from the policy. Many have asked that the Department refrain from eliminating mold coverage entirely.

Since the Department began studying mold coverage issues, several companies have announced plans to take action on their own to address the situation. Such action has included ceasing to write the HO-B policy, an all risk policy which until recently has constituted 96% of the homeowners policies issued in Texas in favor of the HO-A; ceasing to write new business altogether; nonrenewing all HO-B coverage and

offering instead HO-A coverage; and adjusting their marketing strategy by, for example, declining to write policyholders with previous water losses. While the Commissioner has asked the industry not to take such actions, but rather to give the Department an opportunity to find an industrywide solution, companies nevertheless have continued to pursue their own solutions. Numerous companies have also filed individual policy endorsements containing coverage limitations for mold and water damage and others have filed or indicated they will file their own policies with the Department. It was against this backdrop that the Commissioner called upon Department staff to develop a compromise, which was proposed in the petition. Comments and changes to that proposal have been thoroughly evaluated in reaching the decision adopted in this order.

II. Changes to the Endorsements and Manual Rules As Proposed

The original petition proposed a coverage scheme meant to address insurers' concerns about rapidly increasing claims and losses specific to mold and the attendant rate impact; some homeowners' concerns for the need for continued coverage; high claims costs due to "stacking" of policy limits; and the Department's and some consumers' general concern about continued availability and affordability of residential property insurance. The proposed compromise contained in the petition attempted to address the above concerns by establishing a flat $5,000 limit on mold coverage in the basic policy while requiring insurers to give consumers the ability to purchase additional coverage ("buybacks") in increments of 25%, 50%, and 100% of policy limits. It also contained a "stacking" provision whereby multiple mold-related claims due to water damage during a single policy period could not exceed policy limits.

While the $5,000 basic limit was meant to be a compromise measure that would address the large increase in losses while covering approximately 50 percent of mold claims, the vast majority of consumers, insurers, and other interested persons who commented on this provision opposed it. Numerous commenters expressed concern that a $5,000 limit was woefully inadequate because mold remediation costs, particularly with regard to testing and containment, were far in excess of this amount. Estimates of the average cost of a mold-related claim ranged from $18,000 to $92,000. Some commenters advocated raising the basic limit to $10,000 or $15,000. Some commenters stated that air quality testing costs are routinely high and therefore should be placed outside a basic dollar limit. Many consumers alleged it was unfair for the policy to provide such low levels of coverage for undetectable mold infestations. Conversely, many other commenters believed that mold claims frequently arise from a home maintenance failure by the insured, and argued that this coverage was not appropriate in a homeowners policy. Several insurers urged the Commissioner not to adopt the $5,000 limit because they believe mold damage and water damage are inseparable; some argued that a $5,000 limit would be difficult to adjust, citing the lack of standards for remediation, and felt that insurers would be inclined to add $5,000 to any water damage claim, thus increasing costs to all insureds. Some insureds stated that they did not want any mold coverage, nor did they want to pay for it.

The Commissioner believes many of these concerns are valid, and agrees that limiting basic coverage for mold as an ensuing loss based on a fixed dollar amount is not the optimal solution to address the Department's fundamental goal: to allow some basic, limited coverage for ensuing mold, while giving consumers the ability to purchase increased coverage, in order to enhance continued availability and affordability. As many comments made clear, addressing ensuing mold is frequently a part of repairing and replacing property damaged by a covered water loss; however, the remediation process, particularly testing for and containment of airborne mold, has been a major cost driver in losses. Accordingly, the coverage scheme as proposed is modified in response to the above comments and concerns to replace the flat dollar limit on basic coverage with a basic limitation that will allow coverage where mold ensues from a covered water discharge, leak, or overflow that is sudden and accidental (including a discharge, leak, or overflow that is hidden or concealed and is undetectable), but only covers the repair and replacement of water-damaged property and not the cost of remediation or testing. This is intended to effectively return coverage to what it was prior to the recent sharp escalation of mold claims.

The buyback provisions have not changed substantially from the original proposal, and continue to allow enhanced mold coverage in the incremental amounts of 25%, 50% and 100% of policy limits. The coverage purchased in these endorsements is not additional insurance that increases the limit of liability for Coverage A (Dwelling) and/or Coverage B (Personal Property). However, other changes to the original proposal have been made to conform to the modification of the coverage scheme detailed above. Remediation is basically defined to include testing, treating, containing, decontaminating, or disposing of mold beyond that which is necessary to repair or replace property that is physically damaged by water. Further, the "stacking" provision is modified to apply only to the incremental buybacks. This is because the adopted changes to the basic policy coverage to eliminate coverage for remediation costs should obviate the problem that the stacking provision was intended to address: without remediation and testing costs, it becomes highly unlikely that the repair or replacement of property damaged by a covered water loss with an ensuing mold component would exceed policy limits.

Other changes to the proposal have also been made in response to comments, including adding "other microbes" to the category of ensuing losses that include mold or other fungi to address concerns that these could cause problems similar to mold; requiring consumers to report a hidden or concealed water loss no later than 30 days after such loss is or should have been detected; adding the requirement that insurers provide information to consumers about their options under the policy and obtain insureds' written acknowledgement of the coverage selected; and clarifying that insurers are allowed to continue to underwrite residential property policies. These changes and the comments on which they were based are also discussed elsewhere in this order.

Based on the comments and information received, the Commissioner believes the revised coverage scheme is a reasonable, equitable compromise that protects the public while addressing concerns raised by the public and the insurance industry.

A. Amendatory Mandatory Endorsements (Basic Policy Coverage)

Based on comments on the proposal and on information received as a result of the special Mold Data Call, the Commissioner adopts nine amendatory mandatory endorsements which are a modification of the original proposal. The policy modifications made by the adopted amendments are described in more detail as follows:

1. The Exclusions portion of the HO-B, HO-C, HO-CT, HO-C-CON, and TDP-3 policies (where there is currently a mold exclusion, except in the case of mold ensuing from covered water damage) is amended to delete the words "mold or other fungi" from the current mold exclusion and to add a new exclusion to exclude loss caused by or resulting from mold, fungi or other microbes.

2. In addition to the exclusionary language in the new exclusions, several other provisions within the exclusion provide limited mold coverage, as follows:

a. An exception to the exclusion that provides coverage for "ensuing mold, fungi or other microbial losses caused by or resulting from sudden and accidental discharge, leakage, or overflow of water or steam if the water loss would otherwise be covered under the policy."

b. A provision that clarifies that sudden and accidental includes "a physical loss that is hidden or concealed for a period of time until it is detectable." Further, a hidden loss must be reported to the insurer no later than thirty days after the date that the insured detected or should have detected the loss.

c. A provision clarifying that for purposes of the mold coverage provided in the exception to the general mold exclusion, the ensuing mold losses covered include "reasonable and necessary repair or replacement of property covered under Coverage A (Dwelling) and/or Coverage B (Personal Property)."

d. A provision that limits the mold coverage provided in the exception to the general mold exclusion by clarifying that the cost of remediation, "including testing of ensuing mold, fungi or other microbes," is not covered. Additionally, any increases in expenses for Loss of Use and/or Debris Removal due to remediation and testing are not covered.

e. A definition of remediation as "to treat, contain, remove or dispose of mold, fungi or other microbes beyond that which is required to repair or replace the covered property physically damaged by water or steam. Remediation includes any testing to detect, measure or evaluate mold, fungi or other microbes and any decontamination of the residence premises or property".

Basically, these adopted endorsements provide a new, broad mold exclusion but create some basic ensuing mold coverage in an exception to this exclusion. The new mold coverage is more limited than the current coverage in that it only covers mold losses that ensue from a sudden and accidental discharge of water or steam, which is defined to include hidden or concealed water damage until it is detectable. Under the current coverage, mold is covered if it ensues from an accidental discharge, leakage, or overflow of water or steam. The addition of the word "sudden" to the water damage peril as it relates to mold is intended to exclude loss caused by mold resulting from leakage or seepage of water over a period of time that is not hidden or concealed. This is distinguished from the current coverage because currently, mold resulting from repeated and continuous leakage or seepage would be covered.

The other provisions in the adopted amendatory mandatory endorsements limit the mold coverage to provide that there is no mold coverage beyond the physical damage to the covered property from a covered sudden and accidental water loss. With respect to the physical damage caused by a covered water loss, only reasonable and necessary costs to repair or replace the damage are covered. Any expenses beyond this due to mold, fungi or other microbes, such as remediation and testing, are not covered. Additionally, any increase in expenses for Loss of Use and/or Debris Removal due to remediation and testing of mold is not covered. An insured who desires mold coverage beyond the physical repair of the property (e.g., remediation including testing, increased Loss of Use, increased Debris Removal, and remediation of property not physically damaged by water) may purchase the additional mold coverage available in the mandatory offer endorsements.

The nine adopted amendatory mandatory endorsements are a modification of the proposed amendatory mandatory endorsements. Basically, in both the proposed endorsements and the adopted endorsements the current policy exclusion for mold was amended to remove mold or other fungi and a new policy exclusion was created. Additionally, in both the proposed endorsements and the adopted endorsements some limited mold coverage was created through an exception to the exclusion. There are differences between the proposed and adopted endorsements in the limitations and related provisions that govern the mold coverage. However, the amendatory mandatory endorsements as proposed and as adopted consist of a similar general coverage scheme for mold-related losses.

The adopted amendatory mandatory endorsements are: (1) Endorsement No. HO-161A which will be attached to Texas Homeowners Form-A (HO-A), (2) Endorsement No. HO-162A which will be attached to Texas Homeowners Form-B (HO-B), (3) Endorsement No. HO-163A which will be attached to Texas Homeowners Form-C (HO-C), (4) Endorsement No. HO-164A which will be attached to the Texas Homeowners Tenant Policy-Form B (HO-BT), (5) Endorsement No. HO-165A which will be attached to the Texas Homeowners Condominium Policy-Form B (HO-B-CON), (6) Endorsement No. HO-166A which will be attached to the Texas Homeowners Tenant Policy-Form C (HO-CT), (7) Endorsement No. HO-167A which will be attached to the Texas Homeowners Condominium Policy-Form C (HO-C-CON), (8) Endorsement No. TDP-004A which will be attached to the Texas Dwelling Policy-Form 1 (TDP-1) and the Texas Dwelling Policy-Form 2 (TDP-2), and (9) Endorsement No. TDP-005A which will be attached to the Texas Dwelling Policy-Form 3 (TDP-3). These adopted endorsements are more particularly set forth in Exhibits A through I which are attached hereto and made a part hereof for all purposes.

B. Mandatory Offer Endorsements ("Buyback" of Mold Coverage)

The Commissioner adopts the mandatory offer endorsements with only minor changes to the endorsements as originally proposed. The principle change to the endorsements is that all references to the $5,000 base level of coverage have been removed since the Commissioner declines to adopt the $5,000 base level of coverage, and certain other changes have been made to conform to the amendatory mandatory endorsements. In all other respects, the provisions in these endorsements as described below are substantially the same as contained in the original proposal.

The nine new mandatory offer endorsements allow consumers to purchase, for an additional premium, a specified percentage of policy limits for mold, fungi or other microbes coverage. The attachment of one of the proposed mandatory offer endorsements (HO-161, HO-162, HO-163, HO-164, HO-165, HO-166, HO-167, TDP-004, and TDP-005) to the appropriate homeowners or dwelling policy would provide enhanced coverage for mold, fungi or other microbes as an ensuing loss from a covered water claim. The mold coverages specified in the adopted mandatory offer endorsements do not affect any direct water damage coverage otherwise provided in the policy.

These endorsements amend the mold exclusion contained in the policy to provide, for an additional premium, enhanced coverage for ensuing mold, fungi or other microbes. The endorsements further specify the coverage provisions, loss of use provisions, and loss settlement provisions that apply to mold coverage, as follows:

1. Coverage Provisions.

a. The insurer agrees to pay the reasonable and necessary expenses to remediate, repair, or replace property described on the declarations page at a percentage (25%, 50%, or 100%) of the limits applicable to Coverage A (Dwelling) and Coverage B (Personal Property) for loss caused by ensuing mold, fungi or other microbes caused by covered water damage (this coverage only applies to Coverage B (Personal Property) for the HO-164, HO-165, HO-166, and HO-167).

b. The maximum limit of liability for this mold coverage is shown on the declarations page. The coverage purchased in this endorsement is not additional insurance and does not increase the limit of liability for Coverage A (Dwelling) and/or Coverage B (Personal Property).

2. Loss of Use Provisions.

a. In the event a loss caused by ensuing mold, fungi or other microbes that is covered under these endorsements makes the residence wholly or partially untenantable, the insurer will pay the additional living expenses, if the basic policy provides such coverage, so that the household can maintain its normal standard of living and/or the fair rental value of the residence premises usually rented to others by the insured, less any expenses that do not continue.

b. The total limit of liability for all loss of use is included in the maximum limit of liability for this coverage as shown on the declarations page. The deductible clause does not apply to loss of use coverage.

c. The payment for loss of use will be for the reasonable time required to remediate, repair, or replace the damaged property. If the insured permanently relocates, the payment will be for the reasonable time required for the household to become settled.

d. The periods of time for loss of use are not limited by the expiration of the policy.

3. Loss Settlement Provisions.

This provision specifies that an insurer's limit of liability for mold losses covered under items 1 and 2 of the endorsement is the maximum amount the insurer will pay for the sum of all losses regardless of the number of losses that occur during the policy period stated on the declarations page.

4. General Provisions.

a. There is a general provision containing the definition of the term "remediate" that applies to the entire endorsement, which defines this term to include the treatment, containment, removal, decontamination for, and disposal of mold, fungi or other microbes as required to complete the repair or replacement of covered property, including the testing required to evaluate levels of mold, fungi or other microbes.

b. There is also a general provision that all other terms of the policy apply.

The adopted mandatory offer endorsements are: (1) Endorsement No. HO-161 which may be attached to Texas Homeowners Form-A (HO-A), (2) Endorsement No. HO-162 which may be attached to Texas Homeowners Form-B (HO-B), (3) Endorsement No. HO-163 which may be attached to Texas Homeowners Form-C (HO-C), (4) Endorsement No. HO-164 which may be attached to the Texas Homeowners Tenant Policy-Form B (HO-BT), (5) Endorsement No. HO-165 which may be attached to the Texas Homeowners Condominium Policy-Form B (HO-B-CON), (6) Endorsement No. HO-166 which may be attached to the Texas Homeowners Tenant Policy-Form C (HO-CT), (7) Endorsement No. HO-167 which may be attached to the Texas Homeowners Condominium Policy-Form C (HO-C-CON), (8) Endorsement No. TDP-004 which may be attached to the Texas Dwelling Policy-Form 1 (TDP-1) and the Texas Dwelling Policy-Form 2 (TDP-2), and (9) Endorsement No. TDP-005 which may be attached to the Texas Dwelling Policy-Form 3 (TDP-3). These adopted endorsements are more particularly set forth in Exhibits J through R which are attached hereto and made a part hereof for all purposes.

C. Amendment to Endorsement No. HO-170

Endorsement No. HO-170 (Additional Extended Coverage) is an optional endorsement which may be attached to the HO-A, for an additional premium, to extend Coverage A (Dwelling) and Coverage B (Personal Property) to include ten additional Perils Insured Against, including the accidental discharge of water or steam from within a plumbing, heating or air conditioning system or household appliance. With the addition of water as a peril to the HO-A, it is necessary to amend the Exclusions portion of the HO-170 to conform to the other adopted endorsements. The adopted amendment to the HO-170 amends the Exclusions portion of the endorsement to add a new item 4 to exclude loss caused by or resulting from mold, fungi or other microbes, but preserves the same limited coverage as the amendatory mandatory endorsements in the case of sudden and accidental water damage. The language of this new exclusion closely tracks the language of the new exclusion that is contained in the adopted amendatory mandatory endorsements. This amendment to the HO-170 is necessary to ensure that the HO-A includes the same ensuing mold coverage provided by the other adopted amendatory mandatory endorsements. This adopted amended endorsement is more particularly set forth in Exhibit S which is attached hereto and made a part hereof for all purposes.

D. Manual Rules-Policy Writing Sections

To conform to the adopted changes detailed above, the Commissioner adopts two new policy writing Manual rules which are a modification of the original proposal: (1) Rule IV-A, "Section I Mandatory Offer Endorsements" is added in the Homeowners Section, (2) Rule IV, "Mandatory Offer Endorsements" is added in the Dwelling Section. These new rules provide that all applicants who are offered a residential property insurance policy shall also be offered, at the time of application, the Mold, Fungi or Other Microbes Coverage Endorsement. Additionally, the rules specify that coverage is available to provide selected percentages of mold coverage (25%, 50%, or 100% of the limits of liability applicable to Coverage A (Dwelling), Coverage B (Personal Property), and Loss of Use) and that all coverage limits must be offered to each applicant. An illustrative example is included to demonstrate the effect that the elected percentage of coverage has on the limits of liability. These rules are intended to ensure that all applicants for insurance have the opportunity to purchase additional mold coverage to pay the increased expenses for remediation, testing, loss of use, and debris removal if they so desire.

The first modification specifies that insurers may file endorsements (subject to prior approval) to offer limits of liability selection options in lieu of the 25% and 50% selection options. However, the rules maintain the 100% selection option as originally proposed by requiring insurers to offer a 100% selection option in conjunction with selection options that are filed by individual insurers and approved by the Commissioner. A second modification adds a new provision that prevents an insurer from conditioning the sale of a policy based on an insured's selection option. The purpose of this provision is to ensure full consumer choice by requiring that all options be offered by insurers. The next modification provides that an insurer may decline a request by an applicant or insured to purchase the Mold, Fungi or Other Microbes Coverage Endorsement if the declination is based on sound underwriting principles related to an actual or anticipated mold loss exposure for the risk. The purpose of this provision is to address comments by insurers concerning the problem of adverse selection and to provide insurers with the opportunity to decline to provide the optional coverage to those risks that might, for example, have an unreported water claim that may involve mold at the time they are attempting to purchase mold coverage. A note is included to require insurers to offer the Mold, Fungi or Other Microbes Coverage endorsement to insureds upon renewal of their policy without the insured having to make a request for the coverage.

This rule is further modified, in response to comments, to add a provision entitled "Consumer Notice Requirements", to address concerns about the minimum information that insurers are required to provide to explain the available options to applicants or insureds. As advocated by some commenters, this provision is designed to provide some protection for insurers when they provide this basic information to consumers concerning the offer of the new endorsements; in addition, it will assist consumers in making an informed choice. The consumer notice requirements specify that insurers must provide to each applicant

a clear explanation of the available selection options that outlines the coverage and premium charge associated with each option and further require that the consumer sign the written explanation to acknowledge that the consumer understands the options available and is making an informed decision regarding the option selected. A sample of the language that may be used to satisfy the consumer notice requirements is also included in the Manual rules and is outlined as follows:

1. A definition of remediation that specifies this term means to treat, contain, remove or dispose of mold, fungi or other microbes beyond that required to repair or replace the covered property physically damaged by water or steam. It defines remediation to include any testing or measures to evaluate mold, fungi or other microbes and any decontamination.

2. Option 1. (Basic Mold Coverage Only) This option provides the applicant with an explanation of the basic mold coverage in the policies and includes the amount of premium that would be paid if this option were selected. More particularly, the applicant is informed that mold losses must be caused by or result from a sudden and accidental discharge of water or steam to be covered under the policy. A sudden and accidental discharge of water or steam is further clarified to include physical loss that is hidden for a period of time until it is detected. The applicant is further informed that the basic policy does not provide coverage for the cost of remediation, including mold testing, or increases in expenses due to remediation or testing, but does pay for reasonable and necessary repair or replacement of covered property.

3. Option 2 (25%), Option 3 (50%) and Option 4 (100%). (Optional Buybacks) These options provide the applicant with an explanation of the 25%, 50% and 100% selection options and include the amount of premium the applicant would pay for each option. More particularly, the applicant is informed that if one of these percentages of additional mold coverage is chosen, the policy will provide 25%, 50%, or 100%, depending on the option chosen, of the limit of liability for Coverage A (Dwelling) and Coverage B (Personal Property) to pay for the cost to remediate (including testing), repair or replace covered property due to loss caused by ensuing mold, fungi or other microbes resulting from water or steam damage if such loss would otherwise be covered. Additionally, these options will provide 25%, 50%, or 100%, depending on the option chosen, of the loss of use limit of liability to pay for additional living expenses or fair rental value if a loss caused by mold, fungi or other microbes that results from a water or steam loss that is covered under the policy makes the residence premises wholly or partially untenantable.

The adopted rules are a modification of the rules as originally proposed in that the same general scheme of coverage options (25%, 50%, or 100% of the limits of liability applicable to Coverage A (Dwelling), Coverage B (Personal Property), and Loss of Use) are preserved in the adopted rules and are the focus of the rules. Additionally, in both the proposed and adopted rules there are provisions to ensure a smooth effective phase-in of the new mandatory offer endorsements.

These adopted rules and amendments are more particularly set forth in Exhibits T and U which are attached hereto and made a part hereof for all purposes.

E. Policy Rating Manual Rules and Rating Examples

Because the Commissioner is not establishing rates in this order, it is unnecessary for the Commissioner to adopt the two proposed policy rating Manual rules: Rating Rule VI-O for Homeowners, Tenants, and Condominium Policies and Rating Rule VI-L for Dwelling, Additional Extended Coverage, and Physical Loss Form.

F. Amendments to the Residential Statistical Plan

Conforming amendments to the coding section, premiums section, and losses section of the Residential Statistical Plan are set forth in Exhibit V that is attached hereto and made a part hereof for all purposes.

III. Summary of Comments and Agency's Response

In addressing the mold issue, the Department conducted three public informational hearings across the state, received testimony at those hearings as well as at the hearing on staff's petition, and analyzed hundreds of written comments. While all comments were considered, not every comment is specifically identified or addressed individually herein. This is consistent with Article 5.96 which exempts this order from the rulemaking procedures of the APA. However, the following summary generally addresses substantive, procedural, and legal issues raised concerning the proposal, and comments and suggestions for changes to the proposal.

A. TDI Policy Issues

One commenter stated that the proposed endorsements and rules shift the burden of mold problems from insurers to consumers. The Department's original proposal, while limiting basic coverage for mold to $5,000, was not intended to shift the burden of coverage; rather, it was meant to provide for a meaningful level of basic coverage while allowing consumers the ability to select additional levels. The adoption similarly allows a basic level of coverage, although not limited by a flat dollar amount, along with the possibility of obtaining enhanced coverage. However, in response to numerous comments as detailed herein, the Department modified the basic coverage to exempt losses from ensuing mold coverage where the loss was not sudden and accidental and was detectable by the insured. The Department believes this is not a shifting of the burden of coverage; rather, it is a recognition that routine home maintenance should be the responsibility of homeowners rather than insurers.

One commenter states there is an absence of meaningful competition in the residential property insurance market in Texas and an absence of regulatory authority to ensure that mold buyback coverage is reasonably priced and even offered by insurers and suggests legislative action on rate regulation for all insurers. Another commenter calls for an interim legislative study of the homeowners insurance market. The commenter states that since 95% of all homeowners in Texas pay rates that are unregulated, the current proposal assures a cap on the industry's exposure to claims but offers no assurance of a cap on rate increases. The commenter maintains that the Insurance Code's exemption from rate regulation for certain companies was never intended to develop into a wholesale circumvention of the flex-band rating system.

The Department understands the commenters' concerns and recognizes that a significant portion of the market is not rate regulated. An interim charge has been directed to the Senate Committee on Business and Commerce to study among other things, rate regulation of homeowners insurance, and the effects of deregulation on insurance rates and consumers. Additionally, an interim charge has been directed to the House Committee on Insurance to review issues associated with homeowners insurance coverage of toxic mold and mold-related claims, including considering measures that would ensure appropriate coverage and remediation of damage and maintain the viability of the homeowners insurance market.

One commenter states that the Department's proposal is flawed because the model of a bare-bones policy with "consumer choice" for buying back coverages has been discredited, and cites the example of the "Property Protection Plan" forms and endorsements, not one of which policies the commenter states has been sold in the designated underserved areas. The Department disagrees with this comment because the Property Protection Plan, which is operated pursuant to Article 5.35-3, was developed solely to assist underserved markets. Modifying the

residential property policies is not analogous, and therefore, not appropriate for comparison.

A commenter believes that any endorsements limiting mold coverage should expire one year from their effective date to allow the Department to re-evaluate the situation. While the Department does not believe an automatic expiration is appropriate, it is fully committed to monitoring and re-evaluating the status of the market with regard to this adoption order and in general does not believe an automatic expiration is appropriate.

A commenter suggests that the legislature may need to address certain mold issues, such as, insurers should not be allowed to "cherry pick"; rates should be regulated by TDI or by the legislature; and that Article 21.55, concerning prompt payment of claims needs to be amended to shorten the time period that an insurer has to investigate and adjust water damage claims. Another commenter believes that the legislature should exercise oversight over any proposal adopted by TDI to address the mold crisis. As noted above, the legislature has indicated that it will be reviewing certain issues related to mold and rate regulation.

B. Sub-Limits /Base Coverage ($5,000 basic limits)

Numerous commenters expressed disagreement with the $5,000 basic mold coverage as originally proposed. Several said this amount was inadequate to cover the majority of mold claims, and some said the base amount should be increased to $10,000 or $15,000. Others said that a flat cap on mold coverage would remove the incentive for insurers to respond to water claims in a timely manner. Another commenter said the $5,000 limit would be difficult to adjust because of the lack of standards for remediation and the debate over health effects, thus making it unworkable for insurers. Another commenter said the $5,000 cap would merely cause a shift from mold damage claims to water damage, and that insurers would be inclined to merely add a flat $5,000 to a water claim, as it would be too difficult to separate mold from water damage. The same commenter also expressed concerns over liability for not telling insureds how to utilize their $5,000 claim payment. Many commenters suggested changes or alternatives to the proposed approach, including endorsements allowing catastrophic coverage within policy limits; changes to the "remediate, repair, or replace" language; removing this coverage from the Exclusions section and putting it in an endorsement to the Extensions of Coverage section; clarifying the language of the proposed endorsement; providing an exclusion to address wet and dry rot and bacteria in addition to mold and other fungi; amending the definition to make testing part of the claims investigation; and restricting the definition to prevent the recharacterization of remediation costs as water damage and thereby circumventing the base limits.

The proposed cap on mold coverage was designed to be a compromise measure that would address the increase in losses while covering approximately 50 percent of mold claims. However, the vast majority of those who commented on this provision, including both consumers and insurers, opposed it entirely or recommended changes. For the reasons stated earlier, and in response to those comments, the Department has determined not to adopt the base $5,000 coverage limit. The Department believes the current decision provides a compromise that addresses the concerns raised by both consumers and insurers, in that it allows limited coverage for mold, fungi or other microbes, except where such mold results from a home maintenance failure, and excludes coverage for remediation and testing.

C. Stacking of Policy Limits

While some commenters expressed support for the anti-stacking policy limits provision, others believed that the proposed amendments did not entirely alleviate this problem. One commenter said the proposal did not limit the definition of "occurrence" when mold appears in several locations, while another commenter said additional language was needed to clarify that limits apply to claims made within the policy period. Several said that this provision should be amended to prevent stacking over multiple policy periods and multiple occurrences of the same event. One commenter disagreed with limiting coverage for damage caused by multiple events; another said there should be no distinction between claims involving mold, fire, lightning strikes, or hurricanes and that consumers should be able to collect on multiple claims that exceed 100% of their home's value. One commenter said this provision should be deleted because a $5,000 cap on mold claims would solve the problem of exceeding policy limits.

After considering all comments, the Department does not believe that stacking remains a problem in the case of the basic coverage adopted in this order because such coverage is limited to repair or replacement of covered property which would limit to some extent recovery beyond policy limits. Due to the broader coverage provided in the optional buyback endorsements, however, the Department still believes that an anti-stacking provision for mold is necessary in order to control losses in excess of policy limits. The Department believes the language of the anti-stacking provision is sufficient to apply to multiple claims occurring within a policy period. The anti-stacking provision as adopted in this order also addresses the situation where mold appears in several locations since the total losses for all mold-related claims within a policy period are limited to policy limits. Despite the fact that a home theoretically could be totally destroyed by fire or hurricane more than once in a policy period, the likelihood of such events creating the magnitude of losses that have occurred with multiple mold claims is slight. In addition, because the homeowners policy is an occurrence-based policy, it would not be appropriate to apply the stacking provision over policy periods.

D. Separating Mold Claims From Water Claims for Purposes of Claims Handling

Some commenters opposed staff's petition because they believe that mold and water are inseparable and therefore the problem of escalating mold losses will not be solved due to claims disputes regarding whether the costs are allocated to water or mold.

The Department acknowledges and agrees that this may be a concern. To address this concern, the basic coverage adopted herein contains the coverage descriptions and definitions that are directed at excluding certain services related specifically to mold, rather than attempting to differentiate between the damage that may have been caused by mold and the damage caused by water itself. The Department expects and intends that under the basic coverage adopted in this order insurers will pay any and all direct losses due to water damage as provided by the coverage description and definitions in the policy.

E. Under What Circumstances Should Mold Claims Be Covered?

Some commenters contended that mold is frequently the result of a homeowner's failure to maintain or timely repair the plumbing, heating, AC system or a household appliance. The residential property policy was designed to cover unforeseen and fortuitous types of water damage and should not be a service contract or home maintenance policy on a residence. Others said it should be the insured's responsibility to mitigate a condition before it becomes a loss and that the failure to do so should not be covered by insurance. Homeowners who conduct proper maintenance should not be penalized, in the form of higher rates, due to those who shirk their maintenance responsibilities. A commenter said consumers can use simple preventative maintenance techniques to prevent, eliminate, or control mold growth, while another said that a conscientious homeowner could discover a leak before it becomes a serious problem. One agreed that quick repair, evaluation, and

remediation can avoid a mold contamination claim altogether. Another commenter said that the "onus" should be placed on the policyholder to notify and remediate in a timely manner. Some commenters pointed out that a tiny leak could go undetected and a problem could be growing without a person's awareness. Another commenter contended that insurance coverage is intended to protect against unexpected and unforeseeable events, but that mold generally is a maintenance issue rather than an insurable event.

Some commenters urged that mold be limited to water losses that are sudden and accidental, or that the water losses themselves be so limited, consistent with many policies used nationwide. Others disagreed with this approach. One commenter believed coverage should be limited to visible mold rather than mold spores, and that coverage should be limited to repair and replacement of materials that cannot be cleaned with disinfectants. This commenter also noted that one needs only to breathe to be exposed to mold spores; that mold testing compares the inside to outside mold count; and that the homeowners policy cannot be expected to insure the resident against the quality of outdoor air. Another commenter said that the standard policy should exclude all coverage related to remediation, similar to the way in which environmental remediation from other sources is not included, but that consumers should be able to purchase special mold remediation coverage related to water leaks.

After hearing all the comments, the Department is convinced that it is a fair and equitable solution to place the responsibility for mold resulting from inadequate home maintenance on those homeowners, otherwise all homeowners will bear the cost of the omissions of the few. Encouraging homeowners to be vigilant will help to mitigate mold-related losses and costs. This concept, in addition to the limitation in the policy to repair or replace rather than test and remediate, is intended to return coverage to what it was prior to the recent surge in mold-related claims.

F. Mold and Other Fungi

Some commenters stated that "mold and fungi" should be defined to include "bacteria" or "bacteria and other microbial contamination" which one commenter said is abundant in the atmosphere and could be as expensive as mold to remediate. The commenter claimed that without such definition, persons taking advantage of the current mold crisis could recharacterize the problem and seek coverage. The Department agrees with these concerns and has accordingly added the term "other microbes."

G. Exclusion of Water Damage/Mold

Numerous comments were received regarding the issue of a total exclusion of water damage or mold damage or water and mold damage. The focus of the comments concerned discussions regarding some level of base coverage; optional coverages involving insurer's choice or consumer's choice; limitations of coverage to "sudden and accidental"; and certain groups subsidizing mold coverage for other groups.

As noted above, after considering all comments received, the Department has determined that the most reasonable, fair, and equitable approach is for mold coverage to be available to all insureds by providing some basic coverage for mold-related claims in the basic residential insurance policies but giving insureds the option to purchase enhanced mold coverage. The adoption set forth in this order, therefore, is believed to be the appropriate solution to address the issue of mold coverage in Texas residential property policies.

H. Availability of Homeowners Insurance and Mold Coverage

Numerous commenters have expressed concern that mold claims have caused insurers to restrict writing or offer inadequate coverage and that insurance coverage for mold will make policies unaffordable, thereby impacting the Texas economy.

Availability and affordability are the Department's paramount concerns. For that reason, it shares these commenters' concerns, especially in light of market changes that have occurred. This adoption order responds to these concerns by creating a coverage scheme that attempts to return coverage to what it was prior to the recent surge of mold claims.

The issue of availability also generated comments calling for legislative review of the availability and affordability of mold coverage that insurers offer and a desire for broad mold coverage to be available even with the understanding that rates would increase. Conversely, some consumers have indicated that they would forego mold coverage in exchange for lower rates.

As noted previously, the legislature has indicated that it will be reviewing certain issues related to mold and rate regulation. The Department reiterates that the adoption set forth herein is intended to promote market stability by limiting the coverage for mold and providing consumer choice. The adoption set forth herein does provide broad consumer flexibility to the extent that an insured may determine how much mold coverage they desire to purchase.

I. Mandatory Offer Endorsements (25%, 50%, 100% Buybacks)

One commenter supported the mandated offer of additional coverage up to policy limits and believes that if not mandated, insurers would not offer mold coverage. Many commenters opposed the mandatory offer endorsements on various grounds, including the mandatory feature of the offer to buy back coverage; the claim that the proposed percentage limits are too high; the belief that the additional amounts purchased should be stated in specific dollar amounts rather than a percentage of Coverage A and Coverage B or at least the option to so state; and the belief that it is confusing to have a single limit base coverage and a mandatory offer endorsement that provides a "per coverage" limit. One commenter questioned how the percentage buyback of mold coverage will apply when policy limits are increased due to inflationary changes, and one commenter asked for clarification whether the base coverage is additional insurance over the percentage limits chosen. There were also suggestions by commenters that the word "ensuing" should be deleted as being too confusing and that additional language should be added to clarify that mold coverage is intended to be provided only in direct conjunction with water damage.

The Department's rationale for considering mandatory offer coverage was to provide flexibility for consumer choice as well as to address availability of coverage issues. The specific elements of the mandatory offer coverage were designed to allow greater choice by setting forth percentages for buybacks and to preserve the current elements of mold coverage as an ensuing loss resulting from covered water damage. Percentage limits of increased coverage were chosen rather than specific dollar amounts because the wide range of home values as well as the wide variations in claim costs made it difficult for the Department to identify appropriate dollar amount limits. However, the Department is willing to consider alternative approaches in individual insurer filings, including specific dollar limits.

The Department disagrees that the proposed language concerning the base coverage was unclear because the mandatory offer endorsements clearly stated that the coverage would be increased above the $5,000 base amount. However, in response to comments, the adoption changes the flat $5,000 base limit for mold to the limited mold coverage as described herein. Regarding the issue of when policy limits would be increased due to inflationary changes, the Department believes the mold coverage limits, since they are stated as a percentage of policy limits,

would necessarily be increased at the same time and to the same extent any other limits are adjusted in the policy.

J. Manual Rule IV. A.-Mandatory Offer Endorsements

Many commenters raised issues in support and opposition to the manual rule governing mandatory offer endorsements. Several commenters believed that the mandatory offer should be required only one time or every other year or that subsequent offers should be optional; that the mandatory offer could lead to adverse selection and does not allow for underwriting; and that the mechanics of the mandatory offer be clarified to ensure clear consumer information, clear indication of consumer choices, and protection for agents and insurers to document the consumer's ultimate choice. Some commenters spoke to the $5,000 base coverage in terms of either an offer to consumers or the recommendation that this coverage should be offered as an endorsement.

The Department's adoption set forth herein should alleviate many of these concerns. Specifically, the manual rule as modified based on the comments provides that an insurer may decline the insured's option to purchase additional mold coverage if the denial is based upon sound underwriting principles reasonably related to an actual or anticipated mold exposure for the insured risk. This change obviates the concern about timing of the offer. With regard to comments expressing concern about disclosure to consumers, the adopted rule provides minimum required information that must be included in a notice form required to be provided to applicants or insureds, as well as sample language that would satisfy the minimum requirements. The adopted manual rule is also designed to provide for informed consumer choice and documentation of same. Regarding offers of the $5,000 base coverage, because the initial proposal intended that some level of coverage be included in the policy, an offer or an endorsement was not pertinent. This is equally true of the basic policy as adopted herein.

K. Implementation Date

Some commenters expressed concerns regarding the effective date and the issue of implementation of the endorsements. Such concerns centered on insurer system and programming changes, indicating that the time necessary for implementation varied from an eight to ten week period to a six-month period. One commenter suggested one effective date for new business and a later date for renewals.

The Department's adoption of the endorsements and rules as set forth herein provides that the adopted endorsements and rules will be effective, and available for use, on January 1, 2002. Given the comments regarding time needed to implement the endorsements, no fixed implementation date is mandated until January 1, 2003. Rate regulated insurers may use such endorsements upon filing and approval under Article 5.101, Section 4, for appropriate rate changes to be used with the endorsements.

L. Policy Deductibles

Various suggestions were made either to waive policy deductibles on verified mold claims in addition to the $5,000 cap proposal; to have the $5,000 base coverage apply in excess of the policy deductible; to apply the deductible to the $5,000 base coverage and any higher limits of liability that are purchased; or to have a rule allowing insurers to offer different deductibles specific to any higher limits of mold coverage offered by the insurer.

The Department believes that the adoption set forth herein address the concerns raised by these issues; however, the Department notes that policy deductibles under a residential property policy apply to the total amount of the loss and a deductible would apply to each occurrence. The application of deductibles will remain the same under the new basic coverage and the mandatory offer coverage.

M. Loss of Use Coverage Clarification (Additional Living Expenses)

Several commenters expressed concern that the loss of use provisions in the new endorsements are ambiguous or unclear, and that clarification is needed to more clearly reflect the intent stated in the manual rules. Some commenters suggested that the coverage for "loss of use" in the endorsements (termed "additional living expenses" and "fair rental value" in the endorsements) could apply in addition to the loss of use provision in the base policy. There was also a suggestion to delete all language referring to loss of use from the endorsements or clarify that loss of use coverage is not further limited.

The Department disagrees that these provisions are unclear and believes that the manual rules and endorsements clearly state the application of the coverage. Regarding the suggestion to delete all language referring to loss of use in the mandatory offer endorsements, it remains the Department's goal to provide consumers the option to buy back enhanced coverage, including coverage for loss of use. If an insured purchased 100% limits of mold coverage, the loss of use percentage of coverage would be the percentage loss of use coverage provided in the policy (20% in the case of HO-B), and if an insured purchased 25% limits of mold coverage, the loss of use percentage of coverage would be 25% of the percentage loss of use coverage provided in the policy.

N. Third Party Liability

Several commenters contended that third party property damage and bodily injury claims for mold should be excluded from the proposed endorsements and the residential property policies or that there should be a limit on third party bodily injury coverage. The Department disagrees because it has not seen any indication that this is a problem which should be addressed in the prescribed forms at this time.

O. Individual Insurer Filings

Several commenters recommended freedom of choice for consumers by allowing insurers to file their own endorsements or to file national forms. These commenters further suggested that insurers be given the option of using the current HO-B forms with appropriate anti-stacking language and that consumers be given the ability to "opt-out" of mold coverage if they desire. One commenter believes that insurers should be allowed to file and receive approval of individual endorsements that limit mold coverage to sudden and accidental water damage. There were also statements that stability in the homeowners insurance market can be restored only by allowing insurers to make their own filings under Insurance Code Article 5.35.

In response to comments, the Commissioner has adopted what he believes is a fair and balanced compromise approach by preserving some coverage for ensuing mold while allowing insureds to buy back additional limits of coverage for mold. However, pursuant to Article 5.35, insurers continue to have the ability to file individual policies or endorsements modifying coverage in order to provide various levels of mold coverage and/or to provide other forms of mold coverage, and the Department will review and consider for approval or adoption all such filings in addition to those adopted in this order.

P. Pricing of Coverage

A commenter believes that the terms of staff's proposal make it impossible for insurers to predict the frequency or severity of losses, which makes accurate pricing a problem. The Department disagrees. It is the rapidly changing mold-related loss environment that has made accurate pricing a problem, not any action taken by the Department. Ultimately, the changes adopted in this order should stabilize the experience, facilitating accurate pricing.

Several commenters do not believe that the proposed rates for the buyback coverage are adequate. The Department believes that the rating

factors it proposed for the optional buyback coverage in its petition were reasonable given the uncertainties surrounding trends in mold losses. However, this is no longer an issue as the Commissioner has decided not to adopt the rating rules contained in the original proposal. The Department does intend to issue another special Mold Data Call early next year to obtain information on mold-related claims reported in the last two quarters of 2001 as well as to update information on claims that were still open in the data reported in the original call. This more mature information and the resulting rate indications will be considered in the next benchmark rate proceeding.

One commenter believes that widely affordable rates are not possible due to the nature of adverse selection. It is a paramount concern to the Department that rates remain affordable. To address the concern raised by many commenters about adverse selection, the adopted manual rules permit an insurer to decline to issue a policy with the mandatory offer mold coverage endorsement if that declination is based on sound underwriting principles reasonably related to an actual or anticipated mold exposure for the risk, minimizing potential adverse selection. This is intended to promote affordable rates.

A commenter believes that since the Texas Windstorm Insurance Association (TWIA) would have to bear the entire cost of mold claims associated with TWIA policies (TWIA cannot spread mold losses over the whole state), such policies would become unaffordable if mold coverage were required. The Department would anticipate and expect that under individual insurer filings, and ultimately the benchmark rates, each region of the state would bear its own costs with or without mold coverage. This would be true for more than just TWIA policies. However, the Department also notes that TWIA rates and policies are not a subject of this proceeding.

One commenter believes that the solution to the pricing problem is to allow insurers to raise rates and spread the risk and premium over the entire pool of ratepayers. Another commenter expressed concern over certain groups subsidizing mold coverage for other groups.

Staff's petition did indicate the amount by which rates for the optional buybacks would need to increase in each region of the state so that the risk is spread to each region, allowing each region to bear its own costs. The Department believes that this is the most equitable approach to spreading the risk and premium over all the ratepayers so that those with the greatest exposure to mold pay more, while those with a lesser exposure pay less. In this way subsidization of one group by another is minimized. The Department would anticipate and expect that individual insurer filings would vary charges and discounts among the various rating territories so that insureds in each territory pay their fair share.

Several commenters believe that if mold coverage is removed from the residential property policies consumers should receive a credit for this reduction in coverage. Some commenters believe that the current rates do not reflect the losses for mold coverage.

The benchmark rates that became effective November 1, 2001, and current rates for the rate regulated market, reflect few, if any, mold claims. This is because the loss data that went into calculating those benchmark rates was from the five-year period 1994-1999. Insurers that are rate regulated have just begun to make filings in conjunction with the benchmark rates that went into effect November 1, 2001. The Department will review these filings to ensure that the charges are appropriate. The amount of any credit for the limitation on mold coverage in the basic policy would depend on what portion of the premiums are due to mold losses. The Department will also review for reasonability those filings involving charges for optional mold coverage. As noted earlier, however, the vast majority of homeowners insurance is written by non-rate regulated companies.

One commenter believes that the mold premium should be fully earned at the time the coverage is accepted unless the entire policy is cancelled. While the Department understands the commenter's concern, it disagrees that this warrants a departure from well-established insurance accounting principles.

One commenter states that an actuarial consulting firm has reviewed the rate proposed by staff for the mandatory $5,000 limit and has found that it should be 20% instead of the proposed 10%. A commenter believes that leaving $5,000 of mold coverage in the policy will still result in a 25% to 40% rate increase.

While this comment is related to a part of the proposal that was not adopted, the Department disagrees, as the cited study specifically said that it did not try to quantify the effects of the limits on coverage and anti-stacking provisions contained in the original proposal. While the other commenter did not provide any basis for the 25% to 40% rate increase, the Department notes that this issue is no longer relevant because this order does not adopt the $5,000 basic coverage.

One commenter believes that the proposal is premature because the data underlying the staff analysis, according to the commenter, has not been audited or otherwise verified, and the public was not given any opportunity to review the data.

The Department disagrees. The Department's actuarial staff reviewed the data for reasonability and where appropriate resolved possible problems with the insurers. Statistics used in ratemaking are generally not audited but are rather subjected to certain edits and general tests for reasonability. This is analogous to what the Department's actuarial staff did. Data summaries derived from the data call have been posted on the Department's website for some time, and have been available for public review. The Commissioner believes that to defer action on the proposal until more mature claims data can be obtained could have dire effects on the homeowners market in the state.

A commenter believes that recent large increases in losses due to mold claims are unsubstantiated. Another commenter was concerned about the reliability of the reported data because mold and water claims are so difficult to distinguish.

The Department disagrees. The data gathered by the Department in its special Mold Data Call clearly shows that mold claims are increasing drastically in the state. While the full extent of the problem cannot be determined with certainty since many of the claims are ongoing, the Department's actuarial staff believes that, if anything, the data may understate the extent of the problem, particularly in the most recent quarter for which data was gathered under the special Mold Data Call. The special Mold Data Call defined mold claims as being "any homeowners insurance claim where damages alleged include the presence or removal of mold (whether or not it was one of the species of mold commonly referred to as 'toxic mold') within the home." Thus, there would have been a mold element in all of the reported claims. The Department recognizes that some of the costs included in the reported mold-related claims may represent costs that would have existed had mold not ensued from the covered water damage. However, this was recognized and reflected in calculating the charges for the optional buyback coverages in the original proposal.

A commenter alleges TDI's analysis does not contain data from consumer advocate groups and is therefore biased. The commenter further alleges that the average remediation cost/mold claim is $92,000.

The Department disagrees that the data it has collected is necessarily biased. For the purposes of insurance pricing, it is a well-established actuarial principle that the use of data derived from the insurance system itself is preferred. Other databases such as the one cited are apt to be much more statistically biased for several reasons. They would tend

to exclude smaller claims through self-selection, producing apparent average costs that are not reflective of overall insurance system losses. They also would not necessarily include important data elements such as limits of coverage and their effect on covered costs, nor the kind of coverage, if any, held by the affected individuals. Most importantly, they would not include a measure of the size of the total population, including those who did not have claims, from which the claims were drawn. Without these features, the information would not be useable for ratemaking purposes.

One commenter urges that the Department first develop premium rollbacks or discounts for the proposed endorsements in the regulated market. The commenter states that the staff petition ignores the amount of mold claims experience in current rates and that staff should present a petition that provides a discount to customers opting into a capped exclusion. The commenter states that this rate reduction should come only after the parties have closely examined the available data in a contested case hearing.

The Department agrees in part and disagrees in part. The Department believes that the benchmark rates that became effective November 1, 2001, as well as the existing rates for rate regulated carriers, reflect few if any mold claims. Rate regulated insurers may implement the adopted endorsements by filing appropriate credits and charges under Section 4 of Article 5.101, Texas Insurance Code, for approval by the Commissioner. Credits and charges for the adopted mold endorsements will be considered in the next benchmark rate hearing to be held in 2002. Pursuant to the procedural changes enacted by HB 2102 in the 77th Legislature, these rates are adopted through an uncontested non-Administrative Procedure Act rulemaking proceeding.

Q. Claims Handling Practices

Many commenters have expressed frustration with insurer claims handling practices, and have called for a review and development of better and more responsive claims handling, including the establishment of evaluation and remediation guidelines. In regard to claims handling practices, one commenter believes if insurers view claims as separate occurrences and impose a deductible for each occurrence, they should also be liable for policy limits for each occurrence.

Regarding frustrations concerning claims handling and the development of standards for evaluation and remediation guidelines, the Department agrees that improvement is needed; therefore, the Department intends to convene a task force to suggest best practices for claims handling with regard to mold-related claims. While the Department may not be able to mandate that insurers abide by the recommended practices, these practices should help by providing some guidance and expectation to insurers and claimants as to how to adequately respond to mold-related claims. Moreover, the Texas Department of Health has convened a task force to study mold remediation standards and certification of mold remediators. The Department acknowledges that a separate deductible applies to each occurrence; however, the basic coverage adopted in this decision does not affect the application of deductibles and available policy limits for each occurrence.

R. Lack of Mold Remediation Standards

Commenters suggested that the lack of standards for mold testing, inspection, and remediation exacerbate the mold problem. A commenter says that without standards for air quality or mold remediation, fraud and excessive costs will continue to exist. Another believes that mold remediators are "gouging" the insurers (and ultimately the insured through rising rates) with exorbitant charges for mold remediation. Several commenters recommended that a task force be convened to address these issues.

As noted above, the Department intends to convene a task force to suggest best practices for claims handling with regard to mold-related claims, and the Texas Department of Health has convened task forces to develop standards regarding air quality, testing labs, and mold remediation activity. The Department will continue to monitor the referral to the Attorney General's office regarding mold clean-up practices that may be abusive, including the possibility of excessive pricing.

S. Builders, Realtors, and Lenders

Several commenters point to builders and building codes as a root cause of the mold problem and made a variety of recommendations including licensing and bonding of all residential and commercial builders and inspections prior to occupancy; requiring builders and real estate agents to carry certain limits of liability coverage for mold claims; and developing and enforcing building codes and requirements for lenders to furnish evidence of mold clean up and remediation to all buyers and sellers. A commenter suggests that builders have no incentive to build to compliance with code since codes are not enforced, they are not licensed nor are they held accountable in a court of law because of lawsuit abuse proponents and binding arbitration. Many commenters have expressed their belief that a frequent cause of mold in homes is the inferior workmanship and defective building materials that are often used in construction of new homes. These commenters have further expressed considerable frustration that the Texas homeowners policy does not provide coverage for these construction defects and defective building materials. A commenter urged the Department to take certain actions including encouraging insurance companies to subrogate claims to recover losses due to manufacturers and builders and to become proactive as to mold prevention.

The Department plans to evaluate and possibly adopt building code standards that would help in suppressing mold growth, although the Department's authority at this point is limited to the building code governing coverage written through the Texas Windstorm Insurance Association. The Department has no authority to address the other issues raised by the commenters such as licensing of builders and mandating insurance requirements. While the Department certainly understands the frustration of these commenters, it is important to understand that coverage for defective building materials and inferior workmanship is outside the scope of the coverage in the homeowners policy and is not an insurable hazard under a homeowners policy. That exposure should be borne by builders and materials manufacturers, either through direct legal action by consumers or through subrogation initiated by homeowners insurers.

T. Consumer Education

A commenter suggests taking a proactive approach by educating consumers on how to spot signs or potential problems. Another urges the Commissioner to promote public awareness of actions that can be taken by homeowners to mitigate mold damage which include (1) maintenance and inspection of plumbing, roofing, heating and AC systems; (2) early detection of water leakage; (3) early reporting of water damage to insurers; (4) rapid repair of leakage and damage; (5) importance of drying wet area; (6) maintenance of humidity levels in the home.

The Department strongly agrees that consumer education is important both to assist consumers in the mitigation of mold damage and to provide help in the resolution of their claims. The Commissioner has already issued public statements outlining steps consumers can take, and fully expects that such educational efforts will continue in the future.

U. Alternative Solutions

A commenter suggested, in lieu of staff's proposal, that insurers be liable for the cost of testing for the type of mold that is present and, if the type of mold present is "toxic" then the insurer would be liable

for the clean up; if the type(s) of mold present are "non-toxic" then the clean up would be the responsibility of the insured. The Department disagrees as this would require testing to be done on every claim that in any way involves mold, thus driving up the cost of these claims. This is what the adoption order is designed to prevent.

Another commenter suggested an alternative solution as follows: (1) damages related solely to a mold claim (i.e., excluding cost and repairs for related water damage that would exist regardless of mold) that are $10,000 or less the homeowner suffers no penalty, (2) mold damages that exceed $10,000 but do not exceed $20,000 the insurance company would have the option to discontinue all water coverage for the next policy period, (3) mold damages that exceed $20,000 but do not exceed $30,000 the insurance company would have the option to discontinue water coverage for two years, and (4) mold damages that exceed $30,000, the insurance company would have the option to discontinue water coverage for three years.

It appears that the solution proposed by the commenter uses underwriting as a tool to address the mold problem. The Department's decision, which now specifically provides for underwriting based on principles reasonably related to an actual or anticipated mold, fungi or other microbes loss exposure, would not preclude insurers from adopting this approach, provided it complies with applicable statutes.

V. Procedural Issues

A commenter asserted that it is entitled to a hearing based on 28 Tex. Admin. Code §§1.203(d) and 1.205(1) and Texas Insurance Code Article 5.96. The commenter stated that §1.203(d) contemplates that the hearing will be held after the comment period and after the staff's summary of comments is complete so that all interested persons may respond to the written comments.

The Department disagrees. The referenced citations do not state that the hearing will be held after the comment period. Indeed, a complete reading of §§1.203 and 1.205 shows that the Commissioner may take a matter under advisement at the conclusion of a hearing. The Department routinely sets hearings for matters noticed pursuant to Article 5.96. The Department did so in this instance and gave full and fair notice that "while the public hearing will be held before the end of the comment period, no action will be taken by the Commissioner until after the expiration of the comment period." Moreover, while written comments on the published proposal may be filed with the Department, the rules state that at the hearing, "all interested persons shall be permitted to make oral comments to the Commissioner." It does not state "all interested persons may respond to the written comments," as asserted by the commenter, although commenters may certainly obtain all written comments for review.

One commenter requested that the Commissioner not act on staff's petition, stating that the Department failed to comply with the notice requirement of Texas Insurance Code Article 5.96(c), which the commenter says requires notice of the meeting or hearing at which the Commissioner will adopt the proposals.

The Department disagrees because the statute and rules do not state that the Commissioner must act at the hearing; to the contrary, the statute refers to notice of the hearing scheduled "to consider a proposal" (Article 5.96(g)), and the rule states that the Commissioner may take the matter under advisement at the conclusion of the hearing (§1.205(3)). The Department provided full and fair notice of the hearing and the matters to be considered.

The Department also disagrees with another commenter's assertion that the Department's notice failed to comply with Article 5.96(g) which requires the notice to provide the legal authority for the hearing. Article 5.96(g) states in its entirety: "If a hearing is scheduled to consider a proposal, the board shall publish notice in the Texas Register not less than 10 days before the hearing and shall state the time, place, legal authority for the hearing, and the matters to be considered." The Department's notice complied with this requirement by referencing all statutory authority for the hearing.

One commenter stated that the Department's notice failed to comply with the requirements of the Administrative Procedure Act, Texas Gov't. Code §2001.024, which the commenter claims is necessary since staff's petition proposes rules under Article 5.98, which the commenter states is not exempt from the requirements of the Government Code.

The Department disagrees. Article 5.98 is included along with Article 5.96 in Insurance Code Chapter 5, Subchapter L, which sets forth the administrative procedure for changes in manual rules, statistical plans, policy and endorsement forms, and certain rates, and allows the agency to adopt reasonable rules that are appropriate to accomplish the purposes of Chapter 5, Texas Insurance Code. As stated in the notice, the Administrative Procedure Act, (APA) does not apply to actions taken under Article 5.96. The Department's interpretation has been that the APA does not apply because Articles 5.96 and 5.98 are part of the same subchapter and must work in harmony, and actions under Article 5.96 are specifically exempted from the APA.

W. Legal Issues

A commenter suggests that the Commissioner issue a cease and desist order against those insurers that have ceased writing HO-B policies, on the grounds that this constitutes a violation of Insurance Code Article 21.21-8. However, this comment does not relate to the proposed action, as it addresses the agency's enforcement authority. Nothing in the proposal or adopted action relates to, or alters in any way, any enforcement actions which the agency may undertake on a fact-specific basis.

Several commenters assert that mold coverage exists only because the Texas Supreme Court in Balandran v. Safeco Insurance Company of America, 972 S.W.2d 738 (Tex. 1998) held that no exclusions apply to repeated and continuous leakage and seepage and accidental discharge from a plumbing system. The commenters believe that the Balandran case eliminated the exclusion for damages to the dwelling caused by an accidental discharge of water and that based on this "new" coverage sanctioned by the court, there has been a flood of mold claims.

The Department disagrees because the Texas Supreme Court in the Balandran case held that the exclusion repeal provision applied to exclusion 1.h., which concerns foundations, and more importantly that the exclusion repeal language applied to coverage A (Dwelling). The Department believes that the mold coverage comes from the "ensuing loss" language contained in exclusion 1.f. which provides an exception to the exclusion for mold or other fungi if the mold loss ensues from a covered peril. The commenters appear to believe that the court created new coverage; however, claims for water damage to the dwelling have been covered since at least 1978, and the exclusion repeal language that was at issue in the Balandran case was in the exclusions section of the policy (and clearly applicable to both dwelling and contents) until a rewrite of the policy in 1990 to make it more easily read by consumers. It was the mandate of the then State Board of Insurance not to change coverage through the rewrite process; therefore, the class of claims that the commenters are asserting are "new" claims were clearly covered prior to the 1990 policy rewrite. The assertion that Balandran created a new class of water claims which are now creating a flood of mold claims is inaccurate because this coverage has been in the policy since 1978.

Several commenters alleged that the proposal would greatly expand current coverage by acknowledging an intent to provide mold coverage. The commenters further assert that most Texas courts have held that the "ensuing loss" provision does not require coverage for mold claims

caused by water damage. The commenters maintain that the correct interpretation of the "ensuing loss" clause in exclusion 1. f. is that ensuing water damage is required to follow from mold or fungi damage or damage from one of the other perils enumerated in the exclusion.

The Department disagrees because it believes there is currently mold coverage in the policy as a result of the ensuing loss language. The endorsements as proposed or adopted would only modify the coverage that is currently in the policy. The Department also disagrees with the allegation that most courts have held there is no mold coverage even when the loss ensues from a covered water damage. The only cases cited are Harrison v. USAA, 2000 WL 391539 (Tex. App.-Austin, April 19, 2001) and Lambros v. Standard Fire Ins. Co., 530 S.W. 2d 138 (Tex. Civ. App.-San Antonio 1975, writ ref'd). The Harrison case, an unpublished decision, does not involve the peril of mold but instead focuses on the peril of rot. The Lambros case also does not involve the peril of mold but instead involves foundation damage caused by underground water. Additionally, the pre-1978 policy in the Lambros case excluded most forms of water damage from the policy, unlike the HO-B that has broad water damage coverage. It appears that the insurance industry believes mold is covered as an ensuing loss in the residential property policies because insurers are paying a large number of such claims.

The Department further disagrees that the ensuing loss provision requires that ensuing water damage follow from one of the types of damage enumerated in exclusion (f). The Department believes there is currently mold coverage in the HO-B policy as a result of the ensuing loss provision and that therefore neither the proposed or adopted changes create new or expanded coverage.

One commenter asserts that Manual rules apply only to the rate regulated companies and do not apply to non-rate regulated companies (i.e., Lloyd's and reciprocal exchanges). The Department disagrees because both Lloyd's and reciprocal exchange insurers are subject to Article 5.35 which requires that all insurers use the policy forms promulgated by the Commissioner. In addition to the promulgated policy forms, the Commissioner has also adopted policy-writing rules in the Personal Lines Manual (Manual) that all insurers are required to follow. This is because without such rules to govern policy eligibility, coverages, and other general requirements, the use of the standard policy forms would not be uniform and consistent.

Two commenters stated that the Department does not have the legal authority to mandate the offer of mold coverage through a Manual rule. One of those commenters added that the Commissioner cannot require insurers to offer such coverage in any minimum amount. The Department disagrees. The authority granted to the Commissioner pursuant to Articles 5.35, 5.96, and 5.98 has been consistently interpreted by the agency to provide for the Commissioner's adoption of both policy forms and endorsements and concomitant Manual rules to guide the insurers in the writing of policies, for example, setting forth provisions relating to eligibility, coverages, and other general requirements. The requirement for insurers to offer mold coverage is a policy writing rule specific to the policy endorsements adopted herein that all insurers will be required to follow.

A commenter believes that the 1997 amendments to Article 5.35 mean that regulatory disapproval cannot be based on a disagreement between the company and the Department about the appropriateness or extent of coverage. Another commenter asserts that the 1997 changes, which among other things deleted the requirement for equivalent coverage, clearly say that the Commissioner cannot mandate coverage, minimum or otherwise, and maintains that whatever rulemaking authority the Commissioner may have cannot be used to overrule what the commenter says is legislative intent that the companies are free of compulsory coverages or minimum coverages that might have otherwise been imposed under prior law.

The Department disagrees. To accept the commenters' assertions would render meaningless the authority granted to the Commissioner by Article 5.35, which authorizes the Department to review policy forms and endorsements filed for approval to ensure that they meet all standards set forth in Article 5.35. The 1997 changes do not prevent the Commissioner from promulgating a standard policy form, although Article 5.35 allows certain insurers to file their own policy forms for approval. The Department will continue to review such filings and consider them for approval.

One commenter contended that the proposed amendments to the residential property policies have a rate impact which requires adoption of the proposal under the APA (as an Article 5.101 benchmark rate proceeding) rather than under Article 5.96. The Department disagrees with this comment. As noted earlier, Article 5.96, which governs the adoption or approval of policy forms, endorsements and manual rules, specifically states that the APA does not apply to such actions by the Department. To the extent that the Department's action will have a rate impact, rate regulated insurers will have to make individual insurer filings pursuant to Section 4, Article 5.101 if they desire to use the endorsements prior to the benchmark proceeding in 2002. Industry-wide rates will continue to be set under the benchmark proceeding. Pursuant to HB 2102, effective September 1, 2001, benchmark rates are established under a non-APA rulemaking proceeding.

One commenter believes that the Texas Windstorm Insurance Association (TWIA) policy does not provide, and should not be read to provide, mold coverage because such coverage is inconsistent with the legislative intent expressed in Insurance Code Article 21.49. However, this comment relates to a policy form not under consideration herein and is therefore not relevant to the original proposal or the forms adopted by this order.

A commenter believes that other issues in addition to mold are affecting the availability and affordability of homeowners insurance. These include increased foundation claims as a result of the Balandran decision and that companies' ability to cancel and non-renew has been hampered by enactment of Article 21.49-2B in 1991. One commenter advocated a cap on attorneys' fees and disallowing exemplary damages. Another commenter complains of excessive pricing for mold-related property inspections.

The question of foundation claims is outside the scope of this proceeding. The provisions of Article 21.49-2B were enacted by the Texas legislature and any changes would have to be addressed by that body. The remaining comments relate to actions that are beyond the Department's authority.

X. General Comments

One commenter opposes staff's petition and urges that the endorsements, rule amendments, and statistical plan changes not be adopted on the grounds that the changes would only serve to compound the problem. Another commenter opposes the staff petition and, while commending the Department's diligence and perseverance in seeking input and proposed solutions from the public and insurers, believes that the proposal does not address the heart of the homeowner insurance crisis, which the commenter states is Texas' expansive coverage for water damage. The commenter advocates a major overhaul of the homeowners insurance system and that a "quick fix" of an "old-fashioned, one-size-fits-all, state-promulgated policy form", should be abandoned. The commenter recommends alternatives such as: contain $5,000 base policy limits for mold remediation that is the direct result

of a covered water loss: limit covered losses of all types, but particularly water losses, to "sudden and accidental" losses; exclude from coverage losses resulting from faulty, inadequate or defective design, construction, materials or maintenance; exclude from coverage liability that results in whole or in part from exposure to mold; limit tear out and replacement costs associated with a covered water loss from a plumbing drain system located within or under the slab or foundation of the dwelling to $3,500 or 5% of Coverage A (Dwelling) limits, whichever is greater.

In response to these and other comments, the Department has adopted what it believes is a fair and balanced compromise approach by preserving some coverage for ensuing mold while allowing insureds to buy back enhanced coverage for mold. However, pursuant to Article 5.35, insurers continue to have the ability to file individual policies or endorsements modifying coverage in order to provide various levels of mold coverage and/or to provide other forms of mold coverage, and the Department will review and consider for approval or adoption all such filings in addition to those adopted in this order.

A commenter recommends that different endorsement numbers be used for each of the percentage buyback endorsements to facilitate statistical reporting. Otherwise new statistical fields will have to be added and that will greatly add to the implementation costs. The Department agrees and has incorporated this recommendation into the adopted statistical plan changes displayed in Exhibit V.

The Commissioner of Insurance has jurisdiction over this matter pursuant to the Insurance Code, Articles 5.35, 5.96, and 5.98.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Government Code, Chapter 2001 (Administrative Procedure Act).

Consistent with the Insurance Code, Article 5.96((h), the Department will notify all insurers affected by this section of this adoption by letter summarizing the Commissioner's action.

IT IS THEREFORE THE ORDER of the Commissioner of Insurance that nine amendatory mandatory endorsements, to be attached to certain residential property insurance policies: (1) Endorsement No. HO-161A which will be attached to Texas Homeowners Form-A (HO-A), (2) Endorsement No. HO-162A which will be attached to Texas Homeowners Form-B (HO-B), (3) Endorsement No. HO-163A which will be attached to Texas Homeowners Form-C (HO-C), (4) Endorsement No. HO-164A which will be attached to the Texas Homeowners Tenant Policy-Form B (HO-BT), (5) Endorsement No. HO-165A which will be attached to the Texas Homeowners Condominium Policy-Form B (HO-B-CON), (6) Endorsement No. HO-166A which will be attached to the Texas Homeowners Tenant Policy-Form C (HO-CT), (7) Endorsement No. HO-167A which will be attached to the Texas Homeowners Condominium Policy-Form C (HO-C-CON), (8) Endorsement No. TDP-004A which will be attached to the Texas Dwelling Policy-Form 1 (TDP-1) and the Texas Dwelling Policy-Form 2 (TDP-2), and (9) Endorsement No. TDP-005A which will be attached to the Texas Dwelling Policy-Form 3 (TDP-3) as specified herein and which are attached to this Order and incorporated into this Order by reference, be adopted and are applicable to be effective and available for use on and after January 1, 2002, but insurers must implement the endorsements no later than January 1, 2003, and rate regulated insurers may use such endorsements upon filing and approval of discounts and charges for the endorsements under Article 5.101 §4.

IT IS FURTHER ORDERED that nine mandatory offer endorsements, to be attached to certain residential property insurance policies: (1) Endorsement No. HO-161 which may be attached to Texas Homeowners Form-A (HO-A), (2) Endorsement No. HO-162 which may be attached to Texas Homeowners Form-B (HO-B), (3) Endorsement No. HO-163 which may be attached to Texas Homeowners Form-C (HO-C), (4) Endorsement No. HO-164 which may be attached to the Texas Homeowners Tenant Policy-Form B (HO-BT), (5) Endorsement No. HO-165 which may be attached to the Texas Homeowners Condominium Policy-Form B (HO-B-CON), (6) Endorsement No. HO-166 which may be attached to the Texas Homeowners Tenant Policy-Form C (HO-CT), (7) Endorsement No. HO-167 which may be attached to the Texas Homeowners Condominium Policy-Form C (HO-C-CON), (8) Endorsement No. TDP-004 which may be attached to the Texas Dwelling Policy-Form 1 (TDP-1) and the Texas Dwelling Policy-Form 2 (TDP-2), and (9) Endorsement No. TDP-005 which may be attached to the Texas Dwelling Policy-Form 3 (TDP-3) as specified herein and which are attached to this Order and incorporated into this Order by reference, be adopted and applicable to be effective on and after January 1, 2002, but insurers must implement the endorsements no later than January 1, 2003, and rate regulated insurers may use such endorsements upon filing and approval of discounts and charges for the endorsements under Article 5.101 §4.

IT IS FURTHER ORDERED that an amendment to Endorsement No. HO-170 (Additional Extended Coverage) which may be attached to Homeowners Form HO-A, as specified herein and which is attached to this Order and incorporated into this Order by reference, is adopted, and applicable to be effective on and after January 1, 2002, but insurers must implement this endorsement no later than January 1, 2003, and rate regulated insurers may use this endorsement upon filing and approval of discounts and charges for this endorsement under Article 5.101 §4.

IT IS FURTHER ORDERED that two Texas Personal Lines Manual rules: (1) Rule IV-A, "Section I Mandatory Offer Endorsements" in the Homeowners Section, and (2) Rule IV, "Mandatory Offer Endorsements" in the Dwelling Section as specified herein and which are attached to this Order and incorporated into this Order by reference, be adopted and applicable to be effective on and after January 1, 2002, but insurers must implement these rules no later than January 1, 2003.

IT IS FURTHER ORDERED that conforming amendments to the coding section, premiums section, and losses section of the Residential Statistical Plan as specified herein and which are attached to this Order and incorporated into this Order by reference, be adopted and applicable to be effective on and after January 1, 2002, but insurers must implement these amendments no later than January 1, 2003.

TRD-200107336
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: November 28, 2001

REVIEW OF AGENCY RULES

This Section contains notices of state agency rules review as directed by Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review*, which invite public comment to specified rules; and (3) notices of *readoption*, which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the ***Texas Administrative Code*** on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the ***Texas Register*** office.

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 290, Public Drinking Water, Subchapter A, Certification of Person to Install, Exchange, Service, or Repair Residential Water Treatment Facilities, in accordance with the requirements of Texas Government Code, §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the reasons for the rules continue to exist. The proposed notice of intention to review was published in the September 28, 2001 issue of the *Texas Register* (26 TexReg 7582).

As part of a concurrent rulemaking, Chapter 290, Subchapter A is adopted as 30 TAC Chapter 30, Subchapter H, Certification of Water Treatment Specialists. The adoption is discussed in the preamble for Chapter 30, and is published in this issue of the *Texas Register*.

CHAPTER SUMMARY

Chapter 290, Subchapter A provides for the certification of persons for the installation, exchange, servicing, and repair of residential water treatment facilities. Standards of qualifications are set to insure the public health and to protect the public from unqualified persons engaging in activities relating to water treatment. This subchapter is adopted as Chapter 30, Subchapter H.

ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission conducted a review and determined that the reasons for the rules in Chapter 290, Subchapter A continue to exist. The rules are needed to protect the public from unqualified persons engaging in activities relating to water treatment by providing qualifications for persons certified to install, exchange, service, and repair residential water treatment facilities. The commission derives the authority for this subchapter from Texas Civil Statutes, Article 6243-101 as amended by House Bill 2912 of the 77th Legislature, 2001.

PUBLIC COMMENT

The public comment period closed on October 22, 2001. No comments on whether the reasons for the rules continue to exist were received.

TRD-200107276
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: November 27, 2001

♦ ♦ ♦

TABLES & GRAPHICS

Graphic material from the emergency, proposed, and adopted sections is published separately in this tables and graphics section. Graphic material is arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic material is indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 25 TAC §409.531(a)

Mental Retardation Local Authority (MRLA) Program Principles for Program Providers

PURPOSE

The Mental Retardation Local Authority (MRLA) Program Principles for Program Providers will be utilized in the survey and certification of program providers of MRLA Program services. It is expected that MRLA program providers will meet all elements of the MRLA Program Medicaid provider agreement and provider enrollment requirements. MRLA program providers are expected to be comprehensive service providers, provide those services contained in the individual plan of care (IPC) and hours of service that are authorized by the Texas Department of Mental Health and Mental Retardation (TDMHMR), and maintain necessary communication with the mental retardation authority (MRA) in order to provide continuity in services, notify the individual and/or the individual's legally authorized representative (LAR) and the MRA of needed changes to IPCs, and ensure service delivery to the individual.

The MRLA program provider must be able to demonstrate compliance with all of the following principles:

GENERAL NETWORK PROGRAM PROVIDER PRINCIPLES

P1. The MRLA program provider shall provide to the MRA the data elements to complete the provider profiling for the MRA provider network management process.

P2. The MRLA program provider shall maintain a separate record for each individual enrolled with the provider, which shall include a current copy of:
P2.1. the individual plan of care (IPC);
P2.2. the person-directed plan (PDP).

P3. The MRLA program provider shall ensure that service delivery information is correct and clearly communicates to the MRA and the individual and/or the LAR changes to services specified in the individual's IPC and PDP.

P4. At the request of the individual and/or the LAR, the MRLA program provider shall be involved in the person-directed planning process.

P5. The MRLA program provider shall be involved in completion of the PDP and negotiation of the IPC with the individual and/or the LAR and the MRA.

SERVICE DEFINITIONS/DELIVERY

Each service provided under the MRLA Program must be delivered in accordance with the approved IPC and the MRLA Program service definitions set forth in the MRLA program provider agreement.

P6. The MRLA program provider shall ensure that services and supports delivered assist individuals in achieving outcomes as identified in the PDP.

P6.1 The program provider shall implement and maintain a plan for initial and periodic training of personnel that assures personnel are qualified to deliver services as required by the current needs and characteristics of the individuals to whom they deliver services.

P7. The MRLA program provider shall deliver adaptive aids as authorized in the IPC in accordance with the MRLA Program service definition set forth in the MRLA program provider agreement. Adaptive aids consist of the following services, including repair and maintenance not covered by the warranty: the full range of lifts, mobility aids, control switches/pneumatic switches and devices, environmental control units, medically necessary supplies, and communication aids.

Counseling and Therapies

P8. The MRLA program provider shall deliver counseling and therapeutic activities as authorized in the IPC in accordance with the MRLA Program service definition set forth in the MRLA program provider agreement. Components of counseling and therapies include:

P8.1. audiology;
P8.2. speech/language pathology;
P8.3. occupational therapy;
P8.4. physical therapy;
P8.5. dietary;
P8.6. social work; and
P8.7. psychology.

Day Habilitation

P9. The MRLA program provider shall deliver day habilitation as authorized in the IPC in accordance with the MRLA Program service definition set forth in the MRLA program provider agreement. Day habilitation includes:

P9.1. assisting individuals in acquiring, retaining, and/or improving self-help, socialization, and adaptive skills necessary to reside successfully in the community;
P9.2. providing individuals with relevant activities that enhance self-esteem and maximize functional level;
P9.3. complementing any counseling and therapies listed in the IPC;
P9.4. reinforcing skills or lessons taught in school, therapy, or other settings;
P9.5. providing training and support activities which promote the individual's integration and participation in the community;
P9.6. providing assistance for individuals who cannot manage their personal care needs during day habilitation activities;
P9.7. providing transportation necessary for the individual's participation in day habilitation activities; and

P9.8. providing services which are not being provided under Section 110 of the Rehabilitation Act of 1973 or Section 602(16) and (17) of the Individuals with Disabilities Education Act.

Dental Treatment

P10. The MRLA program provider shall deliver dental treatment as authorized in the IPC in accordance with the MRLA Program service definitions as set forth in the MRLA program provider agreement, to include:
- P10.1. emergency dental treatment;
- P10.2. preventive dental treatment;
- P10.3. therapeutic dental treatment; and
- P10.4. orthodontic dental treatment, excluding cosmetic orthodontia.

Minor Home Modifications

P11. The MRLA program provider shall deliver minor home modifications as authorized in the IPC in accordance with the MRLA Program service definition set forth in the MRLA program provider agreement, to include:
- P11.1. purchase and repair of wheelchair ramps;
- P11.2. modifications to bathroom facilities;
- P11.3. modifications to kitchen facilities; and
- P11.4. specialized accessibility and safety adaptations, including repair and maintenance.

Nursing

P12. The MRLA program provider shall deliver nursing as authorized in the IPC, in accordance with the MRLA Program service definition as set forth in the MRLA program provider agreement. Nursing includes:
- P12.1. administering medication;
- P12.2. monitoring the individual's use of medications;
- P12.3. monitoring health data and information;
- P12.4. assisting the individual and/or the LAR to secure emergency medical services for the individual;
- P12.5. making referrals for appropriate medical services;
- P12.6. performing health care procedures ordered or prescribed by a physician/medical practitioner and required by standards of professional practice or law to be performed by licensed nursing personnel; and
- P12.7. delegating and monitoring tasks assigned to other service providers by a registered nurse (RN) in accordance with state law.

Residential Assistance

P13. The MRLA program provider shall deliver residential assistance as authorized in the IPC in accordance with the MRLA Program service definitions as set forth in the MRLA program provider agreement. The four types of residential assistance provided are:
- (a) Supported Home Living – provided to individuals residing in their own residence or the residence of their natural or adoptive family or to

individuals receiving foster care services from the Texas Department of Protective and Regulatory Services (TDPRS). The residential assistance provider does not live in the individual's residence;

(b) MRLA Foster/Companion Care – provided in a residence in which either the residential assistance provider or the individual holds a property interest. MRLA Foster/Companion Care is provided by a residential assistance provider who lives in the residence. MRLA Foster/Companion care may not be provided to an individual who receives foster care services through TDPRS;

(c) Supervised Living – is provided in a residence in which the MRLA program provider holds a property interest. Supervised Living is provided by residential assistance providers who provide services and supports as needed by individuals and who are present in the residence during normal sleeping hours; and

(d) Residential Support – is provided in a residence in which the MRLA Program provider holds a property interest. Residential Support is provided to individuals by residential assistance providers who are present in the residence and awake whenever an individual is present in the residence and who are assigned on a daily shift schedule that includes at least one complete change of provider staff each day.

Residential assistance includes:

P13.1. providing direct personal assistance with activities of daily living (grooming, eating, bathing, dressing, and personal hygiene);
P13.2. assisting with meal planning and preparation;
P13.3. securing and providing transportation;
P13.4. assisting with housekeeping;
P13.5. assisting with ambulation and mobility;
P13.6. reinforcing counseling and therapy activities;
P13.7. assisting with medications and the performance of tasks delegated by a Registered Nurse;
P13.8. supervising individuals' safety and security;
P13.9. facilitating inclusion in community activities, use of natural supports, social interaction, participation in leisure activities and development of socially valued behaviors; and
P13.10. providing habilitation, exclusive of Day Habilitation.

P14. The MRLA program provider shall ensure that the residence of an individual receiving MRLA Foster/Companion Care, Supervised Living, or Residential Support is designed for family-style living. The term individual, as used in this principle shall mean a person enrolled in the MRLA Program.

14.1. An individual receiving MRLA Foster/Companion Care may live with no more than two other individuals receiving MRLA program or other persons receiving similar services at any one time.

14.2. An individual receiving Supervised Living or Residential Support may live in a residence in which no more than two other individuals receiving MRLA program services or other persons receiving similar services live at any one time unless TDMHMR or its designee has, in accordance with §409.542 of this title (relating to TDMHMR Approval of

Residences), approved the residence in which four individuals or other persons receiving similar services live at any one time.

P15. Providers of supported home living, supervised living, and residential support are employed by the MRLA program provider.

Respite

P16. The MRLA program provider shall deliver respite services as authorized in the IPC in accordance with the MRLA program service definition set forth in the MRLA program provider agreement, including:
(a) assistance with training in self-help and independent living skills;
(b) provision of room and board when provided overnight in a setting other than the individual's normal residence;
(c) support of individuals in the MRLA program who are eligible for respite and in need of emergency or planned short-term care;
(d) provision of services on a 24-hour increment or any part of that increment;
(e) assistance with receiving other needed services; and
(f) assistance with securing and providing transportation.

16.1. Respite services shall be are provided in the residence of the individual receiving MRLA program services or in other locations that meet MRLA programmatic requirements and that provide an environment that assures the health, safety, comfort, and welfare of the individual.

16.2. Respite services may be provided to an individual in a location other than the individual's residence, including the residence of another individual receiving MRLA program services. If respite services are provided in the residence of another individual receiving MRLA program services, no more than three individuals receiving MRLA program services or other persons receiving similar services may receive services in the residence at any one time unless the conditions of principle 14.2 have been met by the MRLA Program provider.

16.3. If respite services are provided in the residence of another individual receiving MRLA program services, the provider must obtain permission from that individual or the individual's legally authorized representative. In addition, the program provider in conjunction with the service coordinator for each individual must make a determination that the respite visit will cause no threat to the health, safety, welfare, rights, or needs of that individual.

16.4. Respite services may be provided in a respite facility that is not a residence. Respite services may not be provided in such a facility to more than six persons at any one time. For a respite facility that serves more than three individuals at any one time, the MRLA Program provider must obtain written approval from the fire safety authority having jurisdiction stating that the facility and its operations meet the local fire ordinances.

16.5. Respite services may not be provided in an institution.

Supported Employment

P17. The MRLA program provider shall deliver supported employment as authorized in the IPC in accordance with the MRLA Program service definition set forth in the MRLA program provider agreement.

P17.1. Supported employment is provided in an integrated work setting away from the individual's place of residence (generally no more than one employee or 3% of the work force members have disabilities);

P17.2. Supported employment includes provision of ongoing individualized support services needed to sustain paid work by the individual, including supervision and training;

P17.3. The individuals receiving supported employment are compensated by the employer in accordance with the Fair Labor Standards Act; and,

P17.4. Supported employment is provided when these services are not available or funded through the state education agency or the state rehabilitation agency.

QUALIFIED STAFF

P18. The MRLA program provider will utilize service providers of the individual's and/or the LAR's choice if the service provider meets the minimum qualifications necessary to provide the service, will deliver the service within the direct services portion of the modeled MRLA rates, and will contract with or be employed by the MRLA program provider.

P19. The MRLA program provider shall ensure that its employees or contractors possess legally necessary licenses, certifications, registration, or other credentials and are in good standing with the appropriate professional agency in performing any function or delivering services.

P20. The MRLA program provider shall ensure that in instances where a high school education or "equivalent" is a requirement, when "equivalent" is applied, the personnel or service provider involved shall possess a graduate equivalency diploma (GED) or documentation of being at least 18 years old and a proficiency evaluation of experience and competence to perform the job tasks. The evaluation of experience and competency shall include:

P20.1. written competency-based assessment of the ability to document service delivery and observations of the individuals to be served; and

P20.2. at least three personal references from persons not related by blood which indicate the ability to provide a safe, healthy environment for the individuals being served.

Counseling and Therapies

P21. The MRLA program provider shall ensure that each provider of counseling and therapies is currently qualified by being licensed and/or certified by the State of Texas in the specific area for which services are delivered and by providing services in accordance with state law. Psychologists employed by state operated community services or community mental health and mental retardation centers are required to be licensed in accordance with state law or certified by TDMHMR.

Day Habilitation and Supported Employment

P22. The MRLA program provider shall ensure that the provider of day habilitation and/or supported employment is currently qualified by having a high school diploma or its equivalent and a valid driver's license if providing transportation. Assistance with tasks delegated by an RN must be in accordance with state law.

Dental Treatment

P23. The MRLA program provider shall ensure that the provider of dental treatment is currently qualified by being licensed in the State of Texas by the Texas State Board of Dental Examiners in accordance with Texas Revised Civil Statutes Article 4543.

Nursing

P24. The MRLA program provider shall ensure that the provider of nursing services is qualified by:

P24.1. being currently licensed as a registered nurse in Texas by the Board of Nurse Examiners for the State of Texas; or

P24.2. being currently licensed as a licensed vocational nurse in Texas by the Board of Vocational Nurse Examiners for the State of Texas.

Residential Assistance and Respite

P25. The MRLA program provider shall ensure that the provider of residential assistance and/or respite is currently qualified by having a high school diploma or its equivalent and a valid driver's license if providing transportation. Assistance with tasks delegated by an RN must be in accordance with state law.

ADAPTIVE AIDS

P26. The MRLA program provider shall ensure that adaptive aids are provided through contractors and suppliers capable of providing aids meeting applicable standards of manufacture, design, and installation.

MINOR HOME MODIFICATIONS

P27. The MRLA program provider shall ensure that minor home modifications are provided through contractors qualified to provide the service in accordance with state and local building codes and other applicable regulations.

HEALTH, SAFETY, AND RIGHTS

P28. The MRLA program provider shall implement a process for review of its decisions to limit individual rights and other restrictions by a person not involved in the original decision and to report any individual's dissatisfaction with decisions regarding restricted rights to the MRA and the individual's LAR.

P29. The MRLA program provider shall implement processes to ensure that individuals receiving services are free from abuse, neglect, or exploitation and that program provider personnel are provided initial and periodic training that ensures personnel are knowledgeable of:
(a) acts that constitute abuse, neglect, or exploitation of an individual, as defined in 40 TAC Chapter 711, Subchapter A;
(b) the requirement to report acts of abuse, neglect, or exploitation, or suspicion of such acts, to the Texas Department of Protective and Regulatory Services (TDPRS) in accordance with Program Provider Principle 32.2; and
(c) methods to prevent the occurrence of abuse, neglect, and exploitation.

P30. The MRLA program provider shall ensure that individuals receiving services have health care services.

P31. The MRLA program provider shall protect the rights of the individuals receiving services, including maintaining a process for eliciting complaints and maintaining verifiable evidence of complaint resolution.

P32. The MRLA program provider shall implement procedures for reporting to the individual's LAR, TDPRS, and the MRA all alleged instances of abuse, neglect, or exploitation.
P32.1. The program provider must ensure that the individual and the LAR are informed of how to report allegations of abuse, neglect, or exploitation to TDPRS and are provided with the TDPRS toll-free telephone number (1-800-647-7418) in writing.
P32.2. The program provider must ensure that all program provider personnel:
(a) are instructed to report to TDPRS immediately, but not later than one hour after having knowledge or suspicion, that an individual has been or is being abused, neglected, or exploited;
(b) are provided with the TDPRS toll-free telephone number (1-800-647-7418) in writing, and
(c) report knowledge or suspicion of abuse, neglect, or exploitation as instructed.
P32.3. Upon suspicion that an individual has been or is being abused, neglected, or exploited or notification of an allegation of abuse,—neglect or exploitation, the program provider shall take necessary actions to secure the safety of the alleged victims, including but not limited to:
(a) obtaining immediate and on-going medical or psychological services for the alleged victims as necessary;
(b) if necessary, restricting access by the alleged perpetrator of the abuse, neglect, or exploitation to the alleged victim or other individuals pending investigation of the allegation; and
(c) notifying, as soon as possible but no later than 24 hours after the program provider reports or is notified of an allegation, the alleged victim and the alleged victim's LAR of the allegation report and the actions that have been or will be taken.
P32.4. The program provider personnel shall cooperate with the TDPRS investigation of an allegation of abuse, neglect, or exploitation, including but not limited to providing complete access to all MRLA Program service

sites owned, operated, or controlled by the program provider; providing complete access to individuals and program provider personnel, providing access to all records pertinent to the investigation of the allegation; and preserving and protecting any evidence related to the allegation in accordance with TDPRS instructions.

P32.5. In all respite facilities and all residences in which the program provider or the residential assistance provider hold a property interest, the program provider must post the following in a conspicuous location:

(a) the name, address and telephone number of the program provider;

(b) the effective date of the TDMHMR Waiver Program Provider Agreement; and

(c) the name of the legal entity named on the Waiver Program Provider Agreement.

P32.6. The program provider must:

(a) report the finding of and program provider's response to all TDPRS investigations of abuse, neglect, or exploitation to TDMHMR in accordance with department procedures within 14 calendar days of the program provider's receipt of the investigative report and finding; and

(b) promptly, but not later than five calendar days from the program provider's receipt of the TDPRS investigative report and finding, notify the alleged victim or LAR of:

- the investigation finding;
- the corrective action taken by the program provider if TDPRS confirms that abuse, neglect, or exploitation occurred;
- the process to appeal the investigation finding as described in 40 TAC Chapter 711, Subchapter M (relating to Requesting an Appeal if You are the Reporter, Alleged Victim, Legal Guardian or with Advocacy, Incorporated); and
- the process for requesting a copy of the investigative report from the program provider; and

(c) upon request of the alleged victim or LAR, provide to the alleged victim or LAR a copy of the TDPRS investigative report after concealing any information that would reveal the identity of the reporter or of any individual who is not the alleged victim.

P32.7. If abuse, neglect, or exploitation is confirmed by the TDPRS investigation, the program provider shall take appropriate action to prevent the reoccurrence of abuse, neglect or exploitation including, when warranted, disciplinary action against or termination of the employment of program provider personnel confirmed by the TDPRS investigation to have committed abuse, neglect, and exploitation.

P33. The MRLA program provider shall ensure that its program owns, operates, or leases buildings that comply with all applicable fire, health, and sanitation codes.

33.1. The MRLA program provider must ensure that a residence in which four individuals receiving MRLA program services or other individuals receiving similar services live is in continuous compliance with applicable

provisions concerning Residential Board and Care Occupancies – Small Facilities of the edition of the *NFPA 101 Life Safety Code*, published by the National Fire Protection Association and most recently adopted by the Texas State Fire Marshal's Office, as certified by the fire safety authority having jurisdiction for the location of the residence (e.g., the local fire marshal or building official) at the time the residence is approved by the department and at least annually thereafter.

33.2. The MRLA program provider must ensure that a residence in which four individuals receiving MRLA program services or other individuals receiving similar services live is approved by TDMHMR or its designee in accordance with §409.542 of this title relating to TDMHMR approval of residences.

P34. The MRLA program provider shall implement procedures for meeting all emergencies such as fire, severe weather, and health.

P35. The MRLA program provider shall ensure compliance with all applicable local, state, and federal rules, regulations, and laws.

P36. The MRLA program provider must provide services to any eligible individual who selects that provider, unless that provider is serving at the capacity stated in its MRLA program provider agreement.

P37. The MRLA program provider shall ensure that charges assessed by the program provider against an individual's personal funds for items and services, including, but not limited to, room and board, are at a reasonable cost to the individual and at a cost comparable to the costs of similar items and services generally available in the community.

P38. The MRLA program provider shall ensure costs for items and services reimbursed through the MRLA Program are not charged to the individual.

P39. The MRLA program provider shall ensure that the individual or his/her legally authorized representative is informed of and agrees in writing to any charges assessed by the program provider against the individual's personal funds, to the purpose of those charges, and to the effect of those charges in relation to the individual's financial status.

P40. The MRLA program provider shall ensure that the utilization of restrictive procedures, including the restriction of individual rights and the use of restrictive behavior management procedures, are not utilized without the written informed consent of the individual and/or the LAR.

P41. The MRLA program provider must take the following actions regarding applicants for employment, contractors, and employees of the program provider whose duties involve or would involve direct contact with an individual:

(1) in accordance with Texas Health and Safety Code, Chapter 250, Nurse Aide Registry and Criminal History Checks of Employees and Applicants for Employment in Certain Facilities Serving the Elderly or Persons with Disabilities, obtain criminal history record information that relates to the

applicant, contractor, or employee and refrain from employing or contracting with persons convicted of an offense listed under §250.006 of the Texas Health and Safety Code; and

(2) search the Employee Misconduct Registry and the Nurse Aid Registry maintained by the Texas Department of Human Services to determine whether the applicant, contractor, or employee is designated in either registry as having abused, neglected, or exploited a resident or consumer of a facility or misappropriated a resident's or consumer's property, and refrain from employing or contracting with persons who are designated in either registry.

P42. No later than September 1, 2000, the MRLA program provider must ensure that it employs or contracts with a person who has a minimum of three years work experience in planning and providing direct services to people with mental retardation or other developmental disabilities as verified by written professional references to oversee the provision of all direct services to individuals receiving MRLA program services from the provider.

P43. Within three days of initiating residential support or supervised living for an individual under 22 years of age, the MRLA program provider must provide the information listed in Program Provider Principle 44 to the following:

(1) the MRA in whose local service area the individual's residence is located (see http://www.mhmr.state.tx.us/CentralOffice/PublicInformationOffice/DirectoryOfServicesWHAT.html **for a listing of MRAs by city);**

(2) the community resource coordination group (CRCG) for the county in which the individual's parent or LAR lives (see www.hhsc.state.tx.us/crcg/crcg.htm **for a listing of CRCG chairpersons by county); and**

(3) the local school district for the area in which the individual's residence is located, if the individual is at least three years of age or the early childhood intervention (ECI) program for the county in which the residence is located, if the individual is less than three years of age (see www.eci.state.tx.us **or call 1-800-250-2246 for a listing of ECI programs by county).**

P44. The notification given by the provider in accordance with Program Provider Principle 43 must include the following information about an individual:

(1) full name;

(2) gender;

(3) ethnicity;

(4) birth date;

(5) Social Security number;

(6) LAR's name, address and county of residence;

(7) date of initiation of supervised living or residential support;

(8) address where supervised living or residential supported is provided; and

(9) name and phone number of person submitting the notification.

Figure: 25 TAC §409.541(a)

Mental Retardation Local Authority
Program Principles for Mental Retardation Authorities

PURPOSE

These are principles for the mental retardation authority (MRA) to follow in the administration of the Mental Retardation Local Authority (MRLA) Program. These principles will be used by the Texas Department of Mental Health and Mental Retardation (TDMHMR) to determine compliance by the MRA as specified in §409.541 of this title (relating to Compliance with MRLA Program Principles for Mental Retardation Authorities (MRAs)) and referenced in the MRA's performance contract.

The MRA must be able to demonstrate compliance with all of the following principles:

AUTHORITY AND SERVICE COORDINATION RESPONSIBILITIES

A1. The MRA shall develop an individual plan of care (IPC) and person-directed plan (PDP) for each individual enrolled in the MRLA Program. The MRA shall also maintain for each individual a current:

- A1.1. individual plan of care;
- A1.2. person-directed plan; and
- A1.3. ICF-MR level of care (LOC) and level of need (LON)

A2. The MRA shall furnish to each MRLA program provider within its network a copy of the current IPC, PDP, and documentation reflecting the LOC/LON regarding each individual receiving services by the MRLA program provider.

A3. The MRA shall report all findings from the survey and certification of its MRLA program provider network to the Texas Department of Mental Health and Mental Retardation (TDMHMR).

A4. The MRA shall ensure that service coordinators are employed by the MRA.

A5. The MRA shall ensure that service coordinators:

- A5.1. initiate, coordinate, and facilitate the person-directed planning process to meet the desires and needs as identified by the individual **and** ~~or by~~ the individual's legally authorized representative (LAR) on behalf of the individual;
- A5.2. coordinate the development and implementation of each individual's PDP;
- A5.3. assist in the performance of resource authorization including submission of a correctly completed request for authorization of payment from non-MRLA Program services for which an individual may be eligible;
- A5.4. coordinate and develop the IPC from the PDP;
- A5.5. coordinate and monitor the delivery of MRLA Program and generic services;

A5.6. integrate various aspects of services delivered under the MRLA Program and through other sources;
A5.7. record each individual's progress;
A5.8. develop discharge and transfer plans, when necessary;
A5.9. keep records as they pertain to the individual receiving services; ~~and~~
A5.10. ensure that **an individual under 18 years of age** ~~a child~~ who is unable to ~~reside or~~ live with his or her natural family members lives in a **family-based alternative as described in §409.525 of this title (relating to Enrollment of Individuals)** ~~family environment such as an adoptive or foster family~~;
A5.11 complete a Permanency Planning Review for each individual under 22 years of age who is receiving supervised living or residential support upon enrollment. If the service coordinator in conjunction with the service planning team determines that the individual under the age of 18 is not able to return to the family home or move to a family-based alternative or a person from 18 to 22 years of age is unable move to a consistent and nurturing environment as determined by the individual and LAR, the service coordinator must submit a Permanency Planning Review to the department and approval to continue provide such services is obtained every six months from the department commissioner or designee or the commissioner of the Texas Health and Human Services Commission.

A6. The MRA shall ensure that its employees and contractors possess legally necessary licenses, certifications, registrations, or other credentials and are in good standing with the appropriate professional agency in performing any function or delivering services.

A7. The MRA shall ensure that service coordinators meet minimum qualifications and staff training requirements described in Chapter 412, Subchapter J of this title (relating to Service Coordination).

A8. The MRA shall maintain current service information and clearly communicate to appropriate sources (e.g., the individual and/or the LAR, TDMHMR, MRLA program providers) changes to the development and delivery of each individual's IPC and PDP as they occur.

A9. The MRA shall ensure that it follows the requirements of 25 TAC §409.523 in coordination and management of the MRLA Program referral list.

A10. The MRA has a mechanism to ensure objectivity in the process used to assist individuals and/or LARs in the selection of MRLA program providers.

A11. The MRA shall initiate a person-directed planning, process for each individual to determine supports and services necessary for an individual to continue to live in the community.

A12. The MRA shall ensure the development and completion of the initial IPC, recommendations for resource authorization based on the PDP, and all

necessary assessments, within 45 working days of the individual and/or the LAR indicating his/her desire for MRLA Program services.

A13. The MRA shall submit to TDMHMR necessary documentation for enrollment within 10 working days of the selection of a MRLA program provider by the individual or the individual's LAR on behalf of the individual.

A14. The service coordinator shall develop a completed PDP in conjunction with each individual and/or the LAR and the MRLA program provider based on the PDP within 30 calendar days prior to the projected IPC implementation date.

A15. The MRA shall ensure objectivity in the MRLA program provider survey and certification process and shall ensure standardization of MRA survey and certification processes with TDMHMR survey and certification processes.

A16. The MRA shall comply with all applicable local, state, and federal rules, regulations, and laws.

A17. The MRA shall provide each individual and/or LAR with an objective means for addressing any complaints including restriction of an individual's rights by the MRLA program provider.

MRA RESPONSIBILITIES FOR CONDUCTING PROGRAM REVIEWS

A18. At the direction of TDMHMR, the MRA shall perform reviews of non-MRA operated MRLA program providers for adherence to the MRLA Program Principles for Program Providers and report findings to TDMHMR. These reviews will be conducted by MRA employees.

A18.1. The MRA will conduct annual certification reviews of non-MRA operated MRLA program providers, in accordance with §409.531 (relating to Certification Status), within 90 days prior to the due date and report findings in a timely manner to TDMHMR.

A18.2. The MRA will conduct follow-up and intermittent reviews of non-MRA operated MRLA program providers in accordance with §409.539 of this title (relating to Unannounced or Intermittent Review Visits) and report findings in a timely manner to TDMHMR.

A18.3. In its reviews of the non-MRA program providers, the MRA will identify any hazards that represent a threat to the health, safety, or welfare of individuals in accordance with §409.533 of this title (relating to Hazards to Health, Safety, and Welfare) and report findings in a timely manner to TDMHMR.

A19. The MRA shall determine if MRLA program providers in its network utilize only those staff that meet the qualifications required by the MRLA Program.

A20. The MRA shall determine if MRLA program providers in its network contract with service providers of the individual's and/or LAR's choice if service providers meet the minimum qualifications necessary to provide the service, and the service

provider will deliver the service within the model MRLA rates and will contract or be employed by the MRLA program provider.

A21. The MRA shall determine if services and supports are provided to assist each individual in achieving outcomes as identified within the PDP.

A21.1 The MRA shall determine if the program provider implements and maintains a plan for initial and periodic training of personnel that assures personnel are qualified to deliver services as required by the current needs and characteristics of the individuals to whom they deliver services.

A22. The MRA shall determine if the MRLA program provider is affording each individual receiving services and/or the LAR a process for a review if rights are limited and is providing individuals and/or the LAR with an objective means for addressing complaints regarding restriction of rights by the MRLA program provider.

A23. The MRA shall determine if individuals receiving their services from the MRLA program provider are free from abuse, neglect, or exploitation and that program provider personnel are provided initial and periodic training that ensures personnel are knowledgeable of acts that constitute abuse, neglect, or exploitation of an individual, as defined in 40 TAC Chapter 711, Subchapter A, the requirement to report acts of abuse, neglect, or exploitation, or suspicion of such acts, to Texas Department of Protective and Regulatory Services (TDPRS) in accordance with Program Provider Principle 32.2, and methods to prevent the occurrence of abuse, neglect, and exploitation.

A24. The MRA shall determine if individuals receiving their services from the MRLA program provider have health care services.

A25. The MRA shall determine if MRLA program provider programs protect the rights of the individuals they serve, including addressing and resolving complaints.

A26. The MRA shall determine if the MRLA program provider implements procedures in compliance with Program Provider Principle 32.1 - 32.7 relating to allegations of abuse, neglect or exploitation of an individual.

A27. The MRA shall monitor to determine if sites owned, operated, or leased by the MRLA program provider comply with all applicable fire and sanitation codes.

A28. The MRA shall determine if the MRLA program provider implements procedures for meeting all emergencies such as fire, severe weather, and health.

A29. The MRA shall determine if the MRLA program provider assesses reasonable charges against personal funds, ensures that costs for items and services are comparable to items and services generally found in the community, does not charge individuals for services reimbursed through the MRLA Program, and maintains records indicating that individuals or their LARs are apprised of charges to personal funds and the effect of those charges in relation to the individual's financial status.

A30. The MRLA shall determine and report to TDMHMR findings related to the approval of residences, as described in §409.542 of this title (related to TDMHMR Approval of Residences), in which four individuals may live and receive services.

A31. The MRA shall determine if the MRLA program provider implements procedures in compliance with Program Provider Principles 43 and 44 relating to notification regarding individuals under 22 years of age receiving supervised living or residential support.

IN ADDITION

The ***Texas Register*** is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings, changes in interest rate and applications to install remote service units, and consultant proposal requests and awards.

To aid agencies in communicating information quickly and effectively, other information of general interest to the public is published as space allows.

Texas State Affordable Housing Corporation

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 6:00 p.m., at the Arlington Central Library, 101 E. Abram, Arlington, Texas, 76010, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $105,000,000, the proceeds of which will be loaned to American Opportunity for Housing, Inc., (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Arlington, Grand Prairie, Houston and Spring, Texas. The public hearing, which is the subject of this notice, will concern the Clover Hill Apartments, containing 216 units, located in Tarrant County, at 903 Road to Six Flags West, Arlington, Texas 76012. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107356
Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 12:30 p.m., at the Harris County Library, Cypress Creek Branch, 6815 Cypresswood Drive, Spring, Texas, 77379, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $105,000,000, the proceeds of which will be loaned to American Opportunity for Housing, Inc., (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Arlington, Grand Prairie, Houston and Spring, Texas. The public hearing, which is the subject of this notice, will concern the Mill Creek Apartments, containing 174 units, located in Harris County, at 16339 Stuebner Airline Road, Spring, Texas 77379. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107357
Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 12:30 p.m., at the Harris County Library, Cypress Creek Branch, 6815 Cypresswood Drive, Spring, Texas, 77379, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $105,000,000, the proceeds of which will be loaned to American Opportunity for Housing, Inc., (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Arlington, Grand Prairie, Houston and Spring, Texas. The public hearing, which is the subject of this notice, will concern the One Westfield Lake Apartments, containing 246 units, located in Harris County, at 2800 Hirschfield, Spring, Texas 77373. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107358
Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 12:30 p.m., at the Harris County Library, Cypress Creek Branch, 6815 Cypresswood Drive, Spring, Texas, 77379, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $105,000,000, the proceeds of which will be loaned to American Opportunity for Housing, Inc., (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Arlington, Grand Prairie, Houston and Spring, Texas. The public hearing, which is the subject of this notice, will concern the Briarcrest Apartments, containing 376 units, located in Harris County, at 25650 IH 45, Spring, Texas 77386. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107359
Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 6:00 p.m., at the Houston Public Library, Collier Branch, 6200 Pinemont, Houston, Texas, 77092, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $105,000,000, the proceeds of which will be loaned to American

Opportunity for Housing, Inc., (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Arlington, Grand Prairie, Houston and Spring, Texas. The public hearing, which is the subject of this notice, will concern the Polo Club on Cranbrook I Apartments, containing 228 units, located in Harris County, at 14619 Ella Blvd., Houston, Texas 77014. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107360
Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 6:00 p.m., at the Houston Public Library, Collier Branch, 6200 Pinemont, Houston, Texas, 77092, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $105,000,000, the proceeds of which will be loaned to American Opportunity for Housing, Inc., (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Arlington, Grand Prairie, Houston and Spring, Texas. The public hearing, which is the subject of this notice, will concern the Polo Club on Cranbrook II Apartments, containing 292 units, located in Harris County, at 14531 Ella Blvd., Houston, Texas 77014. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107361
Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 4, 2002 at Noon, at the Corpus Christi Public Library, LaRetama Room, 805 Comanche, Corpus Christi, Texas, 78401, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $92,000,000, the proceeds of which will be loaned to South Texas Affordable Properties Corporation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Corpus Christi, Houston and San Antonio, Texas. The public hearing, which is the subject of this notice, will concern the Willowick Apartments, containing 250 units, located in Nueces County, at 6947 Everhart Road, Corpus Christi, Texas 78413. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107362
Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 6:00 p.m., at the Houston Public Library, Collier Branch, 6200 Pinemont, Houston, Texas, 77092, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $105,000,000, the proceeds of which will be loaned to American Opportunity for Housing, Inc., (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Arlington, Grand Prairie, Houston and Spring, Texas. The public hearing, which is the subject of this notice, will concern the Timbers of Cranbrook Apartments, containing 274 units, located in Harris County, at 14000 Ella Blvd., Houston, Texas 77014. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107363
Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 3, 2002 at Noon, at the Grand Prairie Memorial Library, 901 Condover Road, Grand Prairie, Texas, 75051, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $105,000,000, the proceeds of which will be loaned to American Opportunity for Housing, Inc., (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Arlington, Grand Prairie, Houston and Spring, Texas. The public hearing, which is the subject of this notice, will concern the Hillcrest Apartments, containing 310 units, located in Dallas County, at 1960 West Tarrant, Grand Prairie, Texas 75050. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107364
Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 6:00 p.m., at the Houston Public Library, Collier Branch, 6200 Pinemont, Houston, Texas, 77092, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $140,000,000, the proceeds of which will be loaned to American Housing Foundation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of thirteen separate multifamily housing properties (collectively, the "Properties") located in the cities of Beaumont, Conroe, Dallas, Houston and Wichita Falls, Texas. The public hearing, which is the subject of this notice, will concern the One Willow Chase Apartments, containing 136 units, located in Harris County, at 8330 Willow Place South, Houston, Texas 77070. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107330
Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 6:00 p.m., at the Houston Public Library, Collier Branch, 6200 Pinemont, Houston, Texas, 77092, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $140,000,000, the proceeds of which will be loaned to American Housing Foundation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of thirteen separate multifamily housing properties (collectively, the "Properties") located in the cities of Beaumont, Conroe, Dallas, Houston and Wichita Falls, Texas. The public hearing, which is the subject of this notice, will concern the One Willow Park Apartments, containing 178 units, located in Harris County, at 8450 Willow Place, North, Houston, Texas 77070. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107331
Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 6:00 p.m., at the Houston Public Library, Collier Branch, 6200 Pinemont, Houston, Texas, 77092, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $140,000,000, the proceeds of which will be loaned to American Housing Foundation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of thirteen separate multifamily housing properties (collectively, the "Properties") located in the cities of Beaumont, Conroe, Dallas, Houston and Wichita Falls, Texas. The public hearing, which is the subject of this notice, will concern the Woodedge Apartments, containing 126 units, located in Harris County, at 10802 Green Creek Drive, Houston, Texas 77070. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107332
Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at noon, at the Wichita Falls Public Library, 600 11th Street, Room 204, Wichita Falls, Texas, 76301, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $140,000,000, the proceeds of which will be loaned to American Housing Foundation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of thirteen separate multifamily housing properties (collectively, the "Properties") located in the cities of Beaumont, Conroe, Dallas, Houston and Wichita Falls, Texas. The public hearing, which is the subject of this notice, will concern the Fountaingate Apartments, containing 280 units, located in Wichita County, at 5210 Tower Drive, Wichita Falls, Texas 76310. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107333
Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 3, 2002 at 6:00 p.m., at the Montgomery County Library, Central Branch, 104 I-45 North, Conroe, Texas, 77301, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $140,000,000, the proceeds of which will be loaned to American Housing Foundation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of thirteen separate multifamily housing properties (collectively, the "Properties") located in the cities of Beaumont, Conroe, Dallas, Houston and Wichita Falls, Texas. The public hearing, which is the subject of this notice, will concern the Cimarron Park Apartments, containing 162 units, located in Montgomery County, at 2201 Montgomery Park Blvd., Conroe, Texas 77304. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107334
Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 3, 2002 at 6:00 p.m., at the Montgomery County Library, Central Branch, 104 I-45 North, Conroe, Texas, 77301, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $140,000,000, the proceeds of which will be loaned to American Housing Foundation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of thirteen separate multifamily housing properties (collectively, the "Properties") located in the cities of Beaumont, Conroe, Dallas, Houston and Wichita Falls, Texas. The public hearing, which is the subject of this notice, will concern the Stony Creek Apartments, containing 252 units, located in Montgomery County, at 231 I-45 North, Conroe, Texas 77304. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-

638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107335
Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 3, 2002 at 6:00 p.m., at the Lake Highlands Recreation Center, 9940 Whiterock Trail, Dallas, Texas, 75238, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $140,000,000, the proceeds of which will be loaned to American Housing Foundation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of thirteen separate multifamily housing properties (collectively, the "Properties") located in the cities of Beaumont, Conroe, Dallas, Houston and Wichita Falls, Texas. The public hearing, which is the subject of this notice, will concern the Shadowridge Village Apartments, containing 144 units, located in Dallas County, at 9701 W. Ferris Branch Blvd., Dallas, Texas 75243. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107337
Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 3, 2002 at 6:00 p.m., at the Lake Highlands Recreation Center, 9940 Whiterock Trail, Dallas, Texas, 75238, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $140,000,000, the proceeds of which will be loaned to American Housing Foundation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of thirteen separate multifamily housing properties (collectively, the "Properties") located in the cities of Beaumont, Conroe, Dallas, Houston and Wichita Falls, Texas. The public hearing, which is the subject of this notice, will concern the Bent Creek Apartments, containing 326 units, located in Dallas County, at 9750 Forest Lane, Dallas, Texas 75243. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107338
Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 3, 2002 at Noon, at the RC Miller Branch Library, 1605 Dowlen Road, Beaumont, Texas, 77706, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $140,000,000, the proceeds of which will be loaned to American Housing Foundation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of thirteen separate multifamily housing properties (collectively, the "Properties") located in the cities of Beaumont, Conroe,

Dallas, Houston and Wichita Falls, Texas. The public hearing, which is the subject of this notice, will concern the Settler's Cove Apartments, containing 182 units, located in Jefferson County, at 4045 Treadway, Beaumont, Texas 77706. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107339
Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 3, 2002 at 6:00 p.m., at the Lake Highlands Recreation Center, 9940 Whiterock Trail, Dallas, Texas, 75238, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $140,000,000, the proceeds of which will be loaned to American Housing Foundation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of thirteen separate multifamily housing properties (collectively, the "Properties") located in the cities of Beaumont, Conroe, Dallas, Houston and Wichita Falls, Texas. The public hearing, which is the subject of this notice, will concern the Creekwood Village Apartments, containing 362 units, located in Dallas County, at 10928 Audelia, Dallas, Texas 75243. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107341
Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 6:00 p.m., at the Houston Public Library, Collier Branch, 6200 Pinemont, Houston, Texas, 77092, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $140,000,000, the proceeds of which will be loaned to American Housing Foundation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of thirteen separate multifamily housing properties (collectively, the "Properties") located in the cities of Beaumont, Conroe, Dallas, Houston and Wichita Falls, Texas. The public hearing, which is the subject of this notice, will concern the Northwoods Apartments, containing 200 units, located in Harris County, at 18001 Cypress Trace, Houston, Texas 77090. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107342

Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 6:00 p.m., at the Houston Public Library, Collier Branch, 6200 Pinemont, Houston, Texas, 77092, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $140,000,000, the proceeds of which will be loaned to American Housing Foundation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of thirteen separate multifamily housing properties (collectively, the "Properties") located in the cities of Beaumont, Conroe, Dallas, Houston and Wichita Falls, Texas. The public hearing, which is the subject of this notice, will concern the Aston Brook Apartments, containing 152 units, located in Harris County, at 14101 Walters Road, Houston, Texas 77014. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107343
Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 3, 2002 at 6:00 p.m., at the Montgomery County Library, Central Branch, 104 I-45 North, Conroe, Texas, 77301, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $140,000,000, the proceeds of which will be loaned to American Housing Foundation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of thirteen separate multifamily housing properties (collectively, the "Properties") located in the cities of Beaumont, Conroe, Dallas, Houston and Wichita Falls, Texas. The public hearing, which is the subject of this notice, will concern the Pine Creek Village Apartments, containing 216 units, located in Montgomery County, at 229 1-45 North, Conroe, Texas 77304. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107344
Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 6:00 p.m., at the Houston Public Library, Collier Branch, 6200 Pinemont, Houston, Texas, 77092, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $92,000,000, the proceeds of which will be loaned to South Texas Affordable Properties Corporation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Corpus Christi, Houston and San Antonio, Texas. The public hearing, which is the subject of this notice, will concern the Bayou Oaks Apartments, containing 210 units, located in Harris County, at 13800 Ella Blvd., Houston, Texas 77014. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107345
Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 6:00 p.m., at the Houston Public Library, Collier Branch, 6200 Pinemont, Houston, Texas, 77092, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $92,000,000, the proceeds of which will be loaned to South Texas Affordable Properties Corporation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Corpus Christi, Houston and San Antonio, Texas. The public hearing, which is the subject of this notice, will concern The Charleston Apartments, containing 312 units, located in Harris County, at 2800 Dairy Ashford Road, Houston, Texas 77082. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107346
Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 4, 2002 at Noon, at the Corpus Christi Public Library, LaRetama Room, 805 Comanche, Corpus Christi, Texas, 78401, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $92,000,000, the proceeds of which will be loaned to South Texas Affordable Properties Corporation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Corpus Christi, Houston and San Antonio, Texas. The public hearing, which is the subject of this notice, will concern The Rafters Apartments, containing 250 units, located in Nueces County, at 11325 Interstate Highway 37, Corpus Christi, Texas 78410. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107351
Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on December 28, 2001 at Noon, at The Brook Hollow Branch Library, 530 Heimer Road, San Antonio, Texas, 78232, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $92,000,000, the proceeds of which will be loaned to South Texas Affordable Properties Corporation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Corpus Christi, Houston and San Antonio, Texas. The public hearing, which is the subject of this notice, will concern the Remington Apartments, containing 158 units, located in Bexar County, at 1570 Thousand Oaks Drive, San Antonio, Texas 78232. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107352
Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 6:00 p.m., at the Houston Public Library, Collier Branch, 6200 Pinemont, Houston, Texas, 77092, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $92,000,000, the proceeds of which will be loaned to South Texas Affordable Properties Corporation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Corpus Christi, Houston and San Antonio, Texas. The public hearing, which is the subject of this notice, will concern the Monticello on Cranbrook Apartments, containing 244 units, located in Harris County, at 13913 Ella Blvd., Houston, Texas 77014. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107353
Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 4, 2002 at Noon, at the Corpus Christi Public Library, LaRetama Room, 805 Comanche, Corpus Christi, Texas, 78401, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $92,000,000, the proceeds of which will be loaned to South Texas Affordable Properties Corporation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Corpus Christi, Houston and San Antonio, Texas. The public hearing, which is the subject of this notice, will concern The Wharf Apartments, containing 250 units, located in Nueces County, at 9320 South Padre Island Drive, Corpus Christi, Texas 78418. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-

638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107354
Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on December 28, 2001 at Noon, at The Brook Hollow Branch Library, 530 Heimer Road, San Antonio, Texas, 78232, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $92,000,000, the proceeds of which will be loaned to South Texas Affordable Properties Corporation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Corpus Christi, Houston and San Antonio, Texas. The public hearing, which is the subject of this notice, will concern the Summer Oaks Apartments, containing 256 units, located in Bexar County, at 1400 Patricia, San Antonio, Texas 78213. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda David, ADA Responsible Employee, at 1-888-638-3555, ext. 417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.org.

TRD-200107355
Barbara Jantz
Vice President
Texas State Affordable Housing Corporation
Filed: November 28, 2001

♦ ♦ ♦

Center for Rural Health Initiatives

Rural Health Facility Capital Improvement Loan Fund

The Center for Rural Health Initiatives is issuing a Request for Proposals ("RFP") for The third round of the Rural Health Facility Capital Improvement Loan Fund. The purpose of this RFP is to provide the applicant with grant funding for capital improvement projects under the endowment fund created by HB 1676 during the 76th Legislative Session.

USE OF FUNDS: Funds are awarded for a specifically defined purpose and may not be used for any other project. Matching Grant funds may be used to make capital improvements to existing facilities, construct new health facilities and to purchase capital equipment, including information systems hardware and software. Emergency Grants may only be used to address Life Safety Code Violations.

AMOUNT OF AWARD: Matching Grant funds are available for projects of up to $150,000. Matching Grant funds will total approximately $1,400,000, depending on the amount received from the Comptroller's Office. Emergency Grant funds will total approximately $500,000. Funds for the first two quarters of the fiscal year will be awarded in January and the remaining two quarters will be awarded in July.

ELIGIBLE APPLICANTS: Eligible applicants include rural public and non-profit hospitals located in counties of less than 150,000 persons. A 15% match requirement is now in effect for Matching Grants. No match is required for an Emergency Grant. However, the board must certify that there are no other funding sources available.

EVALUATION AND SELECTION: Applications are initially screened for eligibility and completeness. Applications that do not meet the requirements in this RFP, may not be considered for review and the applicant will be notified in writing. After the initial screening, all remaining applications will be reviewed by the Program Administrator and then by the Executive Director. The Rural Health Facility Capital Improvement Loan Fund Working Group will also have an opportunity to make recommendations to the Executive Director. The Executive Director will then make a final determination.

DEADLINE: Completed applications are due by 01/31/02 or 07/31/02. Announcement of the selected applicants will be made by 02/07/02 and 08/07/02 respectively.

CONTRACT PERIOD: The budget period for the applications funded under this RFP will begin 03/01/02 or 09/01/02 and continue for 6 months.

CONTACT PERSON: To obtain the application, please contact: Capital Improvement Fund Administrator, Center for Rural Health Initiatives, P.O. Drawer 1708, Austin, Texas, 78767-1708, (512) 479-8891

TRD-200107251
Mike Easley
Executive Director
Center for Rural Health Initiatives
Filed: November 26, 2001

♦ ♦ ♦

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 November 16, 2001, through November 21, 2001. The public comment period for these projects will close at 5:00 p.m. on December 28, 2001.

FEDERAL AGENCY ACTIONS:

Applicant: Michael Pugh; Location: The proposed project site is located north of the Highland Bayou Diversion Canal on Flamingo Road, south of Texas city in Galveston County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Virginia Point, Texas. Approximate UTM Coordinates: Zone: 15; Easting: 307700; Northing: 3244800. CCC Project No.: 01-0403-F1; Description of Proposed Action: The applicant requests authorization to create a 1,000-foot long by 100-foot wide by 6-foot deep private access canal connecting his private property to a diversionary canal off Highland Bayou. The canal will be graded so that the upper end will be shallower than the open end. Approximately 30,000 cubic yards of material will be mechanically excavated from the property. All material removed will be placed on uplands within the applicant's private property. In addition, the applicant seeks authorization to excavate a 100-foot long by 50-foot wide by 10-foot deep boat slip located within the proposed canal. Approximately 1,000 cubic yards of material will be removed and placed on uplands. The applicant also proposes to construct a 560-square foot boathouse to be located within the proposed boat slip. The applicant has revised the project to avoid wetlands on the property and to incorporate certain specifications recommended by the resource agencies during initial coordination. Type of Application: U.S.A.C.E. permit application #22526 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

FEDERAL AGENCY ACTIVITIES:

Applicant: U.S. Department of Transportation; CCC Project No.: 01-0402-F6; Description of Proposed Action: The applicant requests inputs on any environmental concerns related to the replacement of the Coast Guard's aging nationwide system of deepwater assets with an integrated system of surface, air, logistics, communication and sensor systems over the next several decades. NOTE: Individual Agency Actions covered by EIS will be subject to consistency review as described by §501.15 of the Coastal Coordination Act Implementation Rules (Rev. 8/00); Title 31. Part 16.

Applicant: U.S. Department of Commerce; CCC Project No.: 01-0405-F2; Description of Proposed Action: The applicant requests implementation of recommendations of International Commission for the Conservation of Atlantic Tunas (ICCAT) adopted at the 2000 meeting. NOTE: The CMP consistency review for this project may be conducted by the Texas Parks & Wildlife Department.

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-200107327
Larry R. Soward
Chief Clerk, General Land Office
Coastal Coordination Council
Filed: November 28, 2001

♦ ♦ ♦

Notice of Approval of Coastal Boundary Survey

Pursuant to §33.136 of the Texas Natural Resources Code, notice is hereby given that David Dewhurst, Commissioner of the General Land Office, approved a coastal boundary survey, submitted by Michael Haas, conducted from November 28, 2000 to November 29, 2000, locating the following shoreline boundary:

Surfside, Texas, in Brazoria County, a portion of the Gulfward boundary of the Frederick J. Calvit Title, Abstract No. 51, fronting on the Gulf of Mexico.

For a copy of this survey or more information on this matter, contact Ben Thomson, Director of the Survey Division, Texas General Land Office by phone at 512-463-5212, email ben.thomson@glo.state.tx.us, or fax 512-463-5098.

TRD-200107323
Larry R. Soward
Chief Clerk, General Land Office
Coastal Coordination Council
Filed: November 28, 2001

♦ ♦ ♦

Notice of Approval of Coastal Boundary Survey

Pursuant to §33.136 of the Texas Natural Resources Code, notice is hereby given that David Dewhurst, Commissioner of the General Land Office, approved a coastal boundary survey, submitted by Nedra J. Foster, conducted January 9, 2001 and January 14, 2001, locating the following shoreline boundary:

Perimeter survey of the T.M. Joseph and M.M. Truehart survey, in Galveston County, Abstract No. 198, known as North Deer Island in Galveston Bay.

For a copy of this survey or more information on this matter, contact Ben Thomson, Director of the Survey Division, Texas General Land Office by phone at 512-463-5212, email ben.thomson@glo.state.tx.us, or fax 512-463-5098.

TRD-200107326
Larry R. Soward
Chief Clerk, General Land Office
Coastal Coordination Council
Filed: November 28, 2001

♦ ♦ ♦

Notice of Approval of Coastal Boundary Survey

Pursuant to §33.136 of the Texas Natural Resources Code, notice is hereby given that David Dewhurst, Commissioner of the General Land Office, approved a coastal boundary survey, submitted by Nedra J. Foster, conducted November 17, 2000, locating the following shoreline boundary:

Survey in Calhoun County, a portion of the shoreline of Matagorda Bay fronting the Abraham Gwatney Survey, Abstract No. 70, the Juan

Cano title grant, Abstract No. 5, and the Benito Morales, Abstract No. 8, title grant.

For a copy of this survey or more information on this matter, contact Ben Thomson, Director of the Survey Division, Texas General Land Office by phone at 512-463-5212, email ben.thomson@glo.state.tx.us, or fax 512-463-5098.

TRD-200107325
Larry R. Soward
Chief Clerk, General Land Office
Coastal Coordination Council
Filed: November 28, 2001

♦ ♦ ♦

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 12/03/01 - 12/09/01 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 12/03/01 - 12/09/01 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by Sec. 303.005[3] for the period of 12/01/01 - 12/31/01 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The monthly ceiling as prescribed by Sec. 303.005 for the period of 12/01/01 - 12/31/01 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-200107305
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: November 27, 2001

♦ ♦ ♦

Texas Funeral Service Commission

New Address

The Texas Funeral Service Commission will be relocating to the William P. Hobby Building Friday, December 14, 2001. Our physical address is: 333 Guadalupe St. Ste. 2-110 Austin, TX 78701 and our mailing address is: P.O. Box 12217 Capitol Station Austin, TX 78711. Our telephone and fax number will remain the same. Please be advised you will not be able to contact the agency via telephone or fax until Monday, December 17th. We do apologize for any inconvenience this may cause you.

TRD-200107387
O.C. "Chet" Robbins
Executive Director
Texas Funeral Service Commission
Filed: November 28, 2001

♦ ♦ ♦

Texas Health and Human Services Commission

Public Hearing - Proposed Payment Rate for the Case Management for Children Who Are Blind and Visually Impaired Medicaid Program Operated by the Texas Commission for the Blind (TCB)

The Texas Health and Human Services Commission (HHSC) and TCB will conduct a public hearing to receive public comments on the proposed payment rate for Case Management for Children who are Blind or Visually Impaired. The public hearing will be held in compliance with Title 1 of the Texas Administrative Code, §355.105(g), which requires public hearings on proposed payment rates for medical assistance programs. The public hearing will be held on December 14, 2001, at 8:30 a.m. in Conference Room 450C (Fourth Floor, West Tower) of the John H. Winters Human Services Building at 701 West 51st Street, Austin, Texas. Written comments regarding payment rates may be submitted in lieu of testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Tony Arreola, HHSC Rate Analysis, MC W-425, P.O. Box 149030, Austin, Texas 78714-9030. Express mail can be sent to Mr. Arreola at HHSC Rate Analysis, MC W-425, 701 West 51st Street, Austin, Texas 78751-2312. Hand deliveries addressed to Mr. Arreola will be accepted by the receptionist in the lobby of the John H. Winters Human Services Building at 701 West 51st Street, Austin, Texas. Alternatively, written comments may be sent via facsimile to Mr. Arreola at (512) 438- 2165. Interested parties may request to have mailed to them or may pick up a briefing package concerning the proposed payment rate by contacting Mr. Arreola, HHSC Rate Analysis, MC W-425, P.O. Box 149030, Austin, Texas 78714-9030, (512) 438-4817.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Mr. Arreola, HHSC Rate Analysis, MC W-425, P.O. Box 149030, Austin, Texas 78714-9030, telephone number (512) 438-4817, by December 12, 2001, so that appropriate arrangements can be made.

TRD-200107301
Marina Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Filed: November 27, 2001

♦ ♦ ♦

Texas Department of Housing and Community Affairs

Housing Trust Fund Development/SECO Notice of Funds Available

Notice of Funding Availability (NOFA)

Housing Trust Fund Development Cycle NOFA

The Texas Department of Housing and Community Affairs, through its Housing Trust Fund, is pleased to announce that it will make available approximately

Four Million Nine Hundred Fifty One Thousand Nine Hundred Seventy Seven dollars ($4,951,977) to finance, acquire, rehabilitate, and develop safe, decent and affordable housing for low, very low, and extremely low income individuals and families; including persons with special needs.

The Housing Trust Fund provides gap financing to eligible single family and multifamily developments, in an effort to ensure that affordable housing providers obtain the total funding necessary for the completion

of their developments. Funds will be awarded pursuant to the Department's Regional Allocation Formula as required by Section 2306.111 of the Government Code. Mixed income developments that include market rate units are encouraged, provided a portion of the units are reserved for families or individuals at or below eighty percent (80%) of Area Median Family Income and for persons with special needs.

Targeting of Extremely Low Income in 2002

In an effort to encourage the production of affordable housing for persons and families of Extremely Low Income, the Housing Trust Fund is setting a goal of directing $2,000,000 towards housing for this income group. In order to achieve our goal, **at least 40% of the Housing Trust Fund development funds award** in this cycle must be used for the development of units that serve residents earning 30% or less of the Area Median Family Income (AMFI). Therefore, the following requirements apply to the 2002 Development Cycle:

The maximum amount of HTF dollars provided for Extremely Low Income units (30% and below of AMFI) will be capped at $70,000 per unit.

The maximum amount of HTF dollars provided for Very Low Income units (31-60% of AMFI) will be capped at $18,000 per unit.

The maximum amount of HTF dollars provided for Low Income units (61- 80% of AMFI) will be capped at $1,500 per unit.

The average cost per unit of any HTF funded units in the development cannot exceed the total cost of the development divided by the total number of units in the development.

The available funding will be allocated to each Uniform State Service Region as required by the Department's Regional Allocation Formula. The 2002 Regional Allocation Formula will be approved by the Texas Department of Housing and Community Affairs Board of Director's at the December 2001 meeting. While the total amount available in both the HTF Development program and the SECO program statewide is final, the regional allocation outlined in this NOFA is an estimate until final approval by the TDHCA Board of Directors. The anticipated funding available to each region is as follows:

Region 1 (Allocation Factor of 4.30%) $214,035

Region 2 (Allocation Factor of 3.00%) $149,522

Region 3 (Allocation Factor of 14.00%) $694,141

Region 4 (Allocation Factor of 5.80%) $288,685

Region 5 (Allocation Factor of 4.60%) $228,196

Region 6 (Allocation Factor of 18.8%) $979,896

Region 7 (Allocation Factor of 9.30%) $461,289

Region 8A (Allocation Factor of 11.60%) $573,094

Region 8B (Allocation Factor of 18.80%) $928,762

Region 9 (Allocation Factor of 3.00%) $149,641

Region 10 (Allocation Factor of 5.80%) $285,718

Total Available Funding $4,951,977

Eligible applicants, which include local units of government, nonprofit organizations, for profit entities, public housing authorities (PHAs), and community housing development organizations (CHDOs), may compete on a statewide basis for the following amounts:

$ 3,658,390 Reserved for eligible nonprofits and CHDOs

$ 1,293,587 Available to all eligible applicants

Housing Trust Fund/ State Energy Conservation Office (SECO) NOFA:

The Texas Department of Housing and Community Affairs' (TDHCA) Housing Trust Fund, in conjunction with the Comptroller of Public Accounts' State Energy Conservation Office (SECO), is please to announce the availability of

One Million Six Hundred Sixty Seven Thousand Nine Hundred Twenty One dollars ($1,667,921) of Exxon Oil Overcharge funds to be utilized in both single family and multifamily developments throughout the state. These funds will be made available on a dollar-for-dollar match basis and applicants may count the dollar value of in-kind contributions as matching funds.

The maximum program award amount per applicant is

Three Hundred Twenty Five Thousand dollars ($325,000) with a limit of Fifteen Hundred dollars ($1,500) per unit. However, specific award amounts are subject to the limits established for each region by the Department's Regional Allocation Formula. The anticipated funding available to each region is as follows:

Region 1 (Allocation Factor of 4.30%) $72,091

Region 2 (Allocation Factor of 3.00%) $50,362

Region 3 (Allocation Factor of 14.00%) $233,800

Region 4 (Allocation Factor of 5.80%) $97,235

Region 5 (Allocation Factor of 4.6%) $76,861

Region 6 (Allocation Factor of 19.80%) $329,711

Region 7 (Allocation Factor of 9.30%) $155,371

Region 8A (Allocation Factor of 11.60%) $193,029

Region 8B (Allocation Factor of 18.80%) $312,825

Region 9 (Allocation Factor of 3.00%) $50,402

Region 10 (Allocation Factor of 5.80%) $96,235

Total Available Funding $1,667,921

These funds may be used to improve the energy efficiency of housing which serves individuals and families whose income is at or below eighty percent (80%) of Area Median Family Income. Applicants of HTF/SECO funding which apply and are recommended for HTF development cycle funding will receive a priority over applicants seeking HTF/SECO funding exclusively.

Eligible applicants include local units of government, nonprofit organizations, for profit organizations, public housing authorities (PHAs), and community housing development organizations (CHDOs).

General Information for both NOFAs:

Applications meeting threshold criteria will be evaluated and scored within categories including but not limited to Leveraging, Project Scope, Services & Income Targeting, Area Need, and Innovation & Energy Conservation. Applications will then be selected based on program scoring criteria (which is included in the combined application package), underwriting criteria, and geographic dispersion. The Housing Trust Fund desires to select a diverse group of single family and multifamily developments that will serve varied populations throughout the state.

Applicants for either or both programs are requested to download the HTF-HTF/SECO combined application package from the Housing Trust Fund web page of the TDHCA web site located at

http://www.tdhca.state.tx.us/htf.htm. Applicants may also request a diskette or hard copy version of the combined application package. Application packages will be transmitted via first class U.S. Postal Service unless applicants request transmittal via overnight courier and provide the name and account number of their desired courier.

The Department's Board of Directors reserves the right to change the award amount, and to award less than the requested amount.

Applications must be submitted on or before 5:00 p.m., March 1, 2002.

FAXED APPLICATIONS WILL NOT BE ACCEPTED.

All interested parties with a viable single family or multifamily development are encouraged to participate in these programs.

Applications will be available on December 7, 2001.

Workshops for this application will be held at various locations throughout the state in December 2001 and January 2002. For additional information, time and date of workshops, or to request an application package, please call the Housing Trust Fund Office at (512) 475-1458, check the Department's web site at www.tdhca.state.tx.us or e-mail your request to shiggins@tdhca.state.tx.us. Please direct your applications to:

Texas Department of Housing and Community Affairs

Housing Trust Fund - Attn: Keith Hoffpauir

Post Office Box 13941

Austin, Texas 78711-3941

Or by courier to:

507 Sabine, Suite 400

Austin, Texas 78701

TRD-200107213
Ruth Cedillo
Acting Executive Director
Texas Department of Housing and Community Affairs
Filed: November 21, 2001

♦ ♦ ♦

Notice of Administrative Hearing

Manufactured Housing Division

Wednesday, December 12, 2001, 1:00 p.m.

State Office of Administrative Hearings, Stephen F. Austin Building, 1700 N Congress, 11th Floor, Suite 1100

Austin, Texas

AGENDA

Administrative Hearing before an administrative law judge of the State Office of Administrative Hearings in the matter of the complaint of the Texas Department of Housing and Community Affairs vs. Hepburn Enterprises, Inc. dba Sun Country Homes to hear alleged violations of Sections 4(d), 8(b), 14(f) and 14(j) of the Act and Sections 80.54(a), 80.131(b) and 80.132(3) of the Rules regarding the selling of an uninhabitable used home, not properly installing a manufactured home and not responding with corrective action in a timely manner. SOAH 332-02-0930. Department MHD2001000450-HB, MHD2001001102-IV.

Contact: Jerry Schroeder, P.O. Box 12489, Austin, Texas 78711-2489, (512) 475-2894, jschroed@tdhca.state.tx.us

TRD-200107316
Ruth Cedillo
Acting Executive Director
Texas Department of Housing and Community Affairs
Filed: November 28, 2001

♦ ♦ ♦

Notice of Administrative Hearing

Manufactured Housing Division

Thursday, December 13, 2001, 1:00 p.m.

State Office of Administrative Hearings, Stephen F. Austin Building, 1700 N Congress, 11th Floor, Suite 1100

Austin, Texas

AGENDA

Administrative Hearing before an administrative law judge of the State Office of Administrative Hearings in the matter of the complaint of the Texas Department of Housing and Community Affairs vs. Sunriver Homes, Inc. to hear alleged violations of Sections 14(f) and 14(j) of the Act and Sections 80.131(b) and 80.132(3) of the Rules by not properly complying with the initial report and warranty orders of the Director and not providing copies of completed work orders in a timely manner. SOAH 332-02-0931. Department MHD2001001070-W.

Contact: Jerry Schroeder, P.O. Box 12489, Austin, Texas 78711-2489, (512) 475-2894, jschroed@tdhca.state.tx.us

TRD-200107317
Ruth Cedillo
Acting Executive Director
Texas Department of Housing and Community Affairs
Filed: November 28, 2001

♦ ♦ ♦

Notice of Administrative Hearing

Manufactured Housing Division

Tuesday, December 18, 2001, 1:00 p.m.

State Office of Administrative Hearings, Stephen F. Austin Building, 1700 N Congress, 11th Floor, Suite 1100

Austin, Texas

AGENDA

Administrative Hearing before an administrative law judge of the State Office of Administrative Hearings in the matter of the complaint of the Texas Department of Housing and Community Affairs vs. Johnny Crider and Bob Crews dba C & C Transporters aka Diamond State Transporters to hear alleged violations of Sections 4(f) (amended 1999) (current version at Section 4(d) of the Act) and 7(d) of the Act and Sections 80.51 (amended 1998) (current version at Section 80.54(a) of the Rules) and 80.125(e) (amended 1998) (current version at Section 80.123(e) of the Rules) of the Rules regarding installation of a manufactured home without obtaining, maintaining or possessing a valid installer's license and not properly installing the manufactured home. SOAH 332-02-0932. Department MHD2001000859-UI.

Contact: Jerry Schroeder, P.O. Box 12489, Austin, Texas 78711-2489, (512) 475-2894, jschroed@tdhca.state.tx.us

TRD-200107318

Ruth Cedillo
Acting Executive Director
Texas Department of Housing and Community Affairs
Filed: November 28, 2001

♦ ♦ ♦

Texas Department of Human Services

Request for Public Comment - Methodology for Determining Caseload Reduction for the Temporary Assistance for Needy Families (TANF) Program for Federal Fiscal Year 2002

The Texas Department of Human Services (DHS) is seeking comments from the public on its methodology for determining the TANF caseload reduction from federal fiscal year (FFY) 1995 to FFY 2001. This methodology and its results will be submitted to the federal Administration for Children and Families for use in calculating the caseload reduction credit used in determining compliance with TANF work participation rates for FFY 2002. The methodology is posted on the DHS Internet web site at **http://www.dhs.state.tx.us/programs/texasworks/TANFcasereduction.html** . Written or electronic copies of the methodology can also be obtained by contacting Lea Isgur at (512) 438-4078.

The public comment period begins December 7, 2001 and ends December 21, 2001. Comments must be submitted in writing to Texas Department of Human Services, Lea Isgur, Mail Code W-517, P.O. Box 149030, Austin, Texas 78714- 9030. Comments may also be submitted electronically to **lea.isgur@dhs.state.tx.us**.

TRD-200107223
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Filed: November 26, 2001

♦ ♦ ♦

Texas Department of Insurance

Company Licensing

Application to change the name of ATLANTIC ALLIANCE FIDELITY AND SURETY COMPANY to THE GUARANTEE COMPANY OF NORTH AMERICA USA, a foreign fire and casualty company. The home office is in Mt. Laurel, New Jersey.

Application to change the name of GENERAL ACCIDENT INSURANCE COMPANY to PENNSYLVANIA GENERAL INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Philadelphia, Pennsylvania.

Application to change the name of CGU INSURANCE COMPANY OF NEW JERSEY to THE COMDEN FIRE INSURANCE ASSOCIATION, a foreign fire and casualty company. The home office is in Mount Laurel, New Jersey.

Application to change the name of CGU INSURANCE COMPANY to ONEBEACON INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Philadelphia, Pennsylvania.

Application to change the name of COMMERCIAL UNION INSURANCE COMPANY to ONEBEACON AMERICA INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Boston, Massachusetts.

Application to change the name of CEDAR HILL ASSURANCE COMPANY to AARDWOLF REINSURANCE COMPANY, a domestic fire and casualty company. The home office is in Austin, Texas.

Application for admission to the State of Texas by NATIONAL TITLE INSURANCE OF NEW YORK, INC., a foreign title company. The home office is in Santa Barbara, California.

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-200107328
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: November 28, 2001

♦ ♦ ♦

Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for incorporation in Texas of Financial Benefits Group, Inc., a domestic third party administrator. The home office is Round Rock, Texas.

Any objections must be filed within 20 days after this notice was filed with the Secretary of State, addressed to the attention of Charles M. Waits, MC 107-5A, 333 Guadalupe, Austin, Texas 78714-9104.

TRD-200107298
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: November 27, 2001

♦ ♦ ♦

Texas Natural Resource Conservation Commission

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 **January 7, 2002**. Section 7.075 also requires that the TNRCC promptly consider any written comments received and that the TNRCC may withhold approval of an AO if a comment discloses facts or considerations that indicate the proposed AO is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code, the Texas Health and Safety Code (THSC), and/or the Texas Clean Air Act (the Act). Additional notice is not required if changes to an AO are made in response to written comments.

A copy of each of the proposed AOs is available for public inspection at both the TNRCC's Central Office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable Regional Office listed as follows. Written comments about these AOs should be sent to the enforcement coordinator designated for each AO at the TNRCC's Central Office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 7, 2002**. 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: Acton Municipal Utility District; DOCKET NUMBER: 2001-0270-PWS-E; IDENTIFIER: Public Water Supply (PWS) Number 1110007; LOCATION: Granbury, Hood County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.45(b)(1)(D)(i) and (iv), by failing to provide two or more wells having a total capacity of 0.6 gallons per minute (gpm) per connection and provide an elevated storage capacity of 100 gallons per connection; 30 TAC §290.41(c)(1)(A) and (F), by failing to provide well completion data and provide sanitary control easements; 30 TAC §290.43(c)(4) and (e), by failing to provide an operable liquid level indicator and provide a properly constructed intruder-resistant fence; PENALTY: $3,423; ENFORCEMENT COORDINATOR: Brian Lehmkuhle, (512) 239-4482; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: BP Pipelines (North America) Inc.; DOCKET NUMBER: 2001-0963-AIR-E; IDENTIFIER: Air Account Number SG-0002-W; LOCATION: near Colorado City, Scurry County, Texas; TYPE OF FACILITY: crude oil transportation; RULE VIOLATED: 30 TAC §122.145(2) and THSC, §382.085(b), by failing to certify compliance with the Title V Permit No. O 01697; PENALTY: $3,000; ENFORCEMENT COORDINATOR: Carolyn Easley, (915) 698-9674; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(3) COMPANY: Beiruth Business, Inc. dba Shop N Go; DOCKET NUMBER: 2001-0085-PST- E; IDENTIFIER: Petroleum Storage Tank Station Identification Number 0039721; LOCATION: La-Porte, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(d)(4)(A)(i) and (ii)(II) and the Code, §26.3475(c)(1), by failing to conduct daily inventory control and perform monthly automatic leak tests for substance loss; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures; and 30 TAC §115.245(2) and THSC, §382.085(b), by failing to conduct an annual pressure decay test on the Stage II vapor recovery system; PENALTY: $5,500; ENFORCEMENT COORDINATOR: Catherine Sherman, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(4) COMPANY: John H. Caldwell and Biosolids Management, Inc.; DOCKET NUMBER: 2001-1089-SLG-E; IDENTIFIER: Beneficial Use Registration Number 710225; LOCATION: Rosharon, Brazoria County, Texas; TYPE OF FACILITY: beneficial use site; RULE VIOLATED: 30 TAC §312.44(i)(1), Beneficial Use Registration Number 710225, and the Code, §26.121, by failing to apply sludge uniformly over the surface of the land; PENALTY: $1,500; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(5) COMPANY: The George R. Brown Partnership; DOCKET NUMBER: 2001-1138-AIR-E; IDENTIFIER: Air Account Number FI-0013-T; LOCATION: Teague, Freestone County, Texas; TYPE OF FACILITY: oil and gas production; RULE VIOLATED: 30 TAC §122.145, §122.146, and THSC, §382.085(b), by failing to submit annual Title V compliance certifications and deviation reports; PENALTY: $4,000; ENFORCEMENT COORDINATOR: James Jackson, (254) 751-0335; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(6) COMPANY: Jim Wilson dba Mainstay Christmas Tree Farm; DOCKET NUMBER: 2001- 0866-AGR-E; IDENTIFIER: Enforcement Identification Number 16450; LOCATION: Cleburne, Johnson County, Texas; TYPE OF FACILITY: christmas tree farm; RULE VIOLATED: the Code, §26.121(a)(1), by failing to prevent the unauthorized discharge of wastewater; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Sushil Modak, (512) 239-2142; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(7) COMPANY: Samuel Martinez; DOCKET NUMBER: 2001-0369-LII-E; IDENTIFIER: Enforcement Identification Number 15907; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: irrigator/installer; RULE VIOLATED: 30 TAC §34.007(a), by failing to obtain a valid certificate of registration as a licensed irrigator and installer; PENALTY: $500; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(8) COMPANY: Mauriceville Special Utility District; DOCKET NUMBER: 2001-0808-PWS-E; IDENTIFIER: PWS Number 1810144; LOCATION: Mauriceville, Orange County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.44(e)(4) and THSC, §§341.031, 341.0315(c), and 341.036(a), by failing to provide public drinking water free from deleterious matter; PENALTY: $26,000; ENFORCEMENT COORDINATOR: Laura Clark, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(9) COMPANY: Merisol USA LLC; DOCKET NUMBER: 2001-0706-IHW-E; IDENTIFIER: Solid Waste Registration Number 30595; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: manufacturers of cyclic crudes and intermediates; RULE VIOLATED: 30 TAC §335.431(c) and 40 Code of Federal Regulations §268.50(c), by failing to meet the land disposal restriction storage limit of one year for a roll-off container; PENALTY: $2,300; ENFORCEMENT COORDINATOR: Catherine Sherman, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(10) COMPANY: Mr. Phil Clemente dba Northeast Mobile Home Park; DOCKET NUMBER: 2001-0314-PWS-E; IDENTIFIER: PWS Number 0610090; LOCATION: Denton, Denton County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: Agreed Order Docket Number 96-1220-PWS-E and THSC, §341.0315(c), by failing to provide a free chlorine residual of 0.5 milligrams per liter; 30 TAC §290.121(a) and Agreed Order Docket Number 96-1220-PWS-E, by failing to provide a sample siting plan; 30 TAC §290.110(a), (c)(5)(B), and (d)(3)(C)(ii) and Agreed Order Docket Number 96-1220-PWS-E, by failing to provide disinfection for the public drinking water, monitor chlorine residuals, and provide a chlorine test kit which uses the diethyl-p- phenylenediamine method; 30 TAC §290.46(e)(1)(A), (h), (i), (j), (l), (m)(1), (n)(2), (q)(1), (r), (t), and (v), Agreed Order Docket Number 96-1220-PWS-E, and THSC, §341.0315(c), by failing to provide a competent waterworks operator holding a Class D certificate, on hand supplies of calcium hypochlorite disinfectant, customer service inspections, adopt adequate plumbing regulations or provide a service agreement with each customer, flush all dead end mains monthly, inspect ground storage tank and pressure tank annually, maintain system facilities and grounds to facilitate cleanliness, provide a distribution map, issue a boil water notice, maintain a minimum pressure of 35 pounds per square inch in the distribution system, provide a legible sign in plain view, and electrical wiring in a securely mounted conduit; 30 TAC §290.41(c)(1)(F) and (3)(J), (L) and (P), Agreed Order Docket Number 96-1220-PWS-E, and THSC, §341.0315(c), by failing to provide a sanitary control easement, provide an adequate

concrete sealing block, provide a well site which is free of depressions and reverse grades, and provide an all-weather road to the well site; 30 TAC §290.43(c)(3) and (e) and Agreed Order Docket Number 96-1220-PWS-E, by failing to provide an adequate inspection ladder for the ground storage tank, a properly designed hinged flap valve on the ground storage tank overflow pipe, and an intruder-resistant fence; 30 TAC §290.42(e)(7) and (i), and THSC, §341.0315(c), by failing to provide properly covered disinfection storage containers and provide American National Standards Institute/National Sanitation Foundation Standard 60 certified bleach; and 30 TAC §290.45(b)(1)(B)(i) - (iii), and THSC, §341.0315(c), by failing to provide a 0.6 gpm per connection well capacity, a 200 gallon per connection ground storage tank capacity, and a two gpm per connection service sump capacity; PENALTY: $8,875; ENFORCEMENT COORDINATOR: Wendy Cooper, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118- 6951, (817) 588-5800.

(11) COMPANY: Phoenix Oil, Inc.; DOCKET NUMBER: 2001-0417-MSW-E; IDENTIFIER: Used Oil Handler Registration Number A85264; LOCATION: Humble, Harris County, Texas; TYPE OF FACILITY: used oil storage, processing, and treatment; RULE VIOLATED: 30 TAC §324.22, by failing to provide an originally signed financial assurance mechanism; PENALTY: $500; ENFORCEMENT COORDINATOR: Laurie Eaves, (512) 239-4495; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(12) COMPANY: The City of Plano and North Texas Municipal Water District; DOCKET NUMBER: 2001-0178-MWD-E; IDENTIFIER: Water Quality Permit Number 10363-001; LOCATION: Plano, Collin County, Texas; TYPE OF FACILITY: collection system; RULE VIOLATED: the Code, §26.121, by failing to prevent an unauthorized discharge of wastewater and prevent an unauthorized discharge from the Upper Spring Creek lift station; PENALTY: $33,250; ENFORCEMENT COORDINATOR: Wendy Cooper, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(13) COMPANY: RCM Investors, Inc.; DOCKET NUMBER: 2001-0246-AIR-E; IDENTIFIER: Air Account Number EE-0836-F; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: convenience store; RULE VIOLATED: 30 TAC §114.100(a) and THSC, §382.085(b), by allegedly having supplied, sold, or disposed gasoline for use as a motor vehicle fuel without the minimum oxygen content of 2.7% by weight; PENALTY: $800; ENFORCEMENT COORDINATOR: Stacey Young, (512) 239-1899; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(14) COMPANY: Rio Grande Sugar Growers, Inc.; DOCKET NUMBER: 2001-1119-AIR-E; IDENTIFIER: Air Account Number HN-0083-G; LOCATION: Santa Rosa, Hidalgo County, Texas; TYPE OF FACILITY: sugar mill; RULE VIOLATED: 30 TAC §122.146(2) and THSC, §382.085(b), by failing to submit the Annual title V compliance certification; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Sandra Hernandez Alanis, (956) 425-6010; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(15) COMPANY: Sand Trap Service Company, Incorporated; DOCKET NUMBER: 2001-0690- IHW-E; IDENTIFIER: Transporter Identification Number 48506; LOCATION: Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: nonhazardous waste transporter; RULE VIOLATED: 30 TAC §335.2(b), by allowing the transport of hazardous wastewater for processing and disposal to an unauthorized facility; and 30 TAC §335.11, by allowing the shipment of approximately 900 gallons of hazardous wastewater for processing and disposal without obtaining a completed correspondent manifest; PENALTY: $800; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(16) COMPANY: Sand Trap Service Company, Incorporated dba Cold Springs Processing and Disposal; DOCKET NUMBER: 2001-0691-IHW-E; IDENTIFIER: Municipal Solid Waste (MSW) Permit Number 1225-C; LOCATION: Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: waste processing and/or disposal; RULE VIOLATED: 30 TAC §335.2(b), by storing a shipment of approximately 900 gallons of hazardous wastewater for processing and disposal at an unauthorized facility; and 30 TAC §330.4(b), by initiating or accepting a shipment of hazardous wastewater for processing and disposal at an unauthorized facility; 30 TAC §330.117(c), by allowing the unloading of hazardous wastewater at an unauthorized facility; 30 TAC §335.12, by accepting a shipment of hazardous wastewater for processing and disposal without obtaining a completed corresponding manifest; 30 TAC §330.114(5) and §330.150(3), by failing to utilize existing site operating plan procedures; and MSW Permit Number 1225-C, by accepting unauthorized regulated hazardous wastewater; PENALTY: $1,600; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(17) COMPANY: Daniel & Elvira Maldonado, Nat & Ruby Rodriquez, and James & Barbara Penn dba Smyler's West; DOCKET NUMBER: 2001-0459-PST-E; IDENTIFIER: PST Facility Identification Number 62753; LOCATION: Colorado City, Mitchell County, Texas; TYPE OF FACILITY: gasoline retail and convenience store; RULE VIOLATED: 30 TAC §37.815(a)(1), by failing to insure the facility for $1 million; 30 TAC §334.50(b)(1)(A), by failing to monitor for releases; 30 TAC §334.8(c)(3)(D)(iii) and (iv), and (4)(B), by falsifying assurance on self- certification section of the underground storage tank (UST) self-certification form, the records so as to appear as if technical standards were being met, and the self-certification section of the UST self- certification form; PENALTY: $13,500; ENFORCEMENT COORDINATOR: George Ortiz, (915) 698-9674; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(18) COMPANY: Tanknology/NDE Corporation; DOCKET NUMBER: 2001-0647-PST-E; IDENTIFIER: PST Facility Identification Number 0026291; LOCATION: Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: gasoline service station; RULE VIOLATED: 30 TAC §115.242(3)(A) and THSC, §382.085(b), by failing to maintain the Stage II system in a manner to keep it free of defects; PENALTY: $720; ENFORCEMENT COORDINATOR: Wendy Cooper, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(19) COMPANY: Trevor Boyce Associates, Inc.; DOCKET NUMBER: 2001-0225-AIR-E; IDENTIFIER: Air Account Number LH-0032-G; LOCATION: Dayton, Liberty County, Texas; TYPE OF FACILITY: railcar rubber lining; RULE VIOLATED: 30 TAC §101.10 and THSC, §382.085(b), by failing to submit an emissions inventory questionnaire; PENALTY: $3,750; ENFORCEMENT COORDINATOR: Craig Fleming, (512) 239-5806; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(20) COMPANY: U.S. Department of Justice-Federal Correctional Institution; DOCKET NUMBER: 2001-0939-PST-E; IDENTIFIER: PST Facility Identification Number 0009560; LOCATION: Seagoville, Dallas County, Texas; TYPE OF FACILITY: petroleum bulk storage; RULE VIOLATED: 30 TAC §334.8(c)(4)(B), by failing to ensure that the UST registration and self- certification form is fully and accurately completed; PENALTY: $720; ENFORCEMENT COORDINATOR: Sunday Udoetok, (512) 239-0739; REGIONAL

OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(21) COMPANY: YWCA/Hueco Corporation dba YWCA Conference and Retreat Center; DOCKET NUMBER: 2001-0678-PWS-E; IDENTIFIER: PWS Number 0710082; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(c)(2)(F) and (3), and (f)(3) (formerly 30 TAC §290.106(a) and (b)(1)(B) and (5)) and THSC, §341.031(a) and §341.033(d), by failing to collect and submit routine monthly water samples for bacteriological analysis, collect and submit the appropriate number of additional routine bacteriological samples, take the appropriate number of repeat bacteriological samples, and exceeding the maximum contaminant level (MCL) for total coliform bacteria; 30 TAC §290.103(5) and §290.122(c), by failing to provide public notice of the failure to conduct additional routine bacteriological sampling, and provide public notice of the failure to conduct repeat bacteriological sampling; and 30 TAC §290.122(b), by failing to provide public notice of the MCL exceedance; PENALTY: $1,875; ENFORCEMENT COORDINATOR: Kent Heath, (512) 239- 4575; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(22) COMPANY: City of Wharton; DOCKET NUMBER: 2001-0475-PWS-E; IDENTIFIER: PWS Number 2410005; LOCATION: Wharton, Wharton County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.41(c)(1)(D) and (F), by failing to prevent livestock from coming within 50 feet of the well and provide sanitary control easements for the wells; PENALTY: $743; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

TRD-200107302
Paul Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: November 27, 2001

♦ ♦ ♦

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 Order (AO) pursuant to Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AO, the commission shall allow the public an opportunity to submit written comments on the proposed AO. 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 **January 7, 2002**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the 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 the proposed AO 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 AO 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 January 7, 2002**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The TNRCC attorneys are available to discuss the AO and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AO should be submitted to the TNRCC in **writing**.

(1) COMPANY: Erasmo Yarrito, Sr.; DOCKET NUMBER: 2000-0534-WTR-E; TNRCC ID NUMBER: 465-62-0058; LOCATION: 203 East Garfield Avenue, Roma, Starr County, Texas; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.33(e)(1)(C), by failing to transfer the actual turbidity values from the operator's daily log sheets to the systems monthly operating report, use reasonable care, judgement or application of knowledge in the performance of his duties; 30 TAC §290.33(e)(1)(C), by reporting turbidity values on the system's monthly operating report, when no turbidity values were shown on the operator's daily log sheet; PENALTY: $0; STAFF ATTORNEY: Elisa Roberts, Litigation Division, MC 175, (512) 239- 6939; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Ave., Harlingen, Texas 78550-5247, (956) 425-6010.

TRD-200107315
Paul C. Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: November 28, 2001

♦ ♦ ♦

Public Utility Commission of Texas

Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on November 21, 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 Masergy Communications, Inc. for a Service Provider Certificate of Operating Authority, Docket Number 25048 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, ADSL, SDSL, Optical Services, and long distance 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 December 12, 2001. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200107255
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 27, 2001

♦ ♦ ♦

Public Notice of Interconnection Agreement

On November 20, 2001, Verizon Avenue Corporation 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 25041. 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 25041. 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 December 21, 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 25041.

TRD-200107296
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 27, 2001

♦ ♦ ♦

Public Notice of Interconnection Agreement

On November 20, 2001, NOS 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 25042. 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 25042. 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 December 21, 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 25042.

TRD-200107297
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 27, 2001

♦ ♦ ♦

Public Notice of Interconnection Agreement

On November 20, 2001, Ciera Network Systems, 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 25043. 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 25043. 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 December 21, 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 25043.

TRD-200107299

Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 27, 2001

♦ ♦ ♦

Public Notice of Interconnection Agreement

On November 20, 2001, Western Wireless Corporation and Alltel Texas, Inc., collectively referred to as applicants, filed a joint application for approval of interconnection agreement under Section 252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2001) (PURA). The joint application has been designated Docket Number 25045. 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 25045. 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 December 21, 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 25045.

TRD-200107300
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 27, 2001

♦ ♦ ♦

Public Notice of Interconnection Agreement

On November 26, 2001, Guadalupe Valley Telephone Cooperative, Inc. and Sprint Spectrum, LP, 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 25050. 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 25050. 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 December 21, 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 25050.

TRD-200107349
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 28, 2001

♦ ♦ ♦

Texas Racing Commission

Correction of Error

The Texas Racing Commission proposed a new §307.62, concerning Disciplinary Hearings in the October 26, 2001, issue of the *Texas Register* (26 TexReg 8460).

Due to an error by the Commission, a period was omitted at the end of §307.62(d)(3). Paragraph (3) should read as follows:

(3) The stewards and racing judges shall make a record of a disciplinary hearing.

TRD-200107324

♦ ♦ ♦

Texas Department of Transportation

Public Notice - Advertising in TxDOT Travel Literature

The Texas Department of Transportation is authorized by Texas Civil Statutes, Article 6144e to publish literature for the purpose of advertising the highways of this state and attracting traffic thereto, and to include paid advertising in such literature. Title 43, Texas Administrative Code, §23.10 describes the policies governing advertising in department travel literature, lists acceptable and unacceptable subjects for advertising in department travel literature, and describes the procedures by which the department will solicit advertising.

As required by 43 TAC §23.10(e)(4)(A), the department invites any entity or individual interested in advertising in department travel literature to request to be added to the department's mailing list. Written requests may be mailed to the Texas Department of Transportation, Travel Division, Travel Publications Section, P.O. Box 141009, Austin, Texas 78714-1009. Requests may also be made by telephone to (512) 486-5880 or sent by fax to (512) 486-5879.

The department is now accepting advertising for the 2003 edition of the *Texas State Travel Guide*, scheduled to be printed and available in January 2003, and four quarterly issues of the *Texas Events Calendar*, beginning with the Summer 2002 calendar. The Summer 2002 calendar lists events scheduled for June, July, and August 2002. The Fall 2002 calendar lists September, October, and November 2002 events. The Winter 2002-2003 calendar lists December 2002, January 2003, and February 2003 events; and the Spring 2003 calendar lists events scheduled for March 2003, April 2003, and May 2003.

All entities and individuals on the mailing list will be contacted by mail sent out on January 7, 2002, and will have an opportunity to request a media kit. The media kit will contain rate card information, an order form, and samples of the respective travel literature. On and after February 7, 2002, the department will accept all insertion orders (in accordance with 43 TAC §23.10) received prior to the publication deadline on a first-come, first served basis or until all advertising space is filled. Insertion orders postmarked or received prior to February 7, 2002, will not be accepted.

All insertion orders will be stamped with the date they are received. Orders for premium space will be accepted only by mail postmarked on

or after February 7, 2002. Advertisers must indicate ranked preference on all premium positions desired. If more than one insertion order for any premium position is received on the same day, the department will determine selection by a drawing held on February 22, 2002. Insertion orders for an inside front cover spread and inside back cover spread for the *Texas State Travel Guide* will take precedence over an inside front cover and inside back cover insertion order.

The advertising due dates for the *Texas Events Calendar* vary depending on the issue involved. The publication deadline for accepting advertising space in the *Texas Events Calendar* is February 15, 2002 for the Summer 2002 issue; May 15, 2002 for the Fall 2002 issue; August 15, 2002 for the Winter 2002-2003 issue; and November 15, 2002 for the Spring 2003 issue. The deadline for accepting materials for the *Texas Events Calendar* is March 1, 2002, for the Summer 2002 issue; June 4, 2002 for the Fall 2002 issue; September 3, 2002, for the Winter 2002-2003 issue; and December 3, 2002, for the Spring 2003 issue.

The *Texas State Travel Guide* is designed to encourage readers to explore and travel in Texas. The guide lists cities and towns alphabetically, featuring population figures and recreational travel sites for each, along with maps and 4-color photography. The guide also includes sections listing Texas lakes, state parks, state and national forests, and hunting and fishing information. The State of Texas distributes this vacation guide to travelers in Texas and to those who request information while planning to travel in Texas.

The *Texas Events Calendar* is published quarterly, corresponding with the seasons, to provide information about events happening in Texas throughout the year. The *Texas Events Calendar* includes festivals, art exhibits, rodeos, charity events, indoor and outdoor theatre productions, concerts, nature tours, and more, depending on the season. The State of Texas distributes this quarterly calendar to travelers in Texas and to those who request information on events happening around the state.

The rate card information for potential advertisers in both the *Texas State Travel Guide* and the quarterly issues of the *Texas Events Calendar* are included in this notice.

Figure:

TEXAS STATE TRAVEL GUIDE

Year 2003 Rate Base: 1,000,000
Space Closing: October 4, 2002
Materials Due: October 11, 2002
First Distribution: January 2003

Advertising Rates

ROP:	Gross	Net*
Full Page	$29,294	$24,900
Half (1/2) Page	$17,530	$14,900
One Fourth (1/4) Page	$10,235	$ 8,700
One Sixth (1/6) Page	$ 7,882	$ 6,700

Premium Positions:	Gross	Net*
Cover 2 (Inside Front)	$43,882	$37,300
Cover 3 (Inside Back)	$41,177	$35,000
Cover 4 (Back)	$50,118	$42,600
Spread (Inside Front Cover Inside Back Cover)	$73,177	$62,200

*Commission: 15% to recognized agencies providing camera-ready materials.

Note: All rates are 4-color (no black and white). Run-of-book spreads are 2 times the page rate. Position request in 7 region editorial sections, add 10%. Rates for inserts, gatefolds, and other special advertising will be quoted on request. Multiple fractional ads will be priced at the equivalent page rate

Payment: Cash with order or net 30 from invoice date. All orders must be paid in full by October 11, 2002.

Advertising Rates/Due Dates

ear 2002/2003 Rate Base: 90,000 Circulation: Spring, Summer, Fall
75,000 Circulation: Winter

1X Gross/Net	2X Gross/Net	4X Gross/Net	Black/White	
600/$1,360	$1,550/$1,318	$1,500/$1,275	FULL PAGE	$1,
100/$ 935	$1,075/$ 914	$1,025/$ 872	HALF PAGE	$1,
800/$ 680	$ 775/$ 659	$ 725/$ 617	THIRD PAGE Square	$

1X Gross/Net	2X Gross/Net	4X Gross/Net	COVERS (4-COLOR)	
500/$2,975	$3,250/$2,763	$3,000/$2,550	COVER 2	$3,
000/$2,550	$2,750/$2,338	$2,500/$2,125	COVER 3	$3,
200/$3,570	$4,000/$3,400	$3,800/$3,230	COVER 4	$4,

recognized agencies or advertisers providing camera-ready
rom invoice date. All orders must be paid in full by material due
al advertising will be quoted on request.

Net rate reflects 15% commission to
materials. Cash with order or net 30
date. Rates for inserts and other spec

Advertising Due Dates:

	Space Closing	Materials Due	Issue Date
	Feb. 15, 2002	Mar. 1, 2002	Summer 2002 (Jun, Jul, Aug-2002)
	May 15, 2002	Jun. 4, 2002	Fall 2002 (Sep, Oct, Nov-2002)
003)	Aug. 15, 2002	Sep. 3, 2002	Winter 2002-3 (Dec-2002, Jan, Feb-2
	Nov. 15, 2002	Dec. 3, 2002	Spring 2003 (Mar, Apr, May-2003)

TRD-200107216

Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: November 26, 2001

♦ ♦ ♦

Public Notice - Aviation

Pursuant to Transportation Code, §21.111, and Title 43, Texas Administrative Code, §30.209, the Texas Department of Transportation conducts public hearings to receive comments from interested parties concerning proposed approval of various aviation projects.

For information regarding actions and times for aviation public hearings, please go to the following web site: **http://www.dot.state.tx.us**

Click on Aviation, click on Aviation Public Hearing. Or, contact Karon Wiedemann, Aviation Division, 150 East Riverside, Austin, Texas 78704, (512) 416-4520 or 800 68 PILOT.

TRD-200107215
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: November 26, 2001

♦ ♦ ♦

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:

City of Eagle Pass, P.O. Box 808, Eagle Pass, Texas, 78853-0808, received July 2, 2001, application for financial assistance in the total amount of $67,920,404 from Texas Water Development Funds and Economically Distressed Areas Program.

La Joya Water Supply Corporation, P. O. Box 518-A, La Joya, Texas, 78560, received August 17, 2001, application for financial assistance in the total amount of $87,534,408 from the Texas Water Development Funds and Economically Distressed Areas Program.

City of Houston, P.O. Box 1562, Houston, Texas, 77251-1562, received October 29, 2001, application for financial assistance in the amount of $24,935,000 from the Clean Water State Revolving Fund.

Far Hills Utility District, 9528 Escondido, Willis, Texas, 77318, received November 1, 2001, application for financial assistance in the total amount of $1,000,000 from the Texas Water Development Funds.

Sandy Land Underground Water Conservation District, P.O. Box 130, Plains, Texas, 79355, received October 23, 2001, application for financial assistance in the amount of $500,000 from the Agricultural Water Conservation Loan Program.

TRD-200107329
Gail L. Allan
Director of Project-Related Legal Services
Texas Water Development Board
Filed: November 28, 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
Legal Staff	(512) 463-5586
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
Financing Statement Changes	(512) 475-2704
UCC Lien Searches/Certificates	(512) 475-2705

Please use this form to order a subscription to the *Texas Register*, to order a back issue, or to indicate a change of address. Please specify the exact dates and quantities of the back issues required. You may use your VISA or Mastercard. All purchases made by credit card will be subject to an additional 2.1% service charge. Return this form to the Texas Register, P.O. Box 13824, Austin, Texas 78711-3824. For more information, please call (800) 226-7199.

❒ **Change of Address**
(Please fill out information below)

❒ **Paper Subscription**
❒ One Year $150 ❒ Six Months $100 ❒ First Class Mail $250

❒ **Back Issue ($10 per copy)**

_____ Quantity

Volume _____, Issue #_____.
(Prepayment required for back issues)

NAME _____

ORGANIZATION_____

ADDRESS _____

CITY, STATE, ZIP _____

PHONE NUMBER _____

FAX NUMBER _____

Customer ID Number/Subscription Number _____
(Number for change of address only)

❒ **Bill Me** ❒ **Payment Enclosed**

Mastercard/VISA Number _____

Expiration Date _____ Signature _____

Please make checks payable to the Secretary of State. Subscription fees are not refundable.
Do not use this form to renew subscriptions.
Visit our home on the internet at http://www.sos.state.tx.us.

_____
_____
Periodical Postage

PAID

Austin, Texas
and additonal entry offices
_____
_____